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IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

536 EDA 2024

DAJAH HAGANS, as Parent and Natural Guardian of J.H., a minor, individually and in her own right,

Plaintiffs/Appellees,

v.

HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA and UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM (D/B/A PENN MEDICINE), KIRSTEN LEITNER, M.D., JULIE A. SUYAMA, M.D., WHITNEY R. BENDER, M.D., SARA GUTMAN, M.D., DENISE JOHNSON, M.D., JESSICA PETERSON, M.D., and VICTORIA KROESCHE, R.N.,

Defendants/Appellants.

BRIEF *AMICI CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY

On Appeal from the Judgment of the Court of Commons Pleas of Philadelphia County, entered January 19, 2024, and the Order entered December 27, 2023, at No. 190607280

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae, the American Medical Association and the Pennsylvania Medical Society, file this brief in support of Appellant the Hospital of the University of Pennsylvania ("HUP") in accordance with Pennsylvania Rule of Appellate Procedure 531.

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Pennsylvania. In support of its mission, the AMA regularly participates as *amicus curiae* in state and federal courts, including Pennsylvania courts.

The Pennsylvania Medical Society ("PAMED") is a Pennsylvania nonprofit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. PAMED regularly participates as *amicus curiae* before the Superior Court of Pennsylvania in cases raising important healthcare issues, including issues that have the potential to adversely affect the quality of medical care.

The AMA and PAMED appear for themselves and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of all states and the District of Columbia. The mission of the Litigation Center is to represent the interests of patients and physicians in the courts of the United States, according to policies of the AMA.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a medical professional negligence case arising from the obstetrics care rendered to Plaintiff and her minor son, who tragically was born with profound developmental impairments, by healthcare providers at Defendant HUP.

Plaintiff's counsel inappropriately conflated factual cause and increased risk of harm by proposing a jury verdict slip that: (1) contrary to the suggested standard verdict slip, asked the jury about increased risk of harm, and (2) set up a jury question on factual cause and increased risk of harm as an "either/or" proposition, erroneously permitting the jury to hold HUP liable even if it found only increased risk of harm and not also factual cause.

In adopting § 323(a) of the Restatement (Second) of Torts, the Supreme Court made it easier for plaintiffs to establish the element of causation necessary to any tort claim by relying on the theory of increased risk of harm. However, the Court did not eliminate the requirement that causation still be proven.

The verdict slip used at trial is contrary to Pennsylvania law, inappropriately reduced Plaintiff's burden to the detriment of HUP, and—if allowed to stand—will represent a dangerous and prejudicial legal development that hazards permitting medical negligence plaintiffs to hold healthcare providers liable without

establishing that the providers—as opposed to some other source—caused the harm sustained.

Contrary to the trial court's ruling, a legally inaccurate, written verdict slip cannot be overlooked or excused simply because previous, verbal instructions to the jury on causation were correct. The verdict slip was plainly wrong—and wrong to such a degree that it cannot be erased by an earlier "right."

There was no need for increased risk to be on the verdict slip at all, and had counsel agreed to the standard verdict slip (as advocated by HUP), this issue—and the questions it raises as to what the jury actually found—would not be before this Court. HUP must be awarded a new trial to address the prejudicial error the flawed verdict slip created.

In must be reinforced that factual cause and increased risk of harm should never be described as equal alternatives and that a jury finding on factual cause is never optional, but always required for liability to attach.

III. FACTS RELEVANT TO THIS BRIEF

At the end of the case, Plaintiff proposed a verdict slip that contained the following two questions relative to causation:

> 2. Was the Defendant's negligence a factual cause of any harm to the minor-Plaintiff?
>
> . . .
>
> 3. Did the Defendant's negligence increase the risk of any harm to the minor-Plaintiff?

(*See* R. 1093a-1094a)

During the charge and verdict slip conference of April 20, 2023, HUP objected to Plaintiff's proposed verdict slip, asserting that the jury should be asked one question about factual cause and that it was not appropriate to have a separate question on increased risk of harm, which—though part of the instructions to the jury—is "not a separate question for the jury." (R. 899a-900a, at 4:11-5:16)

In response, Plaintiff's counsel argued that factual cause and increased risk of harm "are not mutually exclusive," that they are "alternative aspects of medical causation," and that "the way that

plaintiffs' verdict jury verdict slip is set up is to allow for both alternatives in terms of causation." (R. 900a, at 5:18-7:6)

Counsel for HUP reiterated that "[t]here should be one question about factual cause," and that although "[t]he jury is instructed on increased risk of harm," the latter is "not a separate basis for causation under the verdict slip." (R. 900a, at 7:8-20)

When the trial court asked HUP's counsel for authority on that position, he cited the standard jury instruction on causation for medical negligence cases and reiterated that there should not be a separate question on increased risk. (R. 900a, at 7:21-8:10)

The trial court then suggested that "[w]e can make it part of one question," asking "was the defendants' negligence a factual cause of any harm to the minor plaintiff, or you can add, and/or did the defendants' negligence increase the risk of any harm to the minor plaintiff, if you want it all one question dealing with factual cause." (R. 900a, at 8:11-18)

Defense counsel objected to the court's proposal, and a discussion then ensued between counsel for both parties and the

court, during which the court appeared to be confused about the differences between the standard jury instruction and the standard verdict slip in medical negligence cases and was trying to discern whether Plaintiff's requested verdict slip was standard or, instead, highly atypical. (R. 900a-902a, at 8:19-13:8)

To be clear, while the standard jury *instruction* on factual cause in medical negligence cases includes language on the increased risk of harm ("to be read when appropriate"), *see* Pa. SSJI (Civ) §14.20 Medical Malpractice—Factual Cause (2020), the standard *verdict slip* makes no mention of increased risk and asks a single question on factual cause: "Was [the defendant's negligence] [the negligence of those defendants you have found to be negligent] a factual cause of any harm to the plaintiff?" Pa. SSJI (Civ) §14.160 Medical Malpractice—Suggested Special Jury Interrogatories (Under the MCARE Act Effective for All Claims Arising Subsequent to March 20, 2002) (2020).

Ultimately, Plaintiff's counsel offered (akin to the trial court's earlier suggestion) to combine Plaintiff's two proposed questions into one, asking: "Was the defendants' negligence a factual

cause of the harm to minor Jay, and/or did the defendants' negligence increase the risk of harm to minor Jay?" (R. 901a-902a, at 12:21-13:8)

In response, the court instructed Plaintiff's counsel "to frame the verdict slip that way, over defense objection." (R. 902a, at 13:9-11)

The verdict slip submitted to the jury provided:

> 2. Was the Defendant's negligence a factual cause of any harm to the minor-Plaintiff, and/or did the Defendant's negligence increase the risk of harm to the minor-Plaintiff?

(R. 981a-987a, at 983a) The jury answered, "yes." (*Id.*)

Following trial, on April 30, 2023, Plaintiff filed a proposed verdict slip with the trial court that—unlike the verdict slip that Plaintiff earlier advocated or the one that was provided to the jury—contained a single question on causation: "Was the Defendant's negligence a factual cause of harm to the minor-Plaintiff?" (R. 1027a-1034a, at 1028a) Though dated April 19, 2023, and though purportedly the same verdict slip that Plaintiff had previously provided to the court and hand-delivered to

defense counsel during trial (*see* R. 1034a), this was *not* the same version. Thereafter, on May 3, 2023, Plaintiff filed a praecipe to substitute her proposed verdict slip, which contained the two questions relative to causation that Plaintiff in fact had proposed to the court. (R. 1089a-1097a, at 1093a-1094a)

In its post-trial motion and related briefing, HUP renewed its objection to the inclusion of the "increased risk of harm" on the verdict slip (*see* R. 1035a-1088a, at 1045a-1046a, 1050a, 1056a-1060a, 1065a-1066a; R. 1256a-1624a, at 1261a, 1263a-1264a, 1267a, 1277a, 1299a-1303a; R. 1690a-1767a, at 1690a-1691a, 1711a-1714a), which Plaintiff opposed. (*See* R. 1192a-1223a, at 1197a-1198a, 1212a-1213a; R. 1634a-1689a, at 1640a, 1661a-1664a) The parties also addressed the verdict slip issue during oral argument on HUP's post-trial motion and in letters to the trial court. (*See* R. 1768a-1797a, at 1779a-1780a (43:13-45:17), 1783a (58:13-23), 1790a (85:10-24), 1792a (93:7-94:5); R. 1798a-1898a, at 1802a-1803a); R. 1901a-1917a)

In addition to reiterating the position it took at the charge conference, HUP asserted that that Plaintiff's filing of a *correct* verdict slip on April 30, 2023 demonstrated that Plaintiff knew the proper form of the verdict slip and belied the assertion that increased risk needed to be on it. (*See, e.g.,* R. 1300a-1301a, at n.13; R. 1712a, at n.16)

The trial court held that because (1) the jury was properly instructed on "factual cause" and "increased risk of harm," (2) HUP did not object to the jury instructions, and (3) the jury is presumed to follow the court's instructions, a new trial was not warranted with respect to the question on the verdict slip combining factual cause and increased risk of harm. (Appendix A to Appellant's Brief, at pp. 15-18) (citing *A.Y. v. Janssen Pharms. Inc.*, 224 A.3d 1 (Pa. Super. 2019)).

HUP included the following issue in its Statement of Matters Complained of on Appeal.

> The Court erred and/or abused its discretion in submitting, over HUP's objection, a jury verdict slip that allowed the jury to find causation if it concluded that HUP's negligence was the factual cause and/or increased the risk of harm to Plaintiff where: (i) factual

> cause and increased risk of harm are neither equivalent concepts nor alternative ways of proving factual cause; (ii) the "causation" question as set forth in the verdict slip, even if answered in the affirmative, is insufficient to support a finding of factual cause, a necessary element in any negligence case; and (iii) the submission of the "causation" question as set forth in the verdict slip, was inconsistent with the jury instructions and significantly lowered Plaintiff's burden of proof to HUP's great prejudice.

(Appendix B to Appellant's Brief, at p. 3)

IV. ARGUMENT

A. The increased risk of harm standard does not eliminate the need for a jury finding on causation.

The Pennsylvania Supreme Court first adopted the increased risk of harm standard for medical negligence cases in 1978, in its seminal decision in *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978).[1] The standard arises from the Restatement (Second) of Torts § 323(a), which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical

[1] Unless otherwise noted, all citations to other cases and all internal quotations are omitted.

> harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm[.]

As the Supreme Court has made clear, the adoption of § 323(a) "does not . . . change the burden of a plaintiff to establish the underlying elements of an action in negligence"—*i.e.,* duty, breach, causation, and damages. *Morena v. S. Hills Health Sys.*, 462 A.2d 680, 684 (Pa. 1983). Thus, as the Court reaffirmed in *Hamil* itself*,* it remains a basic tenet that a plaintiff pursuing any medical negligence case is required to prove proximate causation—which is normally a fact question for the jury, to do so by a preponderance of the evidence, and (in most cases) to do so via expert medical testimony provided to a reasonable degree of medical certainty*. See Hamil*, 392 A.2d at 1284-86.

Accordingly, even in a case in which a plaintiff is permitted to proceed under an increased risk of harm theory, a jury is required to make a finding on causation, and a plaintiff may not recover unless the jury finds not only that the defendant's

conduct increased the risk of harm, but also that the defendant's conduct giving rise to the increased risk was a factual cause of the plaintiff's harm.[2] As the Supreme Court explained in *Hamil*:

> [O]nce a plaintiff has demonstrated that defendant's acts or omissions . . . have increased the risk of harm to another, **such evidence furnishes a basis for the fact-finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm; the necessary proximate cause will have been made out if the jury sees fit to find cause in fact**.

Id. at 1288 (footnote omitted; emphasis added). *See also id.* at 1286 ("Once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was in fact sustained, **it becomes a question for the jury as to whether**

[2] Of note, § 323(a) "does not purport to address . . . causation requirements, which are specified several chapters later." Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 196 n.7, "Increasing the risk of harm and the lost chance rule" (2d ed.).

or not that increased risk was a substantial factor in producing the harm.") (emphasis added).[3]

Hence, a medical negligence plaintiff cannot recover merely by proving that a defendant's negligence increased the risk of harm and that the harm in fact occurred. Rather, as dozens of appellate cases have consistently and uniformly stated since *Hamil,* the plaintiff must prove, and the jury must find, causation. *See, e.g.*:

- *Mitzelfelt v. Kamrin*, 584 A.2d 888, 894-95 (Pa. 1990): "Once there is sufficient testimony to establish that (1) the physician failed to exercise reasonable care, that (2) such failure increased the risk of physical harm to the plaintiff, and (3) such harm did in fact occur, **then it is a question properly left to the jury to decide whether the acts or omissions were the proximate cause of the injury**." (Emphasis added).

- *Jones v. Montefiore Hosp.*, 431 A.2d 920, 924 (Pa. 1981): "[M]edical opinion need only demonstrate, with a reasonable degree of medical certainty, that a defendant's conduct increased the risk of the harm actually sustained, and **the jury then must decide whether that conduct**

[3] Though *Hamil* and other cases use the term "substantial factor," it is now preferable to instruct the jury on "factual cause." *See* Pa. SSJI (Civ) §13.20, Factual Cause (2020), Subcommittee Note (explaining the rationale for substituting "substantial factor" with "factual cause"); Pa. SSJI (Civ) §14.20 Medical Malpractice—Factual Cause (2020).

was a substantial factor in bringing about the harm." (Emphasis added).

- *Gradel v. Inouye*, 421 A.2d 674, 679 (Pa. 1980): "[M]edical opinion need only demonstrate, with a reasonable degree of medical certainty, that a defendant's conduct increased the risk that the harm sustained by plaintiff would occur. **The jury, not the medical expert, then has the duty to balance probabilities and decide whether defendant's negligence was a substantial factor in bringing about the harm**." (Emphasis added).

- *Winschel v. Jain*, 925 A.2d 782, 789 (Pa. Super. 2007): "[O]nce the plaintiff introduces evidence that a defendant-physician's negligent acts or omissions increased the risk of the harm ultimately sustained by the plaintiff, then **the jury must be given the task of balancing the probabilities and determining**, by a preponderance of the evidence, **whether the physician's conduct was a substantial factor in bringing about the plaintiff's harm**." (Emphasis added).

- *Cangemi ex rel. Est. of Cangemi v. Cone*, 774 A.2d 1262, 1265 (Pa. Super. 2001): "[W]here evidence has been presented establishing conduct by a physician which increased a risk of a specific harm to the patient and evidence that the specific harm did in fact occur, **causation must still be proven**." (Emphasis added).

- *Billman v. Saylor*, 761 A.2d 1208, 1212 (Pa. Super. 2000): "[W]here the plaintiff is unable to show to a reasonable degree of medical certainty that the physician's actions/omissions caused the resulting harm, but is able to show to a reasonable degree of medical certainty that the physician's actions/omissions increased the risk of harm, **the question of whether the conduct**

caused the ultimate injury should be submitted to the jury." (Emphasis added).

- *Montgomery v. S. Philadelphia Med. Grp., Inc.*, 656 A.2d 1385, 1391 (Pa. Super. 1995): "[W]here the testimony of the plaintiff's expert establishes that the defendant's failure to diagnose and treat an existing condition has increased the risk of harm, **the question of whether that conduct caused the plaintiff's ultimate injury requires a jury determination**." (Emphasis added).

- *Reichman v. Wallach*, 452 A.2d 501, 505 (Pa. Super. 1982): "It is now well settled that in a medical malpractice action to which Section 323(a) of the Restatement (Second) of Torts is applicable, once a plaintiff has established a prima facie case of professional negligence through the introduction of expert testimony, which negligence has increased the risk of harm, **the issue of proximate cause is to be determined by the jury**." (Emphasis added).

See also Rolon v. Davies, 232 A.3d 773, 777 (Pa. Super. 2020); *Vogelsberger v. Magee-Womens Hosp. of UPMC Health Sys.*, 903 A.2d 540, 563-64 (Pa. Super. 2006); *Sutherland v. Monongahela Valley Hosp.*, 856 A.2d 55, 60 (Pa. Super. 2004); *Burton-Lister v. Siegel, Sivitz & Lebed Assocs.*, 798 A.2d 231, 240 (Pa. Super. 2002); *Smith v. Grab*, 705 A.2d 894, 899 (Pa. Super. 1997); *Joyce v. Boulevard Physical Therapy & Rehab. Ctr., P.C.*, 694 A.2d 648, 657 (Pa. Super. 1997); *Sacks v. Mambu*, 632 A.2d

1333, 1336 (Pa. Super. 1993); *O'Rourke on Behalf of O'Rourke v. Rao*, 602 A.2d 362, 365 (Pa. Super. 1992).

A determination of causation is essential, as it may be entirely possible that the plaintiff's harm resulted from an independent source and would have occurred regardless of the defendant's conduct. *See Hamil,* 392 A.2d at 1286-87. In *Hamil,* for example, the defense asserted that the plaintiff's husband would have died of a heart attack regardless of any treatment provided. In *Gradel* and *Jones,* the question was whether the defendants' conduct rendered the outcomes of the plaintiffs—who had cancer or pre-cancer on consulting the defendants—any worse.

As the *Hamil* Court explained, whereas the ordinary tort case involves allegations that the defendant's conduct "set in motion a force which resulted in harm," cases to which § 323(a) apply involve allegations that the defendant's conduct failed to protect the plaintiff against harm from a different source. *Id.* at 1287. *See also Riddle Mem'l Hosp. v. Dohan,* 475 A.2d 1314, 1317 (Pa. 1984) (the factor distinguishing cases under § 323(a) "from an

action normally sounding in tort is that the tortfeasor failed to act reasonably in preventing harm from another source"). Thus, the plaintiff is already suffering harm from (or is at risk of harm from) a different source when the plaintiff approaches the healthcare provider. If that different source is the true cause of the plaintiff's ultimate harm and the plaintiff would have suffered that harm regardless of the actions taken (or not) by the provider, fairness dictates that the provider should not and cannot be held liable.

In *Jones v. Montefiore Hospital*, the Supreme Court specifically rejected the notion that a plaintiff need only prove increased risk of harm and not also causation. Although the Court held that the trial court erred in refusing to instruct the jury on increased risk of harm, *see Jones,* 431 A.2d at 924, it also determined that the plaintiff's requested jury charge, which would have automatically attached liability on a showing of increased risk, would have inappropriately eliminated the jury's duty to decide causation. *Jones*, 431 A.2d at 924 n.8. The requested charge provided: "A person who undertakes to render services to

another is liable for physical harm resulting from his failure to exercise reasonable care, if that failure increased the risk of harm.*"* *Id.* at 923. As the Court explained:

> **[T]he specific wording requested would unduly restrict the discretion of the jury, since it instructs that once a defendant's negligence is found to have increased the risk of the harm suffered by a plaintiff, liability must follow. This misconstrues the function of the jury as contemplated by Section 323(a).** Once the medical testimony has demonstrated, with a reasonable degree of medical certainty, that a defendant's conduct increased the risk that the harm sustained by a plaintiff would occur, even though it has not demonstrated that such conduct alone caused that harm, **Section 323(a) requires the jury to decide whether or not to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm**.

Id. (emphasis added).

This Court similarly has held that it would be erroneous to charge a jury that once evidence has been presented that a defendant physician's conduct increased a risk of a specific harm to a patient and the specific harm occurred, causation has been proven. *See Clayton v. Sabeh*, 594 A.2d 365, 367-68 (Pa. Super.

1991). As this Court explained in *Clayton*, the erroneous charge advocated by the plaintiff would have inappropriately taken the important question of causation from the jury:

> **This position overlooks one key element of the increased risk line of cases. Those cases *allow* a jury to find that the conduct which gave rise to an increased risk was the legal cause of a plaintiff-patient's injuries, but *they do not require the jury to do so*.** Once a plaintiff has established conduct giving rise to an increased risk of harm, "such evidence furnishes a basis for the fact-finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm; the necessary proximate cause will have been made out if the jury sees fit to find cause in fact." *Hamil v. Bashline,* 481 Pa. 256, 272, 392 A.2d 1280, 1288 (1978). "[I]t becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm." *Id.,* at 269, 392 A.2d at 1286. The evidence of increased risk merely makes out a *prima facie* case of liability. *Id.,* at 273–74, 392 A.2d at 1289.

Id. at 367 (bold emphasis added; italics in original). *Clayton* observed that the Supreme Court reaffirmed in *Mitzelfelt* "the requirement that the jury must find the increased risk to be a substantial factor in the resultant harm before liability attaches." *Id.* The *Clayton* Court also highlighted the particular importance

of charging the jury on causation in the case before it, in which there was expert testimony that the patient would have died of metastatic cancer even if the defendant doctor had ordered the breast cancer screening procedure advocated by the plaintiffs' expert. *Id.* at 368.[4] *See also Brozana v. Flanigan*, 454 A.2d 1125, 1128 (Pa. Super. 1983) (holding that the trial court properly instructed the jury that the defendant could be found liable if his negligence was either a substantial factor in bringing about the loss of the plaintiff's leg or increased the risk of losing the leg *and that increased risk was a substantial factor in the loss of the leg*, and noting that the verdict slip question on increased risk also appropriately asked whether the increased risk was a substantial factor).

[4] Indeed, prior to the Supreme Court's seminal decision in *Hamil*, which formally adopted § 323(a) in the medical negligence context, this Court found a proposed jury instruction "at best confusing and at worst a misstatement of the law" where it would have permitted a finding of liability based on findings of negligence and increased risk of harm, alone, without a finding of causation. *Cohen v. Kalodner*, 345 A.2d 235, 236-37 (Pa. Super. 1975).

Sick and injured patients require care. Hospitals and the medical professionals who work in and for hospitals exist to provide that care and routinely do so without incident. That is their raison d'être. However, healthcare providers are not guarantors of favorable outcomes. Like all defendants in personal injury actions, healthcare providers are only liable for injuries where they had a duty to a patient, they were negligent in carrying out the duty, and their negligence was the cause of the complained of injury resulting in damages. If any part of a plaintiff's burden is not satisfied, a healthcare provider cannot and should not be held liable. Eliminating the requirement for a plaintiff to prove causation makes medical providers virtual guarantors of the care provided. This is a fundamental shift in the law and substantial expansion of liability which, if allowed to stand, would impose financial and other burdens on healthcare providers that would inevitably have a detrimental impact on the delivery of healthcare in the Commonwealth.

B. The trial court erred in permitting the jury the opportunity to find liability based on increased risk of harm, alone.

Jurors here were provided with a verdict slip that inappropriately asked them to decide whether Defendant's negligence was "a factual cause of any harm to the minor-Plaintiff, **and/or** did the Defendant's negligence increase the risk of harm to the minor-Plaintiff?" (R. 983a) (emphasis added). This improperly opened the door for the jury to find in favor of Plaintiff even if it found only that Defendant's conduct increased the risk of harm and not also factual cause. Specifically, the "and/or" conjunction allowed the jury to find *either* factual cause *or* increased risk of harm *or* both and offered no mechanism through which to determine from a "yes" response which of these options the jury chose. It is entirely possible under these circumstances that the jury's "yes" answer pertained only to increased risk of harm and not to factual cause, which (as discussed above) is not legally sufficient to establish liability. *See* § IV.A., *supra.*

The use of "and/or" is not trivial. Words have meaning, and it cannot simply be assumed that the jury's "yes" answer pertained to both factual cause and increased risk of harm. As this Court has recognized in other contexts, "use of the conjunction 'and/or' leads to two equally possible constructions." *Bito Bucks in Potter, Inc. v. Nat'l Fuel Gas Supply Corp.*, 449 A.2d 652, 654 (Pa. 1982) (holding that a clause in a right of way and easement agreement was ambiguous due to the "inartful use of the conjunction 'and/or'").[5]

While a "strict form" of verdict is not required, it is critical that the intent of the jury "be free of ambiguity and clearly understood." *Palmer v. Foss Motors, Inc.*, 327 A.2d 80, 83 (Pa. 1974); *Rusidoff v. DeBolt Transfer, Inc.*, 380 A.2d 451, 453 (Pa. Super. 1977). Here, the wording of the verdict slip renders the jury's verdict unacceptably ambiguous. It is impossible to discern

[5] *See also* Kenneth A. Adams and Alan S. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting,* 80 St. John's L. Rev. 1167, 1167, 1190 (2006) (observing that "[m]ost general works on legal drafting contain a discussion of ambiguity, and usually such discussions touch on the ambiguity associated with the words and or," and opining that, "[o]n balance, it is best to avoid and/or" in legal drafting).

from it whether the jury's "yes" answer pertained only to increased risk or only to factual cause or to both.

Plaintiff, both during the charge conference and in her post-trial brief, misapprehends the law. It is simply not the case that a plaintiff can prove liability via a showing of (1) factual cause ***or*** (2) increased risk of harm, without more. And, contrary to Plaintiff's argument, the jury absolutely *is* required to "go further" and find factual causation in a case alleging that the defendant increased the risk of harm.

Indeed, if there were any question as to what an appropriate verdict slip should ask in a medical negligence case, it is readily answered by the suggested standard verdict slip, which asks a single question on whether the defendant's negligence was a factual cause of any harm and makes no mention of increased risk. *See* Pa. SSJI (Civ) §14.160 Medical Malpractice—Suggested Special Jury Interrogatories (Under the MCARE Act Effective for All Claims Arising Subsequent to March 20, 2002) (2020). The suggested standard verdict slip is appropriately simple, limited to the elements of the cause of action that the jury is required to

find, and not unduly complicated by an attempt to capture every aspect of the jury instructions. Just as the first question, asking whether the defendant's conduct fell below the standard of care or the defendant was negligent, does not attempt to incorporate all aspects of the jury charge on standard of care—*e.g.,* it does not ask whether the physician had the same knowledge and skill and use the same care normally used in the medical profession—the question on factual cause need not and should not mention increased risk at all. And, in the event that it did, it certainly should not juxtapose increased risk and factual cause as an "either/or" option.

C. A new trial is warranted because the verdict sheet was prejudicial to the Hospital of the University of Pennsylvania.

The prejudicial effect of allowing a jury to find a defendant negligent based solely on a finding of increased risk, without the requisite finding of causation, is obvious. It substantially lowers the liability standard in contravention of the law.

Hamil already lowered the bar considerably by permitting plaintiffs to prove their case via a relaxed standard. *See Hamil*,

392 A.2d at 1286-88 (recognizing that the effect of § 323(a) "is to relax the degree of certitude normally required of plaintiff's evidence in order to make a case for the jury as to whether a defendant may be held liable for the plaintiff's injuries" and that § 323(a) "permits the issue to go to the jury upon a less than normal threshold of proof").[6] To lower it even more, as was permitted here, is a step too far. It allows a jury to find for the plaintiff without deciding causation, an essential element of all negligence cases, including medical negligence cases. *See Quinby v. Plumsteadville Fam. Prac., Inc.*, 907 A.2d 1061, 1070 (Pa. 2006); *Hamil,* 392 A.2d at 1284-86. Our case law already affords plaintiffs a substantial exception to the ordinary standard of proof by allowing them to prove their case by showing that the

[6] *See also K.H. ex rel. H.S. v. Kumar*, 122 A.3d 1080, 1107 (Pa. Super. 2015) (describing *Hamil* and its progeny as imposing a "liberal standard"); *Poleri v. Salkind*, 683 A.2d 649, 654 (Pa. Super. 1996) (describing increased risk of harm cases as involving "a reduced standard of proof"); *Montgomery v. S. Philadelphia Med. Grp., Inc.*, 656 A.2d 1385, 1392 (Pa. Super. 1995) (observing that the increased risk of harm standard allows the issue of causation to "go to the jury upon a less than normal threshold of proof").

defendant increased the risk of harm as an alternative to showing with certainty that the defendant directly caused the harm. *Hamil* and its progeny were not intended, however, to gut causation altogether.

Where it is possible that an erroneous instruction (or, here, verdict slip) might have prejudiced a litigant, this Court "must grant a new trial," even if it "cannot ascertain the extent to which the error influenced the jury." *Gallo v. Yamaha Motor Corp.*, U.S.A., 526 A.2d 359, 366 (Pa. Super. 1987) (citing *Vaughn v. Philadelphia Transportation Co.,* 209 A.2d 279 (Pa. 1965); *Murphy v. Publicker Industries, Inc.,* 516 A.2d 47 (Pa. Super. 1986)); *see also Lupinski v. Heritage Homes, Ltd.*, 535 A.2d 656, 658 (Pa. Super. 1988) (deciding that the Court "must remand" for a new trial where an erroneous instruction was given to the jury to the "possible prejudice" of the defendant, even though the jury could have reached its verdict on the basis of any of the other, correct instructions given by the trial court).

D. Proper jury instructions do not cure a clearly erroneous verdict slip.

In its post-trial opinion, the trial court cited *A.Y. v. Janssen Pharms. Inc.*, 224 A.3d 1 (Pa. Super. 2019) for the premise that "[i]n other cases where verdict-slip issues have been raised, the analysis looks to whether the jury was otherwise, as in this case, properly instructed." On review, however, *A.Y.* did not involve a challenge to the verdict slip, but rather a challenge to the court's instructions to the jury. *See id.* at 24-25. The trial court in *A.Y.* merely pointed to the verdict slip to bolster its opinion that it had accurately instructed the jury on the law, both in its charge and via the verdict slip. *See id.* at 25.

Further, unlike this case, the verdict slip in *A.Y.* was *consistent* with the position advocated by the appellant / defendant. At issue in *A.Y.*, a product liability case, was whether the trial court had properly instructed the jury on the learned intermediary doctrine (under Tennessee law) to the effect that the "user" to which warnings are directed is the physician, not the patient. *Id.* at 24. There, the appellant argued that the verdict slip, which properly asked whether the patient's "healthcare

providers" had been adequately warned, did not cure what it claimed were erroneous jury instructions, directing that warnings should be given to persons expected "to use or to handle the product or be endangered by its use or handling." *See id.* at 25. The appellant argued that the verdict slip, though accurate, merely resulted in the jury being given "'contradictory' charges that could only have misled or confused them." *See id.* Ultimately, the Superior Court found no error in "[v]iewing the court's charge as a whole," but, to be clear, *A.Y.* does *not* stand for the premise that a verdict slip can never be held to be erroneous so long as the jury was properly charged.

To the contrary, a verdict slip may be found to be erroneous even if a court's instructions to the jury were appropriate. In *Com. v. DeHart*, 650 A.2d 38, 48-49 (Pa. 1994),[7] for example, the Supreme Court held that, although the trial court had properly instructed the jury on mitigating circumstances in a death penalty case, those instructions could not cure a defective

[7] *Abrogated on other grounds*, as recognized in *Com. v. Keaton,* 45 A.3d 1050, 1062-63 & n.6 (Pa. 2012).

verdict slip that improperly referred to "any mitigating circumstance" (singular). The verdict slip inappropriately allowed for the possibility that "the jury could have weighed the sole aggravating circumstance against each mitigating circumstance individually, rather than collectively," resulting in a death sentence, even if mitigating circumstances, combined, would have outweighed the aggravating circumstance. *Id.* at 48. In so ruling, the Supreme Court analogized the verdict slip to (disfavored) written jury instructions, noting that where the jury is provided with written instructions, it is highly probable that the jury will interpret the written instructions without seeking clarification in the event of a question, which they would be more inclined to do if the only instructions given were oral. *Id. Cf. Bunting v. Sun Co.*, 643 A.2d 1085, 1087 n.1 (Pa. Super. 1994) (finding that a verdict slip was clearly erroneous in asking whether a Jones Act defendant's negligence was a "substantial factor," even though the trial court had properly instructed the jury that it needed only to find that the defendant's negligence "played any part at all in causing the harm complained of," but

declining to grant a new trial because the jury found "substantial factor" causation and thus would have found "featherweight" causation, such that the error was not prejudicial); *Com. v. Begley*, 780 A.2d 605, 645 n.33 (Pa. 2001) (declining to assume that a proper verdict slip alleviated erroneous instructions given during the jury charge).

As *DeHart* demonstrates, the significance of the written word cannot be understated. The possibility cannot be ruled out that HUP was prejudiced by the improper verdict slip despite the accuracy of the trial court's instructions, and under such circumstances, a new trial is mandatory. *Gallo*, 526 A.2d at 366; *Lupinski*, 535 A.2d at 658.

V. CONCLUSION

Allowing liability to attach without a clear finding of causation is manifestly unjust and in contravention of longstanding Pennsylvania law.

A finding of increased risk, alone, is not sufficient to establish liability, but the verdict slip in this case—properly objected to by HUP—erroneously allowed for that possibility. It

must be made clear to lower courts and litigants alike that factual cause and increased risk are not an "either/or" proposition. A jury must always find factual cause, even when a plaintiff is permitted to proceed on an increased risk theory, and it must do so without ambiguity. The verdict slip, unfortunately, prevented that from occurring here, and a new trial is required as a result.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Matthew W. Rappleye, certify that the foregoing Brief *Amici Curiae* of the American Medical Association and the Pennsylvania Medical Society, excluding the cover page, table of contents, table of authorities, proof of service, and signature block contains 6,206 words, as calculated by the word count function of the word processing system used to prepare the brief, and complies with Pa.R.A.P. 531(b)(3).

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PUBLIC ACCESS POLICY CERTIFICATION

I, Matthew W. Rappleye, hereby certify that the foregoing Brief *Amici Curiae* of the American Medical Association and the Pennsylvania Medical Society complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that requires the filing of confidential information and documents to be performed differently than nonconfidential information and documents and Pa.R.A.P. 127.

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