

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

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ERIC DAVENPORT	:	
	:	
<b>Plaintiff</b>	:	
vs.	:	DECEMBER TERM, 2008
	:	
LEO F. McCLUSKEY, M.D., M.B.E.,	:	No. 4190
PENNSYLVANIA HOSPITAL,	:	
CLINICAL PRACTICES OF THE	:	
UNIVERSITY OF PENNSYLVANIA,	:	
UNIVERSITY OF PENNSYLVANIA	:	
HEALTH SYSTEM, and	:	
TRUSTEES OF THE UNIVERSITY	:	
OF PENNSYLVANIA	:	
	:	
<b>Defendants</b>	:	

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**DOCKETED**  
DEC - 1 2011  
J. B. BOSTELL

JUDGMENT ORDER

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And Now, this 1<sup>st</sup> day of December, 2011, after consideration of the Motion for Post-Trial Relief filed by the defendants and the Responses thereto filed by plaintiff, and after oral argument held on October 21, 2011, and for the reasons set forth in the Memorandum filed this date, it is hereby ORDERED that the Defendants' Motion is **DENIED**, and, Plaintiff's unopposed Motion for Delay Damages is **GRANTED**.

**JUDGMENT** is entered in favor of Eric Davenport in the amount of **Ten Million One Hundred Seventy Thousand Five Hundred Forty Dollars and Forty Six Cents (\$10,170,540.46)** and against Leo F. McCluskey, M.D., M.B.E., Clinical Practices of the University of Pennsylvania, University of Pennsylvania Health System and Trustees of the University of Pennsylvania.

It is further ORDERED that post-judgment interest will run on the molded verdict of \$10,170,540.46 at the statutory rate, from the date of the verdict.

BY THE COURT:

  
FREDERICA A. MASSIAH-JACKSON, J.

Davenport Vs Mccluskey -ORDER



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HEALTH SYSTEM, and	:	
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OF PENNSYLVANIA	:	
<b>Defendants</b>	:	

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MEMORANDUM IN SUPPORT OF ORDER DENYING  
DEFENDANTS' POST-TRIAL MOTIONS  
and  
GRANTING PLAINTIFF'S MOTION FOR DELAY DAMAGES

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MASSIAH-JACKSON, J.

December 1<sup>st</sup>, 2011

**TABLE OF CONTENTS**

	page
I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY .....	1
A.    A Fresh Look at The Record Does Not Encompass Issues Raised For The First Time After the Trial Has Ended .....	3
II. LEGAL DISCUSSION .....	11
A.    Plaintiff –Davenport Met His Burden of Proof in This Medical Malpractice Litigation .....	11
B.    Dr. McCluskey Has Failed to Present Sufficient Grounds for JNOV.....	19
C.    These Defendants Are Not Insulated From Liability By Superseding or Intervening Causes .....	21
D.    Dr. McCluskey Has Failed to Present Sufficient Grounds For a New Trial .....	27
1.    An Expert’s Testimony on Direct Examination Is Limited to The Fair Scope of His Pre-Trial Report.....	29
2.    The Motion For Mistrial Was Properly Denied. ....	36
3.    The Trial Court Granted These Defendants’ Requests To Advise The Jury of The Existence of the New Jersey Lawsuit .....	38
E.    Credibility Matters .....	48
III. THE JURY INSTRUCTIONS AND THE VERDICT SHEET ACCURATELY REFLECT THE LAW AND DID NOT MISLEAD THE JURY.....	56
IV. THE VERDICT AWARD DOES NOT SHOCK THIS COURT’S CONSCIENCE .....	60
V. CONCLUSION .....	64

## **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Eric Davenport is confined to a wheelchair. He commenced this litigation against Leo F. McCluskey, M.D. and numerous neurological and medical practices affiliated with the Trustees of the University of Pennsylvania (“Trustees of UPenn”) after he learned in 2007, that his 2003 MRI films of his back revealed multi-level spinal stenosis and myelopathy with spinal cord impingement. This was boney growth in plaintiff’s spine which was pressing on his spinal cord and caused spinal cord injury leading to weakening of his lower extremities. He suffered spasticity and parathesis and became wheelchair dependent by 2005. With timely diagnosis and surgery in 2003, this condition could have been treated. Progressive deterioration could have been prevented.

Plaintiff-Davenport also learned that he had been misdiagnosed in 2003 with Amyotrophic Lateral Sclerosis, known as ALS or Lou Gehrig’s Disease. This is an incurable and fatal disease. It was not until late in 2006, when Mr. Davenport’s health had not declined in the manner or extent he had been told by the defendants, that the plaintiff sought a referral to a different neurologist and discovered the misdiagnosis. Mar. 30, 2011, A.M., N.T. 19-21, 43-45; Hall Video, N.T. 43-45.

In 2003, Mr. Davenport, then age 52, developed weakness in his extremities and was referred to Dr. McCluskey to “rule out ALS”. Plaintiff-Davenport alleged that in June, 2003, Dr. McCluskey not only failed to diagnosis spinal cord signal changes and myelopathy, but the Defendant-Doctor affirmatively and wrongly diagnosed “certain ALS”. Dr. McCluskey even prescribed two ALS medicines. See, Court Exhibit “A”, attached hereto.

Dr. McCluskey's response to the litigation has been that he did not make any mistakes in his treatment of Mr. Davenport. The Trustees of the University of Pennsylvania stipulated that Dr. McCluskey was their employee and was acting in furtherance of their interests in 2003.

During the two weeks of trial in the Spring, 2011, the jury heard from thirteen witnesses, and reviewed hundreds of medical documents, scans and images of evidence from the plaintiff and the defendants. Multiple expert witnesses were presented by the parties in the specialty areas of neurology, neurosurgery, neuroradiology, economics, physical medicine and rehabilitation, rehabilitation nursing and life care planning. The jury also heard from fact witnesses who described Mr. Davenport's activities of daily living. No expert witness in this trial testified that the plaintiff has ALS today.

On April 4, 2011, the jury returned a verdict in favor of Eric Davenport in the amount of \$9,654,551.00. At defense request, the verdict sheet instructed the jury to itemize past, present and future loss of earnings, future medical and personal care, and past and future non-economic damages. The damage period covered twenty-eight years. The verdict award included \$2,154,551.00 for economic losses and \$7.5 million for non-economic damages.

The defendants have filed **numerous** post-trial challenges -- each with sub-parts and subsidiary issues. After the trial transcripts were received, a post-trial briefing schedule was set by the Court and counsel. Oral argument was heard on October 21, 2011.

Dr. McCluskey and the Trustees of UPenn seek judgment notwithstanding the verdict and/or a new trial and/or remittitur because they claim the jury verdict was against the weight of the evidence and they disagree with certain Trial Court evidentiary rulings. For the reasons which follow, all of the post-trial motions filed by these defendants are DENIED.

Mr. Davenport filed a Motion for Delay Damages, Control No. 11040661, in the amount of \$515,989.46. The calculations have not been challenged. The plaintiff's Motion is GRANTED.

**A. A Fresh Look at The Record Does Not Encompass Issues Raised For The First Time After the Trial Has Ended.**

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Defendants-Dr. McCluskey and Trustees of UPenn have retained new counsel to handle the post-trial matters. See, Post-Trial Hearing, dated Oct. 21, 2011, N.T. 5. Post-trial review must be confined to the record as it exists and may not supplement or incorporate new strategies, new arguments or new issues. At the Post-Trial Hearing, N.T. 41, counsel for plaintiff stated, "Much of JNOV argument that was made by counsel has been waived".

Our Appellate Courts have long recognized that in entering Judgment Notwithstanding The Verdict, the ruling must be based upon the evidence in the record as it existed at the close of trial. The reviewing court may not eliminate evidence which was improperly admitted, nor insert offers of evidence which should have been admitted but which were excluded. 10 Standard Pa. Prac.2d §64.15, "... a court is confined to a

consideration of those things appearing on the entire record as it existed at the close of trial”; Drew v. Laber, 383 A.2d 941, 944 (Pa. 1978); Shenk v. Erie, 43 A.2d 99, 101-102 (Pa. 1945).

It is also true that the failure to effectively argue and brief issues in a post-trial memorandum of law results in a waiver. Browne v. Commonwealth of Pennsylvania, 843 A.2d 429, 434-435 (Pa. Commonwealth Ct. 2004). Similarly, the failure to specify in the post-trial where and how the grounds for relief were asserted at trial or pre-trial will result in a waiver. Hinkson v. Commonwealth of Pennsylvania, 871 A.2d 301, 303 (Pa. Commonwealth Ct. 2005) and cases cited; see also, Demuth v. Miller, 652 A.2d 891, 896 (Pa. Superior Ct. 1995), holding that the absence of a theory in the pleadings or trial or post-trial motions is fatal to post-trial consideration unless the Trial Court addresses the theory in its opinion.

Litigants are expected to make timely and specific objections during the trial. “. . . waiver is indispensable to the orderly functioning of our judicial process . . . .” Reilly v. SEPTA, 489 A.2d 1291, 1300 (Pa. 1985); Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114, 116 (Pa. 1974). Rule 227.1(b)(2) of the Pennsylvania Rules of Civil Procedure requires that the grounds for post-trial relief be specified in the motion. “Grounds not specified are deemed waived . . . .” See also, Estate of Hicks v. Dana Companies, LLC, 984 A.2d 943, 976 (Pa. Superior Ct. 2009).

At this post-trial juncture it is apparent that the defendants' post-trial memoranda and Hearing held October 21, 2011, relied on theories, documents and strategies not raised at any time in the extensive pre-trial and trial proceedings. On March 21, 2011, the Trial Court considered fifteen Motions in Limine filed by the parties. Additionally, post-trial counsel filed Defendant's Motion to Amend Record Pursuant to Pa. R.A.P. 1926, Control No. 11071797, which purports to add to the record documents for consideration for post-trial and appellate review. For purposes of the defendants' Motion for JNOV, it is not clear that these documents may be considered by this Trial Court nor by other courts. Kelly v. Mueller, 912 A.2d 202, (Pa. 2006). Counsel have referred to the substance of transcripts, to the intentions and conduct of individuals in New Jersey and much more as the basis for JNOV. See, Mar. 31, 2011, P.M., N.T. 88; Court Exhibit 'B', attached hereto; Hearing, dated October 21, 2011, N.T. 70-71. Issues and evidentiary challenges not raised at trial can not be presented or considered on appeal. Newark Morning Ledger v. USA, 539 F.2d 929 (3rd Cir. 1976).

At the Post-Trial Hearing new counsel raised theories which do not appear in the pre-trial or trial record including, inter alia:

Hearing, N.T. 10:

'Now we know there's no test for ALS. So any suggestion that [Dr. McCluskey's] use of the word "certain" or "definite" somehow is an absolute we know not to be true, because we know that there is no certainty. This is art more than science when you're dealing with an array of symptoms that a patient exhibits.'

*This legal opinion is not supported by the medical opinion of defense neurologist Dr. Rothstein at Mar. 29, 2011, A.M., N.T. 110.*

Hearing, N.T. 11:

“But what happened with respect to that ruling is that the plaintiffs then were able to put on a case that turned out to be fiction. They were able to take that ruling and make it appear to the jury as if this diagnosis did stop all diagnoses in its tracks; that this patient went home to die; that he never saw another doctor; or that no other doctor would consider doing surgery on this patient [Mr. Davenport] because of this diagnosis. But we know that’s not true.”

*The jury was presented with extensive evidence and information about Mr. Davenport’s medical care after 2003. e.g. Mar. 30, 2011, A.M., N.T. 5-56; Mar. 31, 2011, A.M., N.T. 5-146; Mar. 31, 2011, P.M., N.T. 4-88; Hall Video, Mar. 22, 2011. This post-trial argument is not based on our trial transcript.*

Hearing, N.T. 12-13:

“ . . . They never put on an expert to say that fact; that had [Mr. Davenport] had surgery at T11/T12, he’d be walking today. . . he didn’t have it at T11/T12. He had it at T9/T10, T10/T11, an entirely different location, that nobody says Dr. McCluskey should have seen in 2003. . . .

But we’re not talking about a disease. We’re not talking about a cancer that is permitted to spread because of a failure to diagnose. . . .”

*The jury heard the medical expert opine that multi-level spinal cord injury was progressive and degenerative as the nerves and neurons died due to spinal cord disease. e.g. Mar. 23, 2011, A.M., N.T. 18-113; Mar. 23, 2011, P.M., N.T. 4-90; Mar. 24, 2011, P.M., N.T. 4-118; Hall Video, Mar. 22, 2011; Mar. 29, 2011, P.M., N.T. 19-24. Post-trial counsel are unable*

*to supply case law for this new theory that a plaintiff must demonstrate to an absolute certainty what would have happened under circumstances the tortfeasor did not allow to come to pass.*

Hearing, N.T. 14:

“The other issue that I think we have to keep in mind here with respect to causation is that these conditions are not mutually exclusive. The idea that he was diagnosed with ALS by this doctor does not mean that he doesn’t have . . . ALS today. Because there is no test, we can never say to a certainty that this patient doesn’t have ALS today. And I think that’s another important point with respect to the issue of causation.”

*This legal opinion was never expressed or implied by any medical expert in this litigation.*

*As noted, the failure to include a theory, analysis, argument or briefing will result in a waiver of those grounds.*

Hearing, N.T. 14-15, 59:

“Well, . . . that’s a two-year gap from the last time he saw Dr. McCluskey in 2003 until 2005. . . . But there’s a concept in the law that events have to be causally connected. They can’t be so remote in time to somehow make a connection. Otherwise, everything, if you take it to its logical conclusion, is connected to something else.”

*Plaintiff’s experts provided extensive evidence that Dr. McCluskey’s negligence was the cause of Mr. Davenport’s harm. e.g. Mar. 24, 2011, P.M., N.T. 4-118; Hall Video, Mar. 22, 2011; Post-Trial Hearing, N.T. 42. Defendants’ post-trial counsel are unable to point to any place in the trial record where the “break in causation” defense theory was presented or preserved.*

Hearing, N.T. 20:

“And the other [causation argument] is that the independent duty that the doctors in New Jersey owed, and the negligence that plaintiffs, not Dr. McCluskey, but that plaintiffs have claimed that these doctors performed is a superseding intervening cause in any conduct that Dr. McCluskey could be accused of.”

*Defendants’ post-trial counsel are unable to point to any place in the trial record where plaintiff proffered any theory or argument about New Jersey doctors superseding intervening cause.*

Hearing, N.T. 22-24:

“And I will tell you, I’ve read every case in Pennsylvania on the increased risk of harm doctrine . . . . And in my view it tends to be a fall-back position in circumstances where plaintiffs have difficulty proving causation through traditional means and so they look at this as a relaxed standard. . . . But what you need for that record is statistical evidence or some testimony about the likelihood of success, the condition of the patient, the likelihood of success through statistics, so you have something to compare it to. . . .”

*Not only was this new defense theory never raised at any time pre-trial or trial, this grounds for relief was not specified in the Defendants’ Post-Trial Motion per Rule 227.1 nor briefed in any written memorandum.*

Hearing, N.T. 27-29:

“We have statements from plaintiff’s closing . . . that it would be ridiculous to suggest that anybody would do surgery on this man because no one would do surgery on someone they thought was dying . . . . it’s a fraud on the jury . . . .”

*Post-trial counsel are unable to point to a timely, specific objection during trial relating to plaintiff’s trial counsel’s closing argument.*

Hearing, N.T. 30-31:

“The Bacharach note . . . I think the fact that it was published a second time to the jury, after Your Honor had already sustained that objection is also grounds for a new trial . . . .”

*Post-trial counsel are unable to point to a second motion for mistrial when the document was published a second time one week after the first publication and after defendants’ objection was sustained. See also, Tagnani v. Lew, 426 A.2d 595, 596-97 (Pa. 1981).*

Hearing, N.T. 24, 55-57:

“100 percent sole cause of his injury”

but see,

“I apologize if there was any overstatement in that brief.”

*See also, Plaintiff’s Sur-Reply Brief, page 5, fn. 5.*

Hearing, N.T. 24, 58:

“. . . the plaintiff’s own experts listed as information upon which they relied . . . .”

but see,

“‘Reviewed’, I believe, is the correct word.”

*See also, Rule 703 of the Pennsylvania Rule of Evidence; Mar. 29, 2011, A.M., N.T. 157-160.*

Hearing, N.T. 35:

“Let me address the remittitur issue . . . .

And I’m not going to bore you with reading the rule to you, but it’s Rule 1042.72.”

*This ground for relief based on Rule 1042.72 was not specified in Defendants’ Post-Trial Motion per Rule 227.1 nor briefed in any written memorandum. See also, Weir v. Estate of Ciao, 556 A.2d 819 (Pa. 1989).*

## **II. LEGAL DISCUSSION**

### **A. Plaintiff –Davenport Met His Burden of Proof in This Medical Malpractice Litigation.**

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This Trial Court has considered the comprehensive discussion of Judge (now Justice) McCaffery who wrote for the Superior Court panel which affirmed a Trial Court’s decision to deny JNOV and/or a new trial in a medical malpractice case, Carrozza v. Greenbaum, M.D., 866 A.2d 369 (Pa. Superior Ct. 2004). That decision held that the focus of the inquiry in medical malpractice litigation is whether the plaintiff’s experts offered opinions within a reasonable degree of medical certainty that the Defendant-Doctor’s conduct breached the standard of care and increased the risk of harm to the plaintiff. 866 A.2d 379-380.

The Carrozza Court relied on established precedent and held that the Trial Court may send the issue of causation to the jury as long as reasonable minds could conclude that a preponderance of evidence shows the Defendant-Doctor’s conduct was a substantial factor in causing the resulting harm. The determination rests with the jury. Carrozza v. Greenbaum, M.D., *supra*, 866 A.2d at 380:

“In [*Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978)], our Supreme Court adopted the relaxed ‘increased-risk-of-harm’ standard for use in certain medical malpractice claims. *Id. at 271*, 392 A.2d at 1288. In adopting this principle, the *Hamil* Court reasoned:

In light of our interpretation of Section 323(a), it follows that where medical causation is a factor in a case coming within that Section, it is not necessary that the plaintiff introduce medical evidence in addition to that already adduced to prove defendant’s conduct increased the risk of

harm--to establish that the negligence asserted resulted in plaintiff's injury. Rather, once the jury is apprised of the likelihood that defendant's conduct resulted in plaintiff's harm, that Section leaves to the jury, and not the medical expert, the task of balancing probabilities.

During Eric Davenport's two week trial, the plaintiff's expert witnesses established, (1) that Dr. McCluskey owed a duty of care to his patient, the plaintiff, (2) that Dr. McCluskey breached that duty, (3) that the deviation of that duty of care was a substantial factor in bringing about the injuries suffered by Mr. Davenport, and, (4) that the damages suffered were the direct result of the harm. Mitzelfelt v. Kamrin, 584 A.2d 888, 891 (Pa. 1990); Sutherland v. Monongahela Valley Hospital, 856 A.2d 55, 60 (Pa. Superior Ct. 2004). The plaintiff also demonstrated to a reasonable degree of medical certainty that the deviations of the standard of care increased the risk of harm to Mr. Davenport.

Steven P. Novella, M.D., Associate Director at Yale University Neuromuscular Clinic, ALS Center, was presented as Plaintiff-Davenport's expert witness in neurology and neuromuscular disease. Dr. Novella provided his opinions within a reasonable degree of medical certainty. He explained the basis for his opinion that Defendant-McCluskey deviated from the standard of care in this case. Mar. 24, 2011, A.M., N.T. 61-69.

At Mar. 24, 2011, A.M., N.T. 63-64, Dr. Novella told the jury that multi-level spinal cord damage is a "mimicker" of ALS and must be excluded in the differential diagnosis. At N.T. 65:

"The problem came in with the second visit when Dr. McCluskey said that the diagnosis of ALS is certain. That, I believe, was substandard for a couple of reasons: One, because Mr. Davenport didn't meet the criteria at that time for clinically definite ALS. He certainly still had motor neuron signs. And it

was appropriate to consider the possibility of motor neuron disease or ALS. But the presentation, the information that he had, did not allow for a diagnosis of certain ALS.

And he seemed to also at that point prematurely dismiss from the list of possibilities spinal cord injury. He still was considering the inflammatory disease of the nerves. And he was pursuing the lumbar puncture, and noted that, you know, if the lumbar puncture was positive, that might take him in that direction.

I found that a little interesting, because I thought Mr. Davenport's case actually fit spinal cord injury much better than motor nerve disease. But Dr. McCluskey was still keeping the motor nerve disease on the differential, but didn't seem to be paying any attention to the possibility of spinal cord injury.

The case at that point in time with the information he had available to him did not allow for a certain diagnosis of ALS and did not allow to rule out that this was, in fact, a presentation of spinal cord injury."

Dr. Novella testified at Mar. 24, 2011, A.M., N.T. 68-69, 106, that the standard of care required the ALS neurologist to rule out spinal cord injury as the cause of the patient's problems before the physician concludes "certain ALS" diagnosis:

". . . You need to, first of all, say that there isn't something treatable here that could be causing the patient's symptoms. That's in many ways more important than whether or not you think they have ALS. You want to make sure they don't have something treatable that you're going to miss.

Also, if you're counting the upper and lower motor neuron findings that you're seeing towards the diagnosis of ALS, you have to make sure they're not coming from some other process.

If they're coming from, for example, spinal cord injury or spinal cord disease, well, then you can't say that they are symptoms of ALS.

So in a way ALS is partly what we call a diagnosis of exclusion. You have to have the signs and symptoms of ALS, but you also have to demonstrate that they're not coming from something else. And chief among them is spinal cord injury, because that's something that is potentially treatable."

Plaintiff's expert repeatedly stated the importance of identifying treatable conditions prior to rendering a "certain" diagnosis of ALS, which is not treatable. Dr. Novella explained that ALS does not produce myelomalacia (damage to the spinal cord itself) as was seen on the 2003 MRI's. ALS does not produce abnormal findings on the MRI scan. Mar. 24, 2011, A.M., N.T. 92-93. This expert concluded, after his examination of Mr. Davenport and after reviewing the medical records, that the correct diagnosis in 2003 was "multilevel spinal cord disease". N.T. 90:

"In my opinion, the presentation of Mr. Davenport at that time was consistent with multilevel spinal cord disease. You can't explain it with injury to just one segment of the spinal cord, because he has both arm and leg symptoms.

But if you hypothesize that he had both neck and lower back spinal cord disease, well, then you can explain much of Mr. Davenport's presentation. In fact, that is a reasonable hypothesis for what the major problem was at that time. And, in my opinion, that's the correct diagnosis."

Our Pennsylvania Appellate Courts have held that a plaintiff must introduce evidence that the defendant's negligent act or omission was the proximate cause or increased the risk of harm and that the harm was in fact sustained. See, Vicari v. Spiegel, M.D., 936 A.2d 503, 509-510 (Pa. Superior Ct. 2007), quoting Mitzelfelt v. Kamrin, 584 A.2d 888, 891 (Pa.

1990); Jones v. Montefiore Hospital, 431 A.2d 920, 923 (Pa. 1981); Billman v. Saylor, 761 A.2d 1208, 1212 (Pa. Superior Ct. 2000). “[A] medical opinion need only demonstrate, with a reasonable degree of medical certainty, that a defendant’s conduct increased the risk of harm actually sustained, and the jury then must decide whether that conduct was a substantial factor in bringing about the harm.” Vicari v. Spiegel, M.D., supra, at 510, quoting Jones, supra.

Plaintiff-Davenport established by expert testimony that the 2003 failure to diagnose myelomalacia and the “certain” ALS diagnosis was the proximate cause of harm and increased the risk of harm. Dr. Novella and Dr. Anthony Hall, plaintiff’s expert in neurosurgery, opined that the “certain” diagnosis of ALS, delayed treatment for treatable spinal cord injury, causing irreversible loss of function in Mr. Davenport.

Dr. Novella explained to the jury, Mar. 24, 2011, A.M., N.T. 91:

“Well, from reviewing all of the records, it seems to me that by settling prematurely on a certain diagnosis of ALS when there was still a lot of questions and other viable explanations in this case, that that delayed the ultimate, you know, treatment of the spinal cord injury at the thoracic level allowing that to progress over the next few years leading to the damage which caused his significant leg weakness and his inability to walk.”

Dr. Hall explained that the diagnosis of certain ALS increased the risk of permanent and irreversible loss of function to Mr. Davenport’s lower extremities. Hall Video, N.T. 36, 73, “[It] . . . . resulted in Mr. Davenport being delayed four years in getting his decompressive laminectomy.”

Plaintiff's 2007 decompressive laminectomy enabled the treating neurosurgeon (Dr. Delasotta) to remove the bone and provide room for the spinal cord sac. In this case, the four year delay caused loss of nerves which could have been prevented. Hall Video, N.T.

37-38:

“Well, I’m assuming the jury also knows about this myelomalacia and the effect of the softening of his spinal cord, his lower spinal cord, and the thoracic spine, and the result of that on all of the outflow tracts of the nerves going to his legs to impair his walking. And that process continued because the myelomalacia, or the injury to the spinal cord was caused by compression at a couple of levels in the lower thoracic spine so that compression continued from 2003 through to 2005. And then in 2005 he switched from being predominantly ambulatory to predominantly wheelchair dependent. And from 2005 to 2007 he was predominantly wheelchair dependent, occasionally could stand, maybe sometimes could do short distances. But predominantly wheelchair dependent means that he used it most of the time.

And the compression still remained so, therefore, the injury to the spinal cord and the loss of nerves or neurons would continue with like – you know, continue as daily loss until he was decompressed and that point hopefully the compressive cause of the loss would stop. Loss could still sometimes continue but the compressive loss would stop, which usually, therefore, means that the rapid loss stops. So that was in 2007 so between 2003 to 2007 he continued to have compressive loss of nerves.

So as you lose more and more nerves you lose more and more function. So basically he went from being able to work, walk to walking with deficits, walking with problems, partially wheelchair dependent, and wheelchair dependent.”

This neurosurgery expert opined that Plaintiff-Davenport lost his opportunity to have a good and functional outcome due to the failure to have surgery in 2003. The certain diagnosis of ALS “directly caused” the delay in the return to Dr. Delasotta for surgery. Hall Video, N.T. 46, 47. It was only after Mr. Davenport questioned certain improvements in arm strength in 2007 that he went to a different neurologist. N.T. 43-45.

The jury heard that as Plaintiff-Davenport lost more and more nerves, he lost more function. His condition declined from walking, walking with deficits, to eventually becoming fully wheelchair dependent. Dr. Delasotta, a neurosurgeon, expected Defendant-McCluskey to rule out motor neuron disease before he (Delsasotta) considered surgery. Hall Video, N.T. 38-41. See also, Mar. 22, 2011, A.M., N.T. 72, when jury was told that Mr. Davenport was sent to Dr. McCluskey to “rule out ALS”.

This plaintiff also presented the expert testimony of James J. Abrahams, M.D., Director of Medical Studies and Diagnostic Radiology Fellowship Director for Neuroradiology at Yale University. He reviewed the three Davenport MRI’s from 2003 and told the jury of his conclusion that spinal cord injury (myelomalacia) is visible on the films. Mar. 23, 2011, A.M., N.T. 25-27:

“When I looked at the lumbar spine, there were what we call spondylosis. It’s when the spinal canal, you can have new bone growing, which will make the canal smaller where the spinal cord is. And I saw that in his lumbar spine.

But of greater importance, in the lower thoracic spine, which is also seen on the lumbar spine study, there is an area of what we call abnormal signal in the spinal cord where the

portion of the cord instead of looking gray looks a little bit whiter. And that is very, very significant. What that means is that there is damage to the spinal cord.

And even if it's a tiny, tiny bit of whiteness, it's very, very significant to me, because it means it has been damaged.

And that's what -- that was the most alarming part of the study. It wasn't, Well, it's degenerative. It's not degenerative, but new bone growth. The alarming finding was the abnormal signal that I was seeing."

Dr. Abrahams explained that the myelomalacia meant that the spinal cord was damaged. It "dies" . . . "no longer functions". Mar. 23, 2011, A.M., N.T. 27. In 2003, a New Jersey radiologist reported that severe spinal stenosis was causing the myelomalacia. N.T. 29-30. Dr. Abrahams opined that this finding was "absolutely, absolutely significant . . . if you don't alleviate or undo what's causing it, there is a potential for more injury to continue." See Court Exhibit "C", attached hereto.

The jury also heard from defense expert, Gordon Sze, M.D., Yale University's Chief of Neurology testifying at Sze Video, N.T. 126, that after he examined the 2003 MRI films and looked for myelomalacia, he concluded:

"I can't rule that out."

Dr. McCluskey stated that he disagreed with his expert witness and with the New Jersey radiologist, and told the jury on Mar. 25, 2011, P.M., N.T. 32:

"I don't believe the thoracic MRI scan demonstrated an increase in signal [myelomalacia] in 2003."

The defendant insisted that he did not make any mistakes. Mar. 23, 2011, P.M., N.T. 101:

“With regard to my care of Mr. Davenport,  
I did not make any mistakes.”

Looking at the evidence in a light most favorable to the verdict winner, the record is clear that Plaintiff-Davenport has met his burden of proof. The plaintiff demonstrated that Dr. McCluskey’s 2003 failure to rule out treatable spinal cord injury and the “certain” diagnosis of ALS directly caused the harm and increased the risk of permanent paraplegia. The record in this trial furnished a solid basis for the jury to find that the increased risk was a substantial factor in bringing about the resulting harm (paraparesis). The triers of fact determined that the necessary proximate cause was established and the harm was in fact sustained. Mr. Davenport is wheelchair dependent. Vogelsberger v. Magee Womens Hospital of UPMC Health System, 903 A.2d 540, 563-565 (Pa. Superior Ct. 2006); Sutherland v. Monogehela Valley Hospital, 856 A.2d 55, 60 (Pa. Superior Ct. 2004) and cases cited therein; Cruz v. Northeastern Hospital, 801 A.2d 602 (Pa. Superior Ct. 2002).

**B. Dr. McCluskey Has Failed to Present Sufficient Grounds for JNOV.**

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Judgment notwithstanding the verdict (“JNOV”) may be entered only in a clear case. If any basis exists upon which the jury could have properly made its award, the verdict will not be overturned. Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1074 (Pa. 2006); Somerset Community Hospital v. Allan B. Mitchell & Assoc., Inc., 685 A.2d 141, 146 (Pa. Superior Ct. 1996).

There are only two bases upon which a court may enter JNOV. The first is when the movant is entitled to judgment as a matter of law. The second is when the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. Quinby v. Plumsteadville Family Practice, Inc., *supra* and cases cited at 907 A.2d 1074; Moure v. Raeuchle, 604 A.2d 1003, 1007 (Pa. 1992). JNOV is an extreme remedy. Considering only the evidence which supports the verdict, the court must give the verdict winner (Eric Davenport) the benefit of all doubt and of every fact and inference deducible from the evidence. Griffin v. University of Pittsburgh Medical Center-Braddock Hospital, 950 A.2d 996, 999 (Pa. Superior Ct. 2008); Robertson v. Atlantic Richfield Petroleum Products Co., 537 A.2d 814, 819 (Pa. Superior Ct. 1987). JNOV is not appropriate in this case.

The basis for their JNOV motion in the Defendants' Post-Trial Brief, at page 8:

“This Court should grant JNOV as a result of Plaintiff’s failure to present sufficient probative evidence establishing that Defendants deviated from the applicable standard of care and that this deviation was the proximate cause of Plaintiff’s injuries.”

In support of the JNOV motion, the Defendant-Doctor/Hospital have cited and relied on four cases -- Lux v. Gerald E. Ort Trucking, Inc., 887 A.2d 1281 (Pa. Superior Ct. 2005), in a motor vehicle case, the Superior Court affirmed the Trial Court which sustained preliminary objections; Commerce Bank/Pennsylvania v. First Union National Bank, 911 A.2d 1133 (Pa. Superior Ct. 2006), summary judgment order was affirmed in a check-kiting scheme; Macina v. McAdams, 421 A.2d 432 (Pa. Superior Ct. 1980), when a milk truck was

rear-ended, Superior Court affirmed award of new trial noting that plaintiff was entitled to recovery; and, Northwestern Mutual Life Insurance Co. v. Babayan, 430 F.3d 121 (3rd Cir. 2005), summary judgment was affirmed in an insurance bad faith matter. Defendants' Post-Trial Brief, pages 8-12; Defendants' Reply Brief, pages 5-7.

In this litigation, JNOV is not appropriate. Mr. Davenport and his medical experts did establish that as a result of the defendant-doctor's failure to diagnose spinal cord disease in 2003 and then misdiagnosing a false and fatal condition, the plaintiff's treatable disease progressively worsened causing irreparable harm.

**C. These Defendants Are Not Insulated From Liability By Superseding or Intervening Causes.**

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Throughout the pre-trial and trial proceedings, Dr. McCluskey and the Trustees of UPenn raised the issue of whether an intervening negligent act of a second actor will discharge a first actor's liability for antecedent negligence. Specifically, these defendants assert that because Mr. Davenport has sued his two treating doctors in New Jersey, then the actions of those physicians relieve Dr. McCluskey of his antecedent negligence. Hargrove v. Frommeyer & Co., 323 A.2d 300 (Pa. Superior Ct. 1974) defines superseding cause and relies on Restatement (Second) of Torts, §447 at 323 A.2d at 304:

“A superseding cause may basically be described as an intervening act (or acts) of negligence which operates (or operate) to insulate an antecedent tortfeasor from liability for negligently creating a dangerous condition which results in injury.”

See also, Subcommittee Note to 2011 Pennsylvania Suggested Standard Civil Jury Instruction (“SSJI”) 13.200, Renumbered as former 3.18, Intervening or Superseding Cause, attached hereto as Court Exhibit “D”.

In their Pre-Trial Motions in Limine, Dr. McCluskey and the Trustees of UPenn argued that the Philadelphia jury was entitled to know the details of the Davenport litigation in New Jersey in order to determine whether the diagnosis and treatment provided by Dr. McCluskey in Philadelphia deviated from the standard of care and whether Dr. McCluskey caused Mr. Davenport’s injuries. This argument demonstrates a misapprehension of the principles of causation. Former Chief Justice Nix, in his Concurring Opinion in Grainy v. Campbell, 425 A.2d 379 at 383 stated the general rule:

“The basic question is whether the first tortfeasor’s action was in fact a legal cause of the resultant injury. If in fact it was, as in the case here, the fact that a second actor may have also contributed to the injury does not relieve the initial tortfeasor of responsibility.”

In other words, if the plaintiff proves that Dr. McCluskey was the legal cause of Mr. Davenport’s injury, then the fact that others may have contributed to the injury does not relieve Dr. McCluskey from responsibility. Moreover, in order to establish that conduct of others may have contributed to the plaintiff’s injury, medical expert evidence was required.

It has been the defendants’ position that statements and claims made in New Jersey pleadings are relevant and would have relieved Dr. McCluskey and his Hospital from liability. For example, in Response to Plaintiff’s Motion in Limine To Preclude Any and All

References To The New Jersey Action, Control No. 110306513, defendants wrote at 16, 17:

“The jury is entitled to know of the New Jersey action . . . .”

• • •

“The jury must be permitted to learn of the care rendered by the New Jersey defendants, and the plaintiff’s claims against those New Jersey defendants in order to determine whether such care was superseding and intervening.”

• • •

“. . . The care and treatment rendered by the New Jersey defendants and the claims alleged against them by plaintiff must be known to the jury with respect to the jury’s determination of whether Dr. McCluskey adhered to the standard of care.”

In that Response Memorandum and in related Pre-Trial Submissions, Dr. McCluskey and the Trustees of UPenn refer to facts, allegations and claims in the New Jersey action as the basis for their defense that the New Jersey case is relevant “with respect to the [Philadelphia] jury’s determination” of Dr. McCluskey’s standard of care, causation and damages. See, Paragraph 11 of Defendants’ Response to Control No. 11030651.

At the Pre-Trial Motion Hearing on March 21, 2011, Dr. McCluskey and the Trustees at UPenn expanded their position at N.T. 80, by arguing that because plaintiff’s experts referred to the chronology of care by treating physicians after 2003, then defendants could pursue the superseding cause defense:

“We will be using these opinions set forth by their own experts to argue superseding cause. If the plaintiffs are claiming that Dr. McCluskey was negligent, then the jury is allowed to hear about the care rendered by Dr. Tzorfas and Dr. Delasotta as to the issue of superseding cause.

And, Your Honor, that is certainly a defense that we're allowed to present. In order for us to present it, we need to have testimony through their own experts that this was a superseding cause, if they claim Dr. McCluskey was negligent in failing to diagnose myelopathy."

Neither Dr. McCluskey nor a single one of the nine expert witnesses who testified in this two week trial opined that the New Jersey physicians breached the standard of care or caused any harm to Mr. Davenport.

At a Hearing on April 1, 2011, at N.T. 31-37, the defendants again suggested that Dr. McCluskey was not liable for any harm to Mr. Davenport after 2003, at N.T. 32:

"We believe that superseding cause is something that the jury should be allowed to consider based on all the evidence that they heard."

In defendants' Motion for Post-Trial Relief Pursuant to Pa. R.C.P. 227.1, Dr. McCluskey and the Trustees at UPenn argue, at page 19:

"The Trial Court erred in failing to charge the jury with superseding cause, a defense attempted to be asserted by the Defendants though in a limited way due to the Trial Court's erroneous rulings on the Motions in Limine as described supra."

The defendants' post-trial position is new. In the Defendants' Reply Brief, page 5:

"The fundamental flaw in Plaintiff's proofs is his failure to demonstrate how any alleged error by Dr. McCluskey in 2003, caused Plaintiff's harm long thereafter, when his two New Jersey physicians had two years to diagnose and treat his "cord impingement" at T-11/T-12 before -- by Plaintiff's account -- his injury became irreversible."

This Trial Court concluded that whether these defendants assert a defense of superseding cause or intervening cause or if they now claim that the delay in diagnosis in New Jersey broke the causative link between Dr. McCluskey's negligence and Mr. Davenport's irreversible injury, the jury was not permitted to speculate about an alternative cause of harm in the absence of expert medical evidence. April 1, 2011, N.T. 30, 32. Dr. McCluskey and the Trustees of UPenn would have had to present evidence that the New Jersey physicians were negligent. They failed to present the necessary expert proofs.

Next, and significantly, to the extent that Dr. McCluskey and the Trustees of UPenn also state that they are not claiming that the New Jersey physicians are negligent, then, these Philadelphia defendants certainly can not avoid liability because **the defense of superseding cause was never available to them.** See, e.g., Defendants' Reply Brief, page 11, "But Defendants never attempted to prove that Drs. Tzorfas and Delasotta were negligent", ". . . "Defendants had no intention of presenting evidence that the New Jersey doctors were negligent . . .".

Next, the Defendants' Reply Brief even suggests at page 10, that simply cross-examining plaintiff's expert witnesses by use of miscellaneous materials would have been sufficient to meet their burden that someone/something other than Dr. McCluskey caused Mr. Davenport's paraparesis. The law for medical injury claims does not support these contentions.

In Smith v. German, 253 A.2d 107 (Pa. 1969), the Pennsylvania Supreme Court held that when a defendant is attempting to show that other factors caused the disability complained of, expert medical testimony is required. 253 A.2d at 108-109:

“. . . the rules are equally applicable when a defendant seeks to disprove the causal connection . . . presented by the plaintiff by proving one . . . of his own . . . so too is such expert testimony required by the party seeking to establish that it was not the injury but some other factor which caused the change.”

Smith v. German, *supra* and more recent cases such as Montgomery v. Bazaz-Sehgal, 798 A.2d 742 (Pa. 2000) and Kennedy v. Sell, 816 A.2d 1153 (Pa. Superior Ct. 2003), although not involving superseding cause, apply the well-settled Pennsylvania law of causation in their medical injury analysis: expert testimony is required to enable jurors to understand and determine whether the injuries complained of were the result of the care of Dr. McCluskey or were the result of acts or omissions of the New Jersey physicians.

In order for a jury to conclude that Dr. McCluskey’s actions were a substantial factor in causing Mr. Davenport’s injuries but that the intervening actions or omissions of the New Jersey physicians were so extraordinary so as to relieve Dr. McCluskey from liability, Dr. McCluskey and the Trustees of UPenn were required to establish not only that those other actions or omissions contributed to the harm, but also that those actions or omissions would have brought about the injuries without the antecedent negligent act. Those actions or omissions relied on by defendants involve medical care, thus, expert testimony was required. In order for a jury to conclude that the causative chain was broken between Dr. McCluskey’s care in 2003 and subsequent permanent spinal disease injuries, Dr. McCluskey and the

Trustees of UPenn were required to present expert medical opinion evidence. See also, Plaintiff's Pre-Trial Memorandum in Support of the Motion in Limine to Preclude Defendants from Implying that Non-Parties are Liable, Control No.11030704 at pages 4-5, for an extensive discussion on this issue.

Finally, it must be noted that if these defendants had filed pre-trial dispositive motions to flush out and clarify the legal issues of their defense, much of their confusion at the time of trial could have been avoided. All parties would have had an opportunity to read and consider applicable case law. The defendants' reliance on Trude v. Martin, 660 A.2d 626 (Pa. Superior Ct. 1995) is misplaced. See, Defendant's Post-Trial Brief, page 40. In that case, Judge (now Justice) Saylor wrote and affirmed the Trial Court determination that the evidence did not warrant the defense of intervening, superseding cause.

**D. Dr. McCluskey Has Failed to Present Sufficient Grounds For a New Trial.**

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A Trial Court has broad discretion to grant or deny a new trial. In the circumstances presented here, the record supports the Trial Court's evidentiary rulings and the jury's determinations of liability, causation and damages. See generally, Criswell v. King, 834 A.2d 505, 512 (Pa. 2003), a new trial based on the weight of the evidence only in "truly extraordinary circumstances"; Armbruster v. Horowitz, DDS, 813 A.2d 698, 703 (Pa. 2002), credibility is solely for the jury and a new trial appropriate only when the verdict shocks one's sense of justice; Martin v. Evans, 711 A.2d 458 (Pa. 1998), the jury is free to believe all, part or none of the witnesses' testimony; Morrison v. Commonwealth of Pennsylvania,

646 A.2d 565, 571 (Pa. 1994), the trial court must first determine whether mistakes were made during the trial; Gunn v. Grossman, M.D., 748 A.2d 1235, 1243 (Pa. Superior Ct. 2000), to constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful to the complaining litigant; Johnson v. Hyundai Motors, 698 A.2d 631, 635 (Pa. Superior Ct. 1997), a new trial warranted when there is a palpable abuse of discretion or an error of law which controls the outcome of the case.

This jury was charged to weigh the evidence and inferences, to judge the credibility of witnesses, and draw the ultimate conclusion as to the facts. There was ample evidence in this two week trial which support the verdict on liability, causation and damages. The Plaintiff's Post-Trial Brief notes at page 54:

“Plaintiff put forward evidence of both Dr. McCluskey's negligence and causation. Contrary to defendants' argument, it is hard to imagine how the outcome of this trial could have been different when defendants' own expert, touted by defendants as perhaps the premier ALS expert nationally or internationally, admitted again and again that Dr. McCluskey's actions failed to meet an appropriate standard of care. Dr. McCluskey, though he tried to deny at trial the many admissions of his own negligence he had made in deposition, was effectively impeached and again had to admit his multiple deviations in standard of care. Because of his negligence, Dr. McCluskey, the expert to whom Mr. Davenport was referred for this very expertise, determined that Mr. Davenport had certain ALS, a death sentence, notwithstanding Mr. Davenport's many signs and symptoms either inconsistent with that diagnosis or equally consistent with Mr. Davenport's spinal myelopathy. He either did not review or failed to appreciate clear findings of severe spinal stenosis that explained Mr. Davenport's condition. He told Mr. Davenport he had 18 months to 3 years to live and that nothing would change his outcome. Dr. McCluskey's was not a cameo role. More than adequate evidence supported the jury's verdict against him. Defendants' request for a new trial must,

therefore, be denied. These issues were properly for and properly found by the jury.”

This trial record does not support defendants’ post-trial motion for new trial. Cruz v. Northeastern Hospital, 801 A.2d 602 (Pa. Superior Ct. 2002) and cases cited therein.

***1. An Expert’s Testimony on Direct Examination Is Limited to The Fair Scope of His Pre-Trial Report.***

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Dr. McCluskey and the Trustees of UPenn contend that the Trial Court erred in rulings during the direct expert presentations of Dr. Gordon Sze (defense radiologist), Dr. James J. Abrahams (plaintiff’s neuroradiologist) and Dr. Steven Novella (plaintiff’s ALS neurologist). The contentions are without merit.

In Burton-Lister v. Siegel, Sivitz and Lebed Assoc., 798 A.2d 231 (Pa. Superior Ct. 2002), the Appellate Court cited Rule 4003.5(c) of the Pennsylvania Rules of Civil Procedure and held that the question of whether the permissible limits of testimony have violated the Rule is to be determined on a case by case basis. “The essence of the inquiry is fairness.” 798 A.2d at 240. Fairness is gauged by whether the opposing party has sufficient notice of the expert’s opinion to fashion a meaningful response, citing Jones v Constantino, 631 A.2d 1289 (Pa. Superior Ct. 1993).

These defendants are well aware of the applicable case law. In their Pre-Trial Motion in Limine to Preclude Certain Testimony Not Supported By Expert Opinions, Control No. 11031335, at page 4, Dr. McCluskey and the Trustees of UPenn stated in pertinent part:

“Pursuant to Pa.R.C.P. 4003.5(c) the direct testimony of an expert may not be inconsistent with, or go beyond the fair scope of his report.

The Superior Court of Pennsylvania has stated that an expert witness may only testify at trial as to matters which are within the fair scope of the expert's pretrial report. *Jones v. Constantino*, 429 Pa.Super. 73, 631 A.2d 1289 (1993) app. dn. 649 A.2d 673 (1994); *Walsh v. Kubiak*, 443 Pa. Super. 284, 661 A.2d 416 (1995) app. dn. 672 A.2d 309 (1996); *Christiansen v. Silfies*, 46 Pa. Super. 464, 667 A.2d 396 (1995) app. dn. 686 A.2d 1307; *Miller v. The Brass Rail Tavern, Inc.*, 541 Pa. 474, 664 A.2d 525 (1995).

Specifically, in *Jones v. Constantino*, the Superior Court stated that said limitation on the scope of an expert's testimony 'serves to insure that an expert's report will be sufficiently comprehensive and detailed to inform an opposing party of the expert's testimony at trial.' *Jones v. Constantino, supra.*, at 1295, citing, *Havasy v. Resnick*, 415 Pa. Super. 480, 609 A.2d 1326 (1992) app. dn. and dm 641 A.2d 580 (1994).

An expert's testimony on direct examination is to be limited to the fair scope of the expert's pre-trial report. *Jones v. Constantino*, 429 Pa.Super. 73, 631 A.2d 1289, 1294-95 (1993).

*In Woodard v. Chatterjee*, 827 A.2d 433, 2003 Pa. Super. 207 (2003) the Superior Court granted a new trial for defendant based on the fact that plaintiff's expert witness testified about test results, which were in possession of defendant's counsel, but were not referred to in plaintiff's expert's pre-trial reports."

### **Dr. Gordon Sze**

Plaintiff filed two Pre-Trial Motions in Limine relating to Dr. Sze's expert testimony. This Trial Court denied one motion, Control No. 11032841, and permitted the defense expert to present testimony from a Supplemental Report he submitted on March 14, 2011, in response to Dr. Abraham's Report. At our Hearing, this Court concluded that the late report would not cause prejudice. All parties would have an opportunity to question Dr. Sze and also Dr. Abrahams about the matter at issue. See, Mar. 21, 2011, A.M., N.T. 90-94, 112.

Next, the Trial Court considered Plaintiff's Motion to Preclude certain MRI images that Dr. Sze wanted to present in his direct testimony. Apparently on the morning of Dr. Sze's video session, March 14, 2011, plaintiff's counsel was handed a 30 page PowerPoint packet of slide images taken from a website called STAT-DX. Defendants acknowledge that they had "finalized" the packet that morning and "did hand it" to plaintiff's attorneys at that time. See, Motions Hearing, Mar. 21, 2011, N.T. 95-102.

It was determined that the MRI images were of unknown people and depict stenosis of the spine. The images had not been a part of any of Dr. Sze's expert reports; the plaintiff's experts had no opportunity to review or comment or provide plaintiff's attorney with medical preparation; Dr. Sze was not available to testify at trial if questions came up about the PowerPoint presentation; and, plaintiff's counsel was handed the materials as he walked into the video conference room. See, Plaintiff's Motion and Memorandum, Control No. 11032989.

The Trial Court commented at N.T. 101-102:

"So they were patients. Maybe not other patients of Dr. Sze, but they were photos or films of other patients, other people. We don't know their age. We don't know their race. We don't know their condition. We don't know how long they had their stenosis compared to Mr. Davenport's stenosis.

They were not the kind of exemplars that normally we use within a court scenario. . . . The fact that you did or did not go through all 30 pages isn't the issue. If Mr. Casey was handed 30 pages, he had to be ready on all 30 pages. Even if you just used one of those pages, he had to be ready."

The Court Order, filed March 24, 2011, which granted the Plaintiff's Motion to Preclude, also provided guidelines for all counsel during the trial. The record will reflect that Dr. Jeffrey Rothstein, defendant's expert neurologist, did use drawings and neutral demonstrative evidence as part of his presentation to the jury. Mar. 29, 2011, A.M., N.T. 52-85. See, Court Exhibit "E", attached hereto.

The proffered MRI scans had not been included or referred to in Dr. Sze's written reports, thus through the element of surprise, plaintiff would be stripped of the opportunity to prepare for the cross-examination of this witness. See, Defendants' Memorandum, Control No. 11031335, quoting Woodard v. Chatterjee, 827 A.2d 433 (Pa. Superior Ct. 2003). The Rules of Civil Procedure disfavor unfair and prejudicial surprise particularly when the testimony would prevent Mr. Davenport's attorney from preparing a meaningful response.

Finally, on cross-examination, Dr. Abrahams was asked about the STAT-DX website used by the defendants to prepare the Sze PowerPoint presentation. He testified that he does not use that site, on Mar. 23, 2011, P.M., N.T. 72:

"Actually, we're not allowed. It's illegal. STAT-DX is a website and you're not supposed to duplicate the images from it, so I've never used it."

That conclusion remained uncontroverted in these proceedings.

**Dr. Steven Novella**

According to Mr. Davenport's Amended Complaint, Dr. McCluskey and the Trustees of UPenn were sued because, inter alia, in 2003, the Doctor made a false diagnosis, a misdiagnosis, a wrong diagnosis, an incorrect diagnosis of Mr. Davenport. The Defendant-Doctor concluded on June 3, 2003 that Mr. Davenport had ALS. Dr. McCluskey wrote "the diagnosis is certain". See, Paragraph 45, 78-84, Amended Complaint.

Defendants' neurologist, Dr. Rothstein, explained to the jury what neurologists mean when they use the term "certain diagnosis". Mar. 29, 2011, A.M., N.T. 110:

"That's normal nomenclature. That's how we talk to one another. It basically means the patient has ALS, period."

This defense expert testified that ALS is fatal. "It's on the scale of being the worst." He explained that it "decimates" patients and although treatable, ALS is not curable. After diagnosis, the average life expectancy is two to five years. Mar. 29, 2011, P.M., N.T. 74-76.

Defendants' post-trial arguments and Pre-Trial Motion in Limine to Preclude Dr. Novella's Opinions and Testimony about his 2010 Physical Examination of Plaintiff-Davenport, Control No. 11030956 are inconsistent with the medical opinions as explained by their expert. The defendants argued at the Hearing, Mar. 21, 2011, N.T. 9-11, 11-14, and again in their Post-Trial Brief, page 28, that because Mr. Davenport's "clinical presentation" changed between 2003 and 2010, Dr. Novella's opinion that Mr. Davenport does not have ALS was not relevant and should have been precluded from jury consideration. This Court disagrees.

As Dr. Rothstein explained -- if Mr. Davenport had “certain” ALS in 2003, then in 2010 he would continue to have ALS. See, Mar. 21, 2011, A.M., N.T. 11-13, 15-16; Plaintiff’s Response Post-Trial Memorandum, pages 40-41: “If Mr. Davenport does not have ALS now, he did not have it in 2003.” Even Dr. McCluskey commented at trial, Mar. 25, 2011, A.M., N.T. 43, “we don’t have magic medicine at Penn . . . .”; “ALS . . . it is what it is.” Mar. 25, 2011, A.M., N.T. 42. The Trial Court properly determined that the results of Dr. Novella’s 2010 examination were relevant and admissible.

**Dr. James J. Abrahams**

Dr. McCluskey and the Trustees of UPenn assert that one question during the direct examination of Dr. Abrahams “unfairly suggested to the jury that Defendants bore the burden of proving that they did not deviate from the standard of care when, in fact, Defendants have no such burden under Pennsylvania law.” Defendants’ Post-Trial Brief, page 38. The assertion is baseless.

When considered in context of the trial session, the jury heard that Dr. Sze, unlike the Pennsylvania Hospital radiologist, did not rule out myelomalacia or the abnormal signal in the spinal cord on the 2003 MRI’s. Mar. 23, 2011, A.M., N.T. 30-33. Dr. Abrahams’ testimony was that Dr. Sze “downplayed the importance”, and that Dr. Sze did not criticize the people who read the films. On the other hand, it was Dr. Abrahams’ opinion that the abnormal signal was “absolutely significant”.

“Q. Now, you know and work with Dr. Sze.

**Dr. Abrahams:** Yes, I do.

**Dr. Abrahams:** Yes.

Q. Based upon your review of that video and the deposition testimony, does Dr. Sze -- has Dr. Sze admitted that there was evidence of spinal cord injury.

**Dr. Abrahams:** Yes. . . . Dr. Sze does admit that he does see the abnormal signal and it's there. He tends to downplay the importance of it. But anytime I see this abnormal signal in the cord, there is damage to the cord and you can't ignore that. That's important.

Q. . . . Would you expect Dr. Sze to see, as he testified under oath that he did, this myelomalacia given that he's a radiologist trained like you?

**Dr. Abrahams:** . . . Yes. He does see the myelomalacia and he does mention it in his report.

Q. In the transcript of the testimony that you read -- and the jury will see the video -- did Dr. Sze ever say that there was no deviation in the standard of care on the part of the people who read the films at the University of Pennsylvania?

**Dr. Abrahams:** No, I did not see that.”

When read in context and heard in the courtroom, the exchange with Dr. Abrahams, Director of Medical Studies and Diagnostic Radiology at Yale about the testimony of Dr. Sze, Chief of Radiology at Yale, related to the failure of their Philadelphia counter-part, the Pennsylvania Hospital radiologist, to recognize the myelomalacia that the two Yale colleagues identified . . . “the people who read films”.

This jury was not prejudiced. This jury was not confused. They returned a verdict in favor of the Pennsylvania Hospital radiologist.

Next, in Defendants' Post-Trial Brief, page 27, there has been no identification made of the specific location in the transcript upon which a challenge is based. No issue has been preserved for post-trial review.

**2. *The Motion For Mistrial Was Properly Denied.***

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During re-direct examination of Dr. Novella, plaintiff's expert neurologist, counsel placed on the video screen a medical document from Bacharach Institute for Rehabilitation. Mar. 24, 2011, P.M., N.T. 102-103. Counsel for plaintiff read the sentence setting forth Mr. Davenport's history:

"His initial symptoms began in 2001 with lower limb weakness and in 2003 he was misdiagnosed at the Hospital of the University of Pennsylvania."

Defense counsel made a prompt objection and motion to strike the document. The Trial Court agreed and gave a curative instruction to the jury. "Jurors, disregard that exhibit".

At the end of the workday defense counsel made a motion for mistrial, arguing that the highlighted word "misdiagnosis" was "extraordinarily prejudicial." Mar. 24, 2011, P.M., N.T. 122. The Trial Court denied the motion for mistrial. See Defendant's Post-Trial Brief, page 35; Mar. 24, 2011, P.M., N.T. 125-126.

The Superior Court has noted that when reviewing a Trial Court's decision to deny a request for a mistrial, the inquiry focuses on whether there was an abuse of discretion or legal error. Birt v. Firstenergy Corp., 891 A.2d 1281 (Pa. Superior Ct. 2006); Gorski v. Smith, 812 A.2d 683 (Pa. Superior Ct. 2002).

Here, as in Gatto v. Kisloff, 649 A.2d 996 (Pa. Superior Ct. 1994), the Bacharach Institute document had been provided to the defense team prior to trial. See, Mar. 29, 2011, A.M., N.T. 159. The Superior Court in Gatto commented that ordinary diligence requires counsel who are familiar with the trial materials to take steps to avoid disclosure of objectionable materials. Mar. 24, 2011, P.M., N.T. 125-26. The mere mention of the word “misdiagnosis” in the Bacharach document did not necessitate a new trial.

More importantly, however, the post-trial assertion that this was “new” information is simply inaccurate. Defendants’ Reply Brief, pages 24-27. Post-trial counsel suggests that a statement from a “disinterested professional” is “compelling” and “no instruction possibly could unring the bell”. N.T. 27. The record does not support these arguments. The most “powerful” and “compelling” information which was presented to the jury was that the University of Pennsylvania’s first choice for a defense expert was Dr. Steven Novella who testified on behalf of Mr. Davenport. The “bell” was rung for this jury when they learned that during the year-long pursuit of Dr. Novella (April, 2009 – March, 2010), it was trial counsel for the defense who labeled the litigation “**an alleged misdiagnosis of ALS**”. See generally, Mar. 24, 2011, A.M., N.T. 47-54, 110-115. The trial transcript will reflect that questions, explanations and discussions about those numerous e-messages extended throughout the entire day of testimony on March 24<sup>th</sup>. The motion for mistrial was properly denied on March 24, 2011.

One week later when Dr. Rothstein testified that he relied on records indicating that Mr. Davenport had been misdiagnosed in 2003, Mar. 29, 2011, A.M., N.T. 139-140, no documents were visible to him or the jury. This Court did not know what documents he was referring to. The objection was overruled because the expert verbally indicated he relied on certain post-2003 materials when forming his opinions. Mar. 29, 2011, A.M., N.T. 140. When Bates 4005/The Bacharach Institute document was put on the screen, this Court promptly sustained defense counsel's objection and that document was removed. Mar. 29, 2011, A.M., N.T. 142-143. **Note:** Based on defense counsel's explanations about when he received the Bacharach materials, it appears that Dr. Rothstein was referring to different records in his responses at N.T. 139-140.

***3. The Trial Court Granted These Defendants' Requests To Advise The Jury of The Existence of the New Jersey Lawsuit.***

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Prior to trial, Plaintiff-Davenport filed three Motions in Limine:

**Control No. 11030651 –**

Plaintiff's Motion in Limine to Preclude Any and All References to the New Jersey Action. Mar. 21, 2011, N.T. 57-74.

**Control No. 11032657 –**

Plaintiff's Motion in Limine to Preclude Defendant from Introducing Expert Opinions Via Deposition Testimony From Treating Physicians, Including Fernando Delasotta, M.D. and Scott Tzorfas, M.D. Mar. 21, 2011, N.T. 84-90.

**Control No. 11030704 –**

Plaintiff's Motion in Limine to Preclude Defendants From Implying in Opening Speeches, During Trial Testimony and/or During Closing Argument That Non-Party Treating Physicians Scott Tzorfas, M.D. and/or Fernando Delasotta, M.D. are Liable For Plaintiff's Injuries. Mar. 21, 2011, N.T. 75-83.

The parties submitted written memoranda and presented oral argument. The legal and factual issues of the Motions in Limine were similar and overlapped. The Court's Orders were similar. Mar. 21, 2011, N.T. 107-111, 113-117. See, e.g., Order filed in Control No. 11030651:

“AND NOW this 22<sup>nd</sup> day of March, 2011, upon consideration of Plaintiff's Motion *in Limine* to Preclude Any and All References to the New Jersey Action, and any responses thereto, it is hereby ORDERED and DECREED that Plaintiff's Motion is DENIED in Part and GRANTED in Part. **The existence of the civil suit may be told to the jury by either or both parties.** See Hearing Transcript of March 21, 2011. See also, *Conomos, Inc. v. Sun Company, Inc.*, 831 A.2d 696, (Pa. Superior Ct. 2003).” (emphasis added)

Dr. McCluskey and the Trustees of UPenn have re-argued the Motions in Limine in the Post-Trial Briefs, now styled as JNOV and challenges to evidentiary rulings. These defendants did not have nor present expert reports or medical testimony relating to standard of care or causation of the conduct of the New Jersey physicians. As indicated earlier, JNOV is not appropriate.

The admissibility of evidence is a matter addressed to the sound discretion of the Trial Court and should not be overturned absent an abuse of discretion or legal error. Potochnick v. Perry, 861 A.2d 277, 282 (Pa. Superior Ct. 2004); Whyte v. Robinson, 617 A.2d 380, 383 (Pa. Superior Ct. 1992). Trial counsel took full advantage of the Trial Court's Order and this record is replete with evidence for the jury to consider about the actions of the New Jersey physicians.

At this post-trial juncture, the defendants have modified and shifted their arguments about the New Jersey physicians to areas never raised at trial. The underlying pre-trial and post-trial purpose of these defendants has not changed however, that is, their intent to inject collateral source matters into the litigation.

The broad post-trial evidentiary argument is Defendants-Doctor/Hospital's claim that the Trial Court erred in limiting evidence of the New Jersey action to its existence. Defendants' Post-Trial brief, page 13:

“This Court erred as a matter of law and abused its discretion in granting Plaintiff's Motion to preclude any and all reference, argument or substantive evidence (*i.e.*, everything other than the existence of the action) regarding the pending New Jersey action against Drs. Tzorfas and Delasotta (*Davenport v. Tzorfas, MD, et al*, Superior Court, Atlantic County, Civil Division-Law, C.A. No. L-5-09). Specifically, the Court erred in precluding the defense from publishing the contents of the Complaint, the specific theories of negligence set forth therein, and Plaintiff's claims that the New Jersey Defendants were responsible for Plaintiff's injuries. The Court also erred in excluding expert opinions obtained by Plaintiff in the New Jersey case, discovery verified by plaintiff in the New Jersey action, and the use of the depositions taken in the New Jersey case.”

The defendants have based these evidentiary arguments on Pennsylvania Rules of Evidence and Pennsylvania Rules of Civil Procedure. This Court does not agree with their interpretation of Pennsylvania rules, procedure and case law. Again, in the absence of any medical expert evidence of liability or causation relating to the New Jersey physicians, these post-trial challenges are without merit. The evidentiary challenges are reviewed as follows:

## Pennsylvania Rules of Evidence

### 1. Rule 703 states:

“The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”

During the trial these defendants agreed that if an expert relied upon certain records and materials, he may be cross-examined about them. Mar. 29, 2011, A.M., N.T. 157-160; Rafter v. Raymark Industries, Inc., 632 A.2d 897 (Pa. Superior Ct. 1993); Kemp v. Qualls, M.D., 473 A.2d 1369 (Pa. Superior Ct. 1984). See also, Post-Trial Hearing, N.T. 58. The cross-examination of each of plaintiff’s expert witnesses and the direct examination of Dr. McCluskey encompassed extensive reviews of the New Jersey medical records. It was those medical records upon which plaintiff’s medical expert witnesses relied for their medical opinion.

In this case, plaintiff’s experts (and the jury) were aware of the chronology and history of treatment for Mr. Davenport, however, the plaintiff’s experts did not rely on legal documents, such as the Complaint or depositions from the New Jersey action, in order to reach their medical conclusions. Post-trial counsel are unable to point to any place in the trial record where an expert for the plaintiff testified he relied on New Jersey legal documents.

Beardsley v. Weaver, 166 A.2d 529 (Pa. 1961), quoted at pages 17-19 in Defendants' Post-Trial Brief is a motor vehicle case which does not involve precedent relating to professional negligence litigation or medical expert opinions or Rule 703.

2. Rule 803(25)

Prior to trial, these defendants based their requests to use the New Jersey Complaint, depositions and other litigation materials primarily on the argument that these are "judicial admissions". See, Defendants' Memorandum, Control No. 11030651, pages 14-16. At the Motions Hearing, they argued at Mar. 21, 2011, N.T. 64, 65: ". . . a party's statement in his pleading is a judicial admission"; ". . . this is a judicial admission in the New Jersey case."

The new and revised post-trial posture is that defendants are no longer resting on those arguments. Reply Brief, page 15, "Defendants have not argued they are 'judicial admissions'"; page 17, "But Defendants never claimed that Plaintiff's many statements in the New Jersey action were 'judicial admissions'". See, Bernstein, 2011 Pa. Rules of Evidence, Comment 10 to Pa. R.E. 803(25); John B. Conomos, Inc. v. Sun Company, Inc., 831 A.2d 696 (Pa. Superior Ct. 2003). See also, Post-Trial Hearing, N.T. 16-18.

To the extent that these defendants argue that in New Jersey, Mr. Davenport claimed that the physicians were "solely" responsible and thus cite Rule 613(a) and/or Rule 803(25) of the Pennsylvania Rules of Evidence to assert a prior inconsistent statement of a party or a witness, the defendants are not correct. Such statements are misleading and have been retracted by post-trial counsel. See, Post-Trial Hearing, N.T. 54-58.

### **“Expert Opinions” Obtained By Plaintiff in the New Jersey Case**

Dr. McCluskey and the Trustees of UPenn allege that the jury should have been told about, e.g., “the expert opinions obtained by Plaintiff in the New Jersey case”; “The notarized Affidavits of Merit from Plaintiff’s experts retained in the New Jersey case”; “the affidavits of merit served in the New Jersey action affirm that Drs. Tzorfas and Delasotta were negligent and caused Plaintiff’s injuries”; Defendant’ Post-Trial Brief, pages 13, 14; Defendants’ Reply Brief, page 15.

At the Motions Hearing it was explained on Mar. 21, 2011, N.T. 65-66:

“. . . it’s an affidavit that they have to file. And they filed affidavits on behalf of Dr. Houseknecht and Dr. Weinstein wherein they advised -- and it’s notarized -- that they reviewed the records and they found that their care was a contributing factor to their injuries.”

Here, as in the JNOV discussion, infra, these defendants attempt to rely on something different than or less than the Pennsylvania standards for medical negligence. Not only are the New Jersey affidavits not sufficient proof of negligence and causation in a Pennsylvania medical malpractice case, these would have confused the jury about the law applicable in a Pennsylvania courtroom. See also, Rule 1042.3 of Pennsylvania Rules of Civil Procedure requiring a Certificate of Merit alleging only “a reasonable probability” that medical care was substandard.

The fact that the New Jersey affidavits are notarized did not make them relevant or admissible in this Pennsylvania case.

**Rule 4020(a)(5) of the Pennsylvania Rules of Civil Procedure**

Rule 4020(a)(5) states:

“(5) A deposition upon oral examination of a medical witness, other than a party, may be used at trial for any purpose whether or not the witness is available to testify.”

These defendants are unable to point to a single Pennsylvania case, treatise or commentary to suggest that the term “medical witness” refers to a defendant physician in a different litigation. Dr. Tzorfas and Dr. Delasotta are parties in the New Jersey lawsuit. They were not witnesses in the Pennsylvania case. Counsel for Dr. McCluskey and the Trustees of UPenn did not participate in the New Jersey deposition proceeding. It has not been disclosed whether the attorneys representing the New Jersey physicians were alerted to defense counsels’ plan. Query whether the New Jersey attorneys might have a right to halt the use of the depositions in order to prevent medical analysis of their clients’ actions. See, Post-Trial Hearing, N.T. 66-67.

Next, although the defendants continue to argue that their intent in presenting the New Jersey depositions was not to establish expert opinions and not to establish New Jersey negligence, such arguments fail to embrace the principle that in order to provide substantive evidence about the intervening care and treatment of the New Jersey physicians or breaks in the chain of medical causation, these Philadelphia defendants are required to present expert opinions and testimony. See, Plaintiff’s Memorandum in Opposition to Post-Trial Motions, pages 31-36; Jistarri v. Nappi, 549 A.2d 210 (Pa. Superior Ct. 1988); Pascone v. Thomas

Jefferson Hospital, 516 A.2d 384 (Pa. Superior Ct. 1986). **But compare:**

- Control No. 11032757, page 4, “The testimony will be used with respect to the care and treatment provided by those [New Jersey] defendants including opinions as to their own care.”
- Control No. 11030651, page 17, “The care and treatment rendered by the New Jersey defendants and the claims against them by plaintiff must be permitted to be known to the jury with respect to the jury’s determination of whether Dr. McCluskey adhered to the standard of care.”
- Control No. 11030704, page 7, “Thus defendants may establish, through plaintiff’s experts’ own opinions, plaintiff’s own claims that the New Jersey defendants were negligent.”
- Motions Hearing, Mar. 21, 2011, N.T. 82: “We’re going to cross-examine them on their opinions. We are certainly allowed to do that and develop our expert testimony through that cross-examination if they claim there was a failure to diagnose myelopathy, and that this failure to diagnose over time caused his injuries. That’s care that occurred after Dr. McCluskey.”
- Defendants’ Post-Trial Brief, page 24, “The Defendants, had they been permitted to do so, would have cross-examined Plaintiff and Plaintiff’s experts regarding the testimony as set forth in the depositions to refute their claims as to the actual care rendered by Drs. Tzorfas and Delasotta as well as opinions related to standard of care, causation and damages.”

- Defendants’ Reply Brief, page 12, “Defendants had no intention of presenting evidence that the New Jersey doctors were negligent; their intention [Dr. McCluskey and the Trustees of UPenn] was simply to establish that there was a break in the chain of causation. Nor were Defendants required to call a witness to establish the gaping hole in Plaintiff’s theory of causation where they could have made that point through cross-examination of Plaintiff’s own witnesses.”
- Defendants’ Reply Brief, page 13, “The Court improperly prevented this proper manner of using the New Jersey depositions to establish lack of causation.”

Whether due to trial strategy and/or professional courtesy, Dr. McCluskey and the Trustees of UPenn did not retain medical expert witnesses to provide liability and causation opinions that the care and treatment and the delay in surgery was “the fault” of Dr. Tzorfas or Dr. Delasotta. Nor did the Philadelphia defendants join the New Jersey physicians as additional defendants in our case, as per Rule 2252 of the Pennsylvania Rules of Civil Procedure. This Trial Court properly determined that the depositions of the New Jersey physicians could not be used as expert testimony. The Pennsylvania Rules of Civil Procedure do not support that endeavor.

### **Collateral Source Rule**

Pennsylvania courts do not permit a defendant to offer evidence that the plaintiff has been or will be compensated by a collateral source in order to reduce the damages payable to the plaintiff. See, Packel and Poulin, Pennsylvania Evidence §423, Third Edition, (West,

2007); Bernstein, 2011 Pa. Rules of Evidence, Comment 4 to Pa. R.E. 411 (Gann), and cases cited in both treatises.

Dr. McCluskey and the Trustees of UPenn clearly articulated their actual plan was to utilize the New Jersey materials so that Mr. Davenport could not be “rewarded” by “allowing him to attempt recovery in multiple venues for the same claims of damages.” Control No. 11030651, page 18:

“Plaintiff is seeking a double recovery in this matter and the New Jersey action. Plaintiff made no effort to parcel out the claims of negligence, causation theories or damages. Plaintiff claimed that the New Jersey defendants were ‘directly and proximately’ the cause of his injuries. Plaintiff claims identical theories and damages in this case. Plaintiff should not be permitted to be shielded from his judicial admissions and with lack of candor, infer to the jury that is his only complaints of alleged negligence, causation and damages are against the responding defendants.”

Apparently, these defendants intended to inject improper collateral source testimony or comments or suggestive questioning by counsel under the guise of relevancy and probative value. At Control No. 11030651, page 18, Dr. McCluskey and the Trustees of UPenn submitted their pre-trial warning:

“It is incomprehensible that plaintiff sees no probative evidence in the fact that he has sued other defendants claiming the identical theories of negligence and claiming the same injuries against others [than] the instant defendants.”

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For all of the reasons set forth above, the Trial Court properly limited the use at trial of the New Jersey litigation materials. The jury heard considerable testimony for two weeks about Mr. Davenport's treatment with the New Jersey doctors and others. See, Plaintiff's Sur Reply, pages 6-9. The plaintiff and his expert witnesses were questioned about the New Jersey litigation. Mar. 23, 2011, P.M., N.T. 58; Mar. 24, 2011, P.M., N.T. 39; Mar. 30, 2011, A.M., N.T. 45. Over plaintiff's objections, Defendant-Dr. McCluskey provided detailed analysis of Mr. Davenport's medical care by prior and subsequent treating physicians. Mar. 31, 2011, A.M., N.T. 5-146. The issue at this juncture is whether the plaintiff met his burden to prove that the conduct of Dr. McCluskey was a substantial factor in causing Mr. Davenport's injuries. The answer is clearly "Yes". The Court did not abuse its discretion in limiting cross-examination of trial witnesses to relevant and admissible evidence.

#### **E. Credibility Matters.**

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The Pennsylvania Rules of Professional Conduct provide in pertinent part:

"3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . .

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness, has offered material evidence before a tribunal or in an ancillary proceeding . . . such as a deposition, and the lawyer comes to know of its

falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

The Explanatory Comments provide guidance specifically relating to Paragraph (a)(3). Additional Comments describe the professional obligations to take Remedial Measures and indicates that the duration of the obligation for Remedial Measures is when the proceedings have concluded.

### **Dr. Leo F. McCluskey – Part One**

At the pre-trial Motions Hearing on March 21, 2011, defendants submitted a Motion in Limine to Preclude Any/All Evidence Concerning Dr. McCluskey’s Other Medical Malpractice Lawsuits, Control No. 11030953. N.T. 8-9. The Motion identified prior litigation where Dr. McCluskey was a named defendant. On March 22, 2011, this Court filed an Order granting the Motion in Limine.

On March 23, 2011, Defendant-McCluskey was being cross-examined about his experiences in sitting for depositions as an expert witness and his experiences in sitting for the two pre-trial depositions in this case. He told the jury that the pre-trial depositions were a **new experience** because he had not previously provided deposition testimony in lawsuits involving himself.

March 23, 2011, P.M., N.T. 93:

“Q. So its fair to say that wasn’t something new, that experience of giving sworn testimony under oath?”

**Dr. McCluskey:** Well, it was new to the extent that in prior depositions I had basically gave a deposition as an expert witness in neurology, **not for the purpose of a lawsuit involving myself.**”

At no time did counsel for Dr. McCluskey initiate an explanation for this testimony -- not at the end of the day on March 23, nor at any time on March 24, 2011.

Under those circumstances, at the conclusion of the trial day on March 24<sup>th</sup>, this Court asked the attorneys to provide advice about the truth of Dr. McCluskey's testimony and determine whether or not further action was required. Counsel were reminded of their professional responsibilities. Mar. 24, 2011, P.M., N.T. 127-128. There was no effort to initiate Remedial Measures by counsel for Dr. McCluskey. See Defendants' Post-Trial Brief, page 47.

At the close of the day of March 25, 2011, the attorney for Dr. McCluskey provided his justification for the doctor's testimony, at P.M., N.T. 102:

“. . . it appears as though it was an innocent misrecollection.”

Over plaintiff's objection, the Trial Court concluded that none of the attorneys were permitted to bring this issue to the attention of the jury. Defense counsel could not clear-up the “innocent misrecollection”. Plaintiff's counsel could not impeach the Defendant-Doctor with the fact that he had testified as a defendant in an earlier medical malpractice case. Mar. 25, 2011, P.M., N.T. 100-105.

Dr. McCluskey also testified that in 2004, he received a Masters Degree in Biomedical Ethics (M.B.E.) from the University of Pennsylvania. Mar. 31, 2011, A.M., N.T. 139-146.

## **Dr. Jeffrey Rothstein**

In every civil jury trial one of the routine in-court trial tactics occurs when opposing counsel requests to examine an expert's file. Trial attorneys for all parties engage in this mini-theatre as part of cross-examination. Sometimes the attorney looks through a file slowly in the jury's presence; sometimes counsel will start paging through the papers then will request a brief recess to examine the folder; occasionally, if there is no file, the expert will be questioned about its absence. All of these exchanges are skillfully handled to peak the jury's curiosity.

Generally, in the follow-up after the file review, experienced attorneys will ask questions, inter alia, about the absence of bills or invoices, the presence of published articles, or, challenges about materials which may or may not have been exchanged during the pre-trial discovery period.

Expert witnesses are expected to be prepared by trial counsel for their entire trial presentation. This "prep" should include direct and cross-examination.

Our trial transcript discloses that Dr. Rothstein had never testified in a jury courtroom before this case; that he had "prepped" with the defense team for less than two hours about a week earlier; that he was not prepared for this standard line of questions; that the defense team may not have been familiar with the procedure for subpoena service or cross-examination; and, that an attorney who Dr. Rothstein did not know and who did not represent him, interfered and proffered incorrect "legal" advice. See generally, Rule 234.1 to 234.9 of the Pennsylvania Rules of Civil Procedure.

At this post-trial juncture, Dr. McCluskey and the Trustees of UPenn argue that the Trial Court should have intervened to assist their trial counsel in order that service of a subpoena would be accomplished; and, cross-examination about Dr. Rothstein's files would be curtailed; and, questions about materials in his file and the service of the subpoena could have been "cut off". See, Defendants' Post-Trial Brief, pages 30-32, Defendants' Reply Brief, page 24.

The facts are that on March 24, 2011, as soon as the issue was brought to this Court's attention, this Court promptly suggested the correct resolution in a discussion outside of the jury's presence. Not only did defendants' trial counsel reject the Court's response on the record, but in an off-the-record comment challenged judicial ethics and integrity and stated that the Court's suggestion was "inappropriate". On March 24, 2011, N.T. 132:

COURT: Would you accept service for Dr. Rothstein?

Mr. Savon: No, Your Honor. I can't accept service for Dr. Rothstein."

See also, Mar. 29, 2011, A.M., N.T. 16-18, where counsel's confusion is apparent.

More importantly, however, from the jury's perspective, they observed Dr. Rothstein as a cautious and careful man who acknowledged that he was not familiar with courtroom procedure. The jury also learned that he did seek advice from a Johns Hopkins attorney for guidance about the subpoena request for documents on his computer. See, Mar. 29, 2011, A.M., N.T. 145-150, 152. When Dr. Rothstein received advice from an attorney, he did not hesitate to say so. It appears that when the Defendant-Attorney for Trustees of UPenn

offered “advice”, Dr. Rothstein did not know the identity of the individual standing next to him who erroneously suggested that he not accept that subpoena. Mar. 29, 2011, A.M., N.T. 147.

These defendants have presented the following situation:

At the trial, Mar. 29, 2011, P.M., N.T. 4:

“That subpoena was not accepted on advice of counsel.”

N.T. 6:

“I did confirm . . . that it was on advice not to accept that because he was a Maryland resident.”

Defendants’ Post-Trial Brief, page 29:

“Counsel for the Hospital, who did not represent Dr. Rothstein at trial, advised Dr. Rothstein that he was not obligated to accept the envelope.”

Defendants’ Post-Trial Brief, page 32:

“. . . in fact, Dr. Rothstein was merely following the advice of counsel . . .”

**Query:** If Dr. Rothstein did not know the individual next to him was an attorney, was he following advice of counsel? If the attorney was not representing him at that time, is that advice of counsel? When Dr. Rothstein denied that the reason he refused service was because he lived in Maryland, was he following the advice of the individual who stood next to him? Mar. 29, 2011, A.M., N.T. 152.

This Trial Court did provide prompt, timely and correct advice to the defendants and their trial team. Accepting service of the subpoena is ethical and appropriate and should have been accomplished as a routine matter. The post-trial challenge is without merit.

**Dr. Leo F. McCluskey – Part Two**

Prior to trial, Dr. McCluskey testified at his deposition that he reviewed Mr. Davenport's 2003 MRI films with a Pennsylvania Hospital radiologist. At trial, Dr. McCluskey again gave this testimony. e.g. Mar. 31, 2011, A.M., N.T. 52-54; Mar. 31, 2011, P.M., N.T. 52-56.

The defendant testified that the Pennsylvania Hospital neuroradiologist agreed with Dr. McCluskey's conclusion that the MRI's did not show the myelopathy in Mr. Davenport's lower spine. See, Plaintiff's Post-Trial Response, pages 44-45.

At trial, counsel for the Trustees of UPenn revealed to the Trial Court that the Hospital was not able to locate or identify the resident or attending radiologist with whom Dr. McCluskey testified he conferred. That radiologist made no notations on any medical records. Notwithstanding the detailed state and federal record requirements and/or academic accreditation mandates and/or Hospital personnel files, none of the defendants have been able to identify the unnamed and unknown radiologist. See, April 1, 2011, N.T. 15-22, 50-57. Rather, the Hospital defendants could neither admit or deny that the neuroradiologist described by one defendant was an agent of the other defendants.

If the accuracy or veracity of pre-trial and trial testimony could not be admitted or denied by the Hospital, it may be that any doubts about the evidence were resolved in favor of the other client, Dr. McCluskey. See, Rule 3.3., Explanatory Comment [8]. If the Pennsylvania Hospital radiologist exists and plaintiff presented expert opinion describing a deviation of care, proximate-causation and/or increased risk of harm, then the trial properly proceeded against that person. If the radiologist does not exist, then defendants and counsel cannot claim trial court error. Defendants' Post-Trial Brief, page 33. The jury rendered a verdict in favor of the Pennsylvania Hospital radiologist.

### **III. THE JURY INSTRUCTIONS AND THE VERDICT SHEET ACCURATELY REFLECT THE LAW AND DID NOT MISLEAD THE JURY**

It is well settled that when reviewing a Trial Court's instructions, the jury charge must be viewed as a whole. Jury instructions must be upheld if they adequately and accurately reflect the law and are sufficient to guide the jury in its deliberations.

The Supreme Court in Stewart v. Motts, 654 A.2d 535 (Pa. 1995), quoted numerous cases and stated at 540:

“In reviewing a trial court's charge to the jury we must not take the challenged words or passage out of context of the whole charge, but must look at the charge in its entirety.”

See also, Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1069 (Pa. 2006); Gorman v. Costello, 929 A.2d 1208, 1211-1212 (Pa. Superior Ct. 2007).

First, Dr. McCluskey and the Trustees of UPenn renew their superseding and intervening cause defense at Post-Trial Brief, page 39-40:

“. . . the Court erred in failing to charge the jury on the issue of superseding cause . . . the failure to provide the charge was highly prejudicial to Defendants since this defense, if accepted, would have relieved Defendants from liability in this case.”

For the reasons discussed above in this Memorandum, the defense of superseding cause was not available to these defendants. Further, although the Pennsylvania Suggested Standard Civil Jury Instructions (“SSJI”) are not binding on courts, the Trial Court here relied on the SSJI for guidance. SSJI 13.200 states that because factual cause is the test for causation, then:

“No instruction should be given.”

See, SSJI 13.200 (Civ) Intervening or Superseding Cause, attached hereto as Court Exhibit “D”.

Next, defendants argue in their Post-Trial Brief, page 41, that the Court erred in reading the Concurrent Cause charge:

“The Court . . . instructed the jury that it could find liability against defendants even if there was more than one cause of harm (so long as they each contributed concurrently to the occurrence or incident). This gave the jury the opportunity to find each of these persons fully responsible for the harm suffered by the plaintiff without allowing the jury to find the New Jersey doctors **solely liable**.” (emphasis added)

In this trial, the jury heard expert medical opinions that two individuals deviated from the appropriate medical care and caused Mr. Davenport’s injuries. The evidence included detailed testimony of the distinct roles of Dr. McCluskey and the unnamed Pennsylvania Hospital radiologist. Here, unlike in Sutherland v. Monongahela Valley Hospital, 856 A.2d 55, 62 (Pa. Superior Ct. 2004), the evidence was sufficient to permit the jury to determine the vicarious liability of Defendant-Pennsylvania Hospital for the acts of the unnamed radiologist.

The SSJI Subcommittee Note to 3.17, states in part, “This charge may be used as a supplement to the Instruction 3.16, where the second force is the negligent conduct of another defendant and either act alone would have brought about the harm.” See also, Powell v. Drumheller, 553 A.2d 619 (Pa. 1995), holding that where a jury could reasonably believe that a defendant’s actions were a substantial factor in bringing about plaintiff’s harm,

the fact that another defendant [the Pennsylvania Hospital radiologist] was determined to be a concurring cause of harm does not relieve Dr. McCluskey of liability.

Next, the defendants' contention that in the absence of expert testimony the jury should have been permitted to consider acts of the New Jersey doctors and allow the jury to find them "**solely liable**" is without legal basis. Defendants' Post-Trial Brief, pages 40-41.

In a related matter, Dr. McCluskey and the Trustees of UPenn allege that the jury was confused by the verdict sheet because the unnamed Pennsylvania Hospital radiologist was presented. The defendants have not articulated any foundation for this speculative argument. Nor have the defendants distinguished this case from any other situation where the names of settling defendants are presented on a verdict sheet. The jury returned a verdict in favor of Defendant-Pennsylvania Hospital. See, Post-Trial Hearing, N.T. 33-34; In Goldberg v. Islander, M.D., 780 A.2d 654 (Pa. Superior Ct. 2001), it was noted in dicta that where a jury was aware that if they found against a physician the hospital would be liable, the verdict sheet was proper.

Next, the defendants argue there was error in the jury charge on "Other Contributing Causes". Defendants' Post-Trial Brief, page 40. The "Other Contributing Causes" in SSJI 6.05 refers to plaintiffs, such as Eric Davenport, who have pre-incident complaints of health problems or conditions. April 1, 2011, N.T. 24-25. See also, Collins v. Cement Express, Inc., 447 A.2d 987 (Pa. Superior Ct. 1982), where charge failed to instruct jury about legal effects of prior neurosis or other contributing causes a new trial was ordered; Bushell v. J.H. Beers, Inc., 258 A.2d 682 (Pa. Superior Ct. 1969), when jury was not instructed that a

defendant becomes liable for all harm caused even though increased by prior physical condition, a new trial was ordered, citing Menarde v. Philadelphia Transportation Co., 103 A.2d 681 (Pa. 1954).

Finally, throughout the post-trial the defendants raise questions about plaintiff's counsel's closing argument. The record will reflect that there were no objections by trial counsel, thus, no review is warranted. April 1, 2011, N.T. 64-133. Harman v. Borah, 756 A.2d 1116 (Pa. 2000) noting that timely and specific objections preserve post-trial review.

#### **IV. THE VERDICT AWARD DOES NOT SHOCK THIS COURT'S CONSCIENCE**

Dr. McCluskey and the Trustees of UPenn contend that the verdict award is not supported by the evidence. In both of the defendants' post-trial memoranda they challenge the damages as excessive. The record which includes evidence of economic and non-economic losses for twenty-eight years, does not support their contention.

In Stoughton v. Kinzey, 445 A.2d 1240 (Pa. Superior Ct. 1982) the Superior Court held that when a plaintiff's verdict is supported by the evidence, an order of the court modifying it is an abuse of discretion. 455 A.2d at 1242:

“The issue of the amount of damage that a person is to be awarded for pain and suffering, both past and future is primarily a jury question. . . . A jury is justified in awarding substantial damages for pain and suffering where the injuries are permanent and cause pain.” (numerous citations omitted).

See also, McManamon v. Washko, 906 A.2d 1259 (Pa. Superior Ct. 2006), and cases cited therein, for a comprehensive discussion about damages while affirming a Trial Court's decision to not grant remittitur of a \$20 million verdict. The test for remittitur is well established and often repeated. Harding v. Consolidated Rail Corporation, 620 A.2d 1185 (Pa. Superior Ct. 1993) relied on Kemp v. Philadelphia Transportation Co., 361 A.2d 362 (Pa. Superior Ct. 1976), held at 620 A.2d 1193:

“The granting or the refusal to grant a new trial because of the excessiveness of the verdict is within the discretion of the trial court and its decision will be sustained by an appellate court absent a gross abuse of that discretion. *Botek v. Mine Safety Appliance Corp.*, 531 Pa. 160, 611 A.2d 1174 (1992); *Mineo v. Tancini*, 349 Pa.Super. 115, 502 A.2d 1300 (1986), *aff'd*, 517 Pa. 335, 536 A.2d 1323 (1988). In determining whether a verdict is excessive a court may consider the following factors:

(1) the severity of the injury; (2) whether the injury is manifested by objective physical evidence or whether it is only revealed by the subjective testimony; (3) whether the injury is permanent; (4) whether the plaintiff can continue with his or her employment; (5) the size of out-of-pocket expenses; (6) The amount of compensation demanded in the original complaint. *Kemp v. Philadelphia Transportation Company*, 239 Pa.Super. 379, 361 A.2d 362 (1976). However, as each case is unique, the court should apply only those factors which are relevant to that particular case before determining if that verdict is excessive. *Mineo at 126, 502 A.2d at 1305.*”

In this trial, the defendants’ Economist and their Life Care Planner submitted Reports but were not called to testify. See, Mar. 28, 2011, A.M., N.T. 191. The defendants had not arranged for a pre-trial Independent Medical Examination by any physician. The jury observed and listened to the plaintiff’s Economist, Physical Medicine Physician, Life Care Planner and several fact witnesses. See, April 4, 2011, N.T. 8. The defendants did not present any damage witnesses for the jury’s consideration.

The jury was presented evidence about the severity of Mr. Davenport’s injuries when Ross Noble, M.D., specialist in physical medicine and rehabilitation described the results of his examination of the plaintiff. The jury heard about Mr. Davenport’s weakness and loss of sensation in his lower extremities. Mar. 28, 2011, A.M., N.T. 37. The plaintiff does not have complete paralysis, rather extreme weakness in his legs. He is wheelchair bound. Mar. 28, 2011, A.M., N.T. 38. Dr. Noble, who is Board Certified in Spinal Cord Injury Medicine concluded that the plaintiff does have spinal cord injury. Mr. Davenport will need to be cared for by several different types of medical providers, including physicians, physical therapists and nursing care. Nurse Betsy Bates, Mar. 28, 2011, A.M., N.T. 158, confirmed

that due to skin breakdown, the plaintiff has had bedsores on his tailbone. She also provided a detailed review of Mr. Davenport's present and future medical and life care needs. She identified nine categories of needs and services. Mar. 28, 2011, A.M., N.T. 98-191.

Because Mr. Davenport is confined to his wheelchair, his daughter explained that he is unable to dress himself, except for sweatpants and socks; he can not bend; and he has had "accidents" because he is not able to get to the bathroom on time. Mar. 28, 2011, P.M., N.T. 88. Kara and her family live in a basement apartment and Mr. Davenport drags himself up and down the stairs with his arms because his feet are "dead weight". Evidence was presented of the physical manifestations of injury when Dr. Noble stated that the involuntary and visible shaking of plaintiff's legs is evidence of spasticity. Mar. 28, 2011, A.M., N.T. 37-43. He explained "clonus" (tremors), "atrophy" (loss of soft tissue) and twitching of muscle which the jury observed in the courtroom. Mar. 28, 2011, A.M., N.T. 43, 52-54.

Tamara Davenport described how the plaintiff became emotional and withdrawn when he lost his ability to walk. Mar. 28, 2011, A.M., N.T. 13-14. He thought he was dying and made funeral arrangements. Mar. 30, 2011, N.T. 23-25.

The spinal cord injury is permanent as both Dr. Hall and Dr. Noble testified. The loss of function can not be reversed, however, the neurosurgeon described how it could have been prevented. Dr. Noble testified that the plaintiff will always be dependent on others; that his upper extremity strength will eventually be stressed; and that Mr. Davenport will need increased assistance with aging. Mar. 28, 2011, A.M., N.T. 42-45. The plaintiff will need multiple medications for pain, spasticity, for skin care and bladder and bowel. N.T. 55-56.

The pains he suffers were indentified as “nervous system pain syndrome”, by Dr. Noble. Mar. 28, 2011, A.M., N.T. 40-41. He has scars from surgical procedures to relax his tendons and muscles.

The plaintiff who worked two jobs for most of his life, is unable to engage in gainful employment. It is not realistic to expect that a job would be available to him in his condition. Mar. 28, 2011, A.M., N.T. 39, 87-88.

When considering the factors set forth above, including the factors outlined in Kemp v. Philadelphia Transportation Co., *supra*, this Court which sits as an experienced Civil Trial Court and which had the benefit of seeing and hearing all of the evidence, concludes that the verdict award is not excessive. The expert witnesses opined in detail about the lost earnings; costs of future medical care and life care. The jury was able to see and hear and consider ample evidence of tangible and intangible factors. The jury considered eight years of past damages and twenty years of future life expectancy. April 1, 2011, N.T. 231-238. The jury’s verdict was fair, thoughtful and reasonable. Haines v. Raven Arms, 640 A.2d 367 (Pa. 1994). The verdict award does not shock this Court’s conscience.

## **V. CONCLUSION**

A new trial is not warranted merely because of disagreements with rulings or conflicts in testimony. The jury was free to believe all or part or none of the evidence. They had two weeks to consider and weigh evidence and inferences and arrive at their verdict.

For all of the reasons set forth above, the Motion for Post-Trial Relief filed by Leo F. McCluskey, M.D., Clinical Practices of the University of Pennsylvania, the University of Pennsylvania Health System, and the Trustees of the University of Pennsylvania is **DENIED**. Eric Davenport's unopposed Motion for Delay Damages is **GRANTED**.

**The jury award was \$9,654,551.00 and delay damages are \$515,989.46. Judgment will be entered in favor of plaintiff, Eric Davenport, in the amount of Ten Million One Hundred Seventy Thousand Five Hundred Forty Dollars and Forty Six Cents (\$10,170,540.46).**

**BY THE COURT:**

  
FREDERICA A. MASSIAH-JACKSON, J.  
Dec. 1, 2011

Pennsylvania  
Hospital

Department of Neurology



University of Pennsylvania Health System

Leo McCluskey, M.D.

Assistant Professor

Phone: 215-829-6500

Fax: 215-829-6606

Email: lmcclusky@pahosp.com

June 3, 2003

Scott Tzorfas, M.D.  
160 Shore Road  
Somers Point, NJ 08244

RE:Eric Davenport  
DOV:6/3/03

Dear Dr. Tzorfas:

Your patient, Eric Davenport, was seen in neurologic follow up at the ALS center of the Penn Neurological Institute at Pennsylvania Hospital on June 3, 2003. Since his last visit in early May, he has not experienced any significant change in his symptoms. Today I performed a limited EMG/NCV study. The limited study was determined predominantly by restriction of his referral. I looked at his both legs with nerve conduction and the left leg and lumbar paraspinal and thoracic paraspinal muscles with EMG. Although the sural amplitudes are mildly reduced, the overall impression from the nerve conduction point of view is that he has motor amplitude loss and coexisting conduction velocity slowing. The needle examination demonstrates multisegmental acute and chronic denervation involving lumbar roots 3-4 through S1. There were abnormalities of thoracic paraspinal muscles with note of abnormal motor units. He did not relax sufficiently in order to evaluate spontaneous activity at this site.

**NEUROLOGIC EXAMINATION (PERTINENT FINDINGS):** Vital signs are normal. Mental status and cranial nerves are normal with the exception of clear fasciculations of the tongue with tongue atrophy and some slowness of tongue motion. There is weakness throughout the right arm with note of fasciculations bilaterally in the arms and chest. There is distal weakness of the legs bilaterally. Reflexes are absent at the biceps, triceps, and brachioradialis, but there is distal spread of reflexes to the finger flexors. Lower extremity reflexes are brisk at the knee and adductor. Sensation is normal.

**IMPRESSION:** Mr. Davenport, unfortunately, demonstrates signs and symptoms consistent with the diagnosis of amyotrophic lateral sclerosis. His EMG/NCV study performed today is consistent with that diagnosis. I await the results of lumbar puncture performed today at the University of Pennsylvania. Unless this clearly points us in a different direction, I am afraid the diagnosis is certain. I explained this to him today and I started him on Rilutek.

Sincerely,

Leo McCluskey, M.D.

LM/39

PN\_LM\_39.605

Court Exhibit "A"

Case ID: 081204190

**FILED**  
18 JUL 2011 12:00 pm  
**Civil Administration**  
L. OWENS

Eric Davenport

v.

Leo F. McCluskey, MD, Pennsylvania  
Hospital, Clinical Practices of the University of  
Pennsylvania, The University of Pennsylvania  
Health System, and The Trustees of the  
University of Pennsylvania

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

DECEMBER TERM, 2008

NO. 4190

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2011, upon consideration of Defendant's Motion to Amend Record Pursuant to PA. R.A.P. 1926 and after hearing, and it appearing that, it is hereby ORDERED that the Prothonotary shall include the following materials in the certified record:

D-18 Anthony Hall, M.D.'s deposition transcript marked in accordance with the Court's Rulings;

D-19 Bacharach Note shown to the jury by plaintiff referencing "misdiagnosed";

D-20 Gordon Sze, M.D. Power Point pre Motion in Limine ruling;

D-27 Gordon Sze, M.D. Power Point post Motion in Limine ruling;

D-53 Scott Tzorfas, M.D.s' deposition transcript dated April 30, 2010 and July 9, 2010;

D-54 Fernando Delasotta, M.D.'s deposition transcript dated January 4, 2011;

D-56 Affidavits of Merit, New Jersey Action; and

D-59 Dr. Sze's video transcript marked in accordance with the Court's Rulings.

BY THE COURT

\_\_\_\_\_  
J.

— **Court Exhibit "B"** —

Case ID: 081204190  
Control No.: 11071797



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Marc R. Peck, M.D.  
Alan S. Friedman, M.D.  
David E. Hendol, M.D.  
Jack Rakerahy, M.D.  
David A. Dowe, M.D.  
Craig S. Glick, M.D.

Eric H. Tiger, M.D.  
Robert M. Glassberg, M.D.  
Mitchell H. Grezel, M.D.  
Sun Chen, M.D.  
James R. Meham, M.D.  
Margaret C. Avegliano, M.D.

Stephen McManus, M.D.  
James L. Montuori, D.O.  
Prajesh I. Patel, M.D.  
Alan J. Simpson, M.D., F.A.C.R.  
Albert J. Salzman, M.D., F.A.C.R.  
Hung Vu, M.D.

30 East Maryland Avenue • Somers Point, New Jersey 08244 • (609) 677-XRAY(9729) • Fax: (609) 926-1307

SCOTT TZORFAS, M.D.  
160 SHORE ROAD

SOMERS POINT NJ 08244

RE: DAVENPORT, ERIC

D.O.B. 05/28/1950  
Accession #: MR-03-006610  
Exam Date: 04/18/03  
Ordering Dr.: SCOTT TZORFAS, M.D.

To: SCOTT TZORFAS, M.D.

The following is a report regarding a study on your above captioned patient.

MRI LUMBAR SPINE WITHOUT CONTRAST

HISTORY: Back pain.

Sagittal and axial imaging have been obtained using several pulse sequences on a GE 1.5 Tesla magnet. The examination demonstrates diffuse degenerative disc disease. Desiccation is present at every level. Annular bulges are identified with variable degrees of distortion of the thecal sac. This is probably mostly prominent at L5-S1 and is somewhat asymmetrically noted to be greater on the left side of midline. The left sided S1 nerve root may be displaced posteriorly. Of greater significance, the presence of significant spinal stenosis at T11-T12 is resulting in myelomalacia. The spinal stenosis appears to be relatively severe as compared to the evaluated levels in the lumbar spine. No evidence of significant spinal stenosis is present involving the lumbar spine. No significant paravertebral soft tissue abnormalities are noted. There is no evidence of focal disc herniation involving the lumbar intervertebral disc space levels.

IMPRESSION:

THERE IS EVIDENCE OF DIFFUSE AND GENERALIZED DEGENERATIVE JOINT AND DISC DISEASE INVOLVING THE LUMBAR SPINE WHICH HAS BEEN DESCRIBED IN GREATER DETAIL IN THE BODY OF THE REPORT. THERE APPEARS TO BE NO EVIDENCE OF FOCAL DISC HERNIATION, SIGNIFICANT SPINAL STENOSIS OR SIGNIFICANT NEURAL FORAMINAL STENOSIS INVOLVING THE LUMBAR SPINE. HOWEVER, THE STUDY DOES DEMONSTRATE THE

COPY

PAX# 609 653 9898

Page#: 1

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Court Exhibit "C"



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Muro R. Peck, M.D.  
Alan S. Friedman, M.D.  
David B. Hendel, M.D.  
Jack Shakarsky, M.D.  
David A. Dowe, M.D.  
Craig S. Gilck, M.D.

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Albert J. Salzman, M.D., F.A.C.R.  
Hung Vu, M.D.

30 East Maryland Avenue • Somers Point, New Jersey 08244 • (609) 677-XRAY(9729) • Fax: (609) 828-1307

RE: DAVENPORT, ERIC

PRESENCE OF RELATIVELY SEVERE SPINAL STENOSIS AT T11-T12 WITH SECONDARY NYELOMALACIA.

Thank you for referring this patient to us.

MCW  
Transcribed: 04/19/03  
Signed: 04/19/03

Jack Shakarsky, M.D.  
Electronic Signature

COPY

FAX# 609 653 9899

Consulting Copies:  
TZORFAS, SCOTT, M.D.

Page 4: 2

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Festival at Hamilton • 4450 Black Horse Pike • Routes 322 & 40 • Suite 3872 • Mays Landing, NJ 08330 • (609) 677-XRAY(9729) • Fax: 825-2002  
421 Route 9 North • P.O. Box 208 • Cape May Court House, NJ 08210-0208 • (609) 485-8500 • Fax: 465-0918

## 13.200 (Civ)

## INTERVENING OR SUPERSEDING CAUSE

[No instruction should be given.]

## SUBCOMMITTEE NOTE

“Intervening” and “superseding” causes have been some of the most confusing legal concepts for jurors to grasp. Because factual cause remains the test of causation as stated in Instruction 13.160, Factual Cause, and any additional charge on superseding or intervening cause will only serve to confuse the jury, the subcommittee recommends that no additional charge should be given. Further, since it is the exclusive function of the court to declare the existence or nonexistence of rules that restrict the actor’s responsibility short of making the person liable for harm that his or her negligent conduct is a factual cause in bringing about, and to determine the circumstances to which such rules are applicable under Restatement (Second) of Torts § 453, instructions placing the responsibility for these decisions with the jury may well be reversible. *Brown v. Tinneney*, 421 A.2d 839 (Pa.Super. 1980). (But compare *Estate of Flickinger v. Ritsky*, below, 305 A.2d at 43.)

Until recently, the test of liability announced in *Kline v. Moyer*, 191 A. 43 (Pa. 1937), was being applied despite its apparent inconsistency with Restatement (Second) of Torts § 447, which had been adopted in Pennsylvania. The *Kline* test provided:

Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause.

*Id.*, 191 A. at 46. *Grainy v. Campbell*, 425 A.2d 379 (Pa. 1981), expressly overruled *Kline* to the extent that it is in conflict with Restatement (Second) of Torts, which provides:

## § 447. Negligence of Intervening Acts

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor’s negligent conduct is a substantial factor in bringing about, if

- (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
- (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
- (c) the intervening act is a normal consequence of a situation created by the actor’s conduct and the manner in which it is done is not extraordinarily negligent.

In *Estate of Flickinger v. Ritsky*, 305 A.2d 40 (Pa. 1973), section 447 of the Restatement (Second) of Torts was adopted as Pennsylvania law. The general rule was clearly stated by Justice Nix in his concurring opinion in *Grainy v. Campbell*, 425 A.2d at 383:

The basic question is whether the first tortfeasor’s action was in fact a legal cause [factual cause] of the resultant injury. If in fact it was, as is the case here, the fact that a second actor may also have contributed to the injury does not relieve the initial tortfeasor of responsibility.

“Factual cause” as charged under Instruction 13.160, Factual Cause, should satisfy all of the requirements of a charge where there is an issue of superseding cause. Indeed, superseding cause is defined by Restatement (Second) of Torts § 441(2) as being the intervening cause that *prevents* the defendant’s negli-

\* Renumbered (former 3.18).

gence from being a substantial contributing factor in bringing about the harm. A subsequent act is *not* a superseding cause insulating the defendant from liability if the defendant's negligence was a substantial contributing factor to the accident, either by creating or increasing the risk of harm itself or by creating or increasing the risk of harm from subsequent acts of another. Restatement (Second) of Torts §§ 442A, 442B (1965); *Ford v. Jeffries*, 379 A.2d 111 (Pa. 1977). If the subsequent acts are a normal consequence of the defendant's negligence, the defendant remains liable. Restatement (Second) of Torts § 443. Likewise, where the subsequent acts are within the scope of the risk of harm, liability continues. *Ford v. Jeffries*, above, Restatement (Second) of Torts § 448. Further, the Supreme Court has rejected the contention that an intervening criminal act is per se a superseding cause. *Powell v. Drumheller*, 653 A.2d 619 (Pa. 1995). "Instead, the proper focus is not on the criminal nature of the negligent act, but instead on whether the act was so extraordinary as not to be reasonably foreseeable." *Id.* at 624.

The Superior Court has affirmed the trial court's refusal to give an additional charge on superseding or intervening causation. For example, in *Elder v. Orluck*, 483 A.2d 474, 481 (Pa.Super. 1984), *aff'd* on other grounds, 515 A.2d 517 (Pa. 1986), the trial court declined the defendant's proposed points for charge on superseding and intervening cause and the Superior Court affirmed. The trial court's rationale, approved by the Superior Court, is precisely that stated in the subcommittee's note:

The trial court denied said points for charge finding that the charge as given to the jury on the substantial factor test for proximate cause was sufficient to cover the concept of superseding and intervening causation even though that specific concept was not expressly mentioned. The trial court reasoned that the question of superseding and intervening causation is essentially one of proximate cause and thus a proper charge on proximate cause would permit the jury to find superseding and intervening causation by the finding that the act of a defendant was not a substantial factor in causing plaintiff's injuries. In addition, the court found that an additional specific charge on superseding and intervening cause would confuse the jury. We have reviewed the charge and found it to be accurate. We have also reviewed the extensive and thorough discussion of this issue in the trial court opinion and find that the court correctly disposes of this issue.

Accord, *Bryant v. Girard Bank*, 517 A.2d 968, 977 (Pa.Super. 1986) ("we conclude that the trial court's careful instructions on substantial factor and concurring cause obviated the need for a separate instruction on superseding cause").

*Corbett v. Weisband*, 551 A.2d 1059 (Pa.Super. 1988), is not necessarily to the contrary. The testimony in *Corbett* was that the subsequent treating physician's actions in performing a total knee replacement on a patient with chronic osteomyelitis "was doomed to failure," *id.* at 1074, and "border[ed] on insanity." *Id.* This testimony caused the trial court to rule as a matter of law that the subsequent treating physician's negligence was so extraordinary as to relieve the defendant (the original physician) from any liability for the knee replacement and consequent amputation of the leg. The Superior Court reversed, ruling that "[w]hether or not such conduct was so extreme as to constitute a superseding cause was a question that should properly have been left to the jury." *Id.* at 1075. The instructions the jury should be given to resolve the question were not discussed.

**FILED**  
21 MAR 2011 08:38 am  
**Civil Administration**  
N. ESSOUNNI

---

ERIC DAVENPORT	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
	:	
	:	December Term, 2008
Plaintiff	:	No.:4190
vs.	:	
	:	JURY TRIAL DEMANDED
LEO F. MCCLUSKEY, M.D., M.B.E., ET AL	:	

---

**ORDER**

AND NOW, this 24<sup>th</sup> day of March, 2011, upon consideration of Plaintiff's Motion *in Limine* to Preclude Defendants from Introducing, Referencing or Otherwise Publishing to the Jury Evidence Concerning MRI Images from Other Patients, and any response thereto, it is hereby **ORDERED** and **DECREED** that Plaintiff's Motion is **GRANTED**. It is further **ORDERED** and **DECREED** that defendants are precluded from introducing, referencing or otherwise publishing to the jury at the time of trial any evidence concerning MRI images from other patients. *Experts may refer to neutral images, such as Nutter's, anatomical exemplars (plastic), or similar demonstrative evidences.* BY THE COURT: *See Hearing Transcript of March 21, 2011.*

*Frassalbach*  
J.

Davenport Vs Mccluskey -ORDER



**DOCKETED**

MAR 24 2011

**R. POSTELL  
DAY FORWARD**

**Court Exhibit "E"**

Case ID: 081204190  
Control No.: 11032989