Exhibit A

J. A26003/00

LUTHER E. WEAVER, III, ESQ. AS GUARDIAN AD LITEM OF DARRYL BOSKET, A MINOR JEAN HARRIS,	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	
v.	
ST. CHRISTOPHER'S HOSPITAL FOR, CHILDREN, STEPHEN P. DUNN, M.D., AND LOUIS MARMON, M.D. JAMES GLAUBER, CHARLES REED, JANE M. LAVELLE, WILLIAM H. WEINTRAUB AND CHARLES D. VINOCUR,	
Appellees	No. 1759 EDA 1999

Appeal from the Order Dated June 2, 1999
In the Court of Common Pleas of Philadelphia County
Civil Division at No.3374.

BEFORE: JOHNSON, STEVENS and BECK, JJ.

MEMORANDUM Filed: December 29, 2000

Appellant, Luther E. Weaver, Esquire, as guardian *ad litem* of Darryl Bosket, a minor, appeals from the June 2, 1999 Order which denied his motion for post-trial relief and entered judgment in favor of appellees, St. Christopher's Hospital for Children and Stephen P. Dunn, M.D. Weaver asserts he is entitled to a new trial because the trial court erred in refusing to instruct the jury on the doctrine of increased risk of harm. For the reasons that follow, we reverse and remand for a new trial.

The record in this medical malpractice action reveals that on July 2, 1989, Darryl Bosket appeared at St. Christopher's Hospital with an

incarcerated hernia. Dr. Louis Marmon, a pediatric surgical resident, treated Darryl in the early morning hours of July 3, 1989. Darryl remained at the hospital. It was not until July 5, 1989, that Dr. Marmon and Dr. Dunn, who was an attending pediatric surgeon at St. Christopher's Hospital, performed surgery, which revealed a perforated bowel. Darryl underwent several bowel resection procedures. As a result of the loss of a portion of his bowel Darryl developed short bowel syndrome.

A complaint was filed on September 29, 1993. The complaint alleged that the appellees failed to treat Darryl in timely manner, which resulted in the death of a majority of the bowel tissue in the child's body and short bowel syndrome. Trial commenced on May 18, 1998. On May 26, 1998, the jury returned a verdict in favor of the appellees. The jury found that Dr. Marmon was not negligent. With regard to Dr. Dunn, the jury found that he was negligent but that his negligence was not a substantial factor in causing harm to Darryl. St. Christopher's Hospital was not on the verdict sheet because the sole claims against it were derivative in nature, as the trial court found both Dr. Dunn and Dr. Marmon were ostensible agents of the hospital. Weaver filed a motion for post-trial relief on June 4, 1998, which was denied on June 2, 1999. This appeal followed. Weaver appeals only the entry of judgment as to Dr. Dunn and St. Christopher's Hospital based on *respondeat superior*.

On appeal, Weaver asserts the trial court erred in refusing to instruct

the jury on the doctrine of increased risk of harm. Based on the trial court's alleged error, Weaver maintains a new trial is warranted. Initially, we note our standard of review:

> Where the motion for a new trial is based upon the sufficiency of the jury charge, we must examine the charge in its entirety against the background of the evidence to determine whether error was committed. If an appellate court concludes that the charge was erroneous, a new trial will be granted only if the jury charge might have prejudiced the appellant. A new trial will be granted even though the extent to which the appellant had been prejudiced is unascertainable. An alleged inadequacy in jury instructions constitutes trial error if the jury was probably misled by what the trial judge said or there is an omission in the charge which amounts to fundamental error. As a general rule, refusal to give a requested instruction containing a correct statement of law is ground for a new trial unless the substance thereof has otherwise been covered in the court's general charge.

Ottavio v. Fibreboard Corp., 617 A.2d 1296, 1301-1302 (Pa. Super. 1992)(citations omitted).

Weaver argues the trial court erred in denying his request that the jury be instructed on increased risk of harm as provided in the Pennsylvania Standard Jury Instructions, which states, in part, that "[a] causal connection between the injuries suffered and the defendant's failure to exercise reasonable care may be proved by evidence that the risk of incurring those injuries was increased by the defendant's negligent conduct." Pa.S.S.J.I. (Civil) 10.03B(b)(1991).

In the context of actions for medical malpractice, the plaintiff's

evidence must establish that: (1) the physician owed a duty to the patient; (2) the physician breached that duty; (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and (4) the damages suffered by the patient were a direct result of that harm. ***Eaddy v. Hamaty***, 694 A.2d 639, 642 (Pa. Super. 1997). A plaintiff is required to present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered. ***Brannan v. Lankenau Hospital***, 490 Pa. 588, 417 A.2d 196 (1980).

In certain cases, however, the standard of proof regarding medical expert testimony is an impossible standard. ***Mitzelfelt v. Kamrin***, 526 Pa. 54, 584 A.2d 888 (1990).

> An example of this type of case is a failure of a physician to [make a timely diagnosis]. Although timely detection of a [disease or medical condition] may well reduce the likelihood that a patient will have a terminal [or adverse] result, even with timely detection and optimal treatment, a certain percentage of patients unfortunately will succumb to the disease. This statistical factor, however, does not preclude a plaintiff from prevailing in a lawsuit. Rather, once there is testimony that there was a failure to detect the cancer in a timely fashion, and such failure increased the risk that the [plaintiff] would have either a shortened life expectancy or suffered harm, then it is question for the jury whether they believe, by a preponderance of the evidence, that the acts or omissions of the physician were a substantial factor in bringing about the harm.

Billman v. Saylor, 2000 PA Super. 320. The expert in these cases has

been permitted to testify under the relaxed degree of certainty enunciated in Section 323(a) of the Restatement (Second) of Torts,[1] that the physician's failure to exercise reasonable care in the diagnosis and treatment increased the risk of harm. ***Mitzelfelt***, at 66-67, 584 A.2d at 894. Once a patient shows to a reasonable degree of medical certainty that a physician increased the risk of harm and that harm actually occurred, sufficient evidence has been offered to submit the case to a jury. ***Billman, supra***. The jury then must decide whether the increased risk constituted a substantial factor contributing to the injuries sustained. ***Mitzelfelt, supra***.

The trial court found that because Weaver presented evidence of direct causation he was not entitled to a charge on increased risk of harm. Our Supreme Court rejected such an argument in ***Jones v. Montefiore Hospital***, 494 Pa. 410, 431 A.2d 920 (1981). In ***Jones*** the plaintiff alleged

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[1] Section 323 of the Restatement (Second) of Torts 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 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 harm, or
>
> (b)the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts Section 323.

the negligent delay in the diagnosis and treatment of her breast cancer. At trial the trial court did not instruct the jury on the doctrine of increased risk of harm. The Pennsylvania Supreme Court found the trial court's failure to charge the jury on the doctrine of increased risk of harm was erroneous. The Court stated:

> The appellees insisted, and the Superior Court agreed, that because appellants sought to prove that appellees' failure either to remove the mass in Mrs. Jones' breast or to properly diagnose and treat a later-discovered mass caused the harm, they were not entitled to a Section 323(a) charge. Thus, the jury was precluded from deciding whether or not appellees' conduct increased the risk of harm which was in fact sustained, and, if so, whether or not the increased risk of harm was a substantial factor in producing the harm. We conclude that the jury should have been instructed to impose liability if it decided that appellees' negligent conduct increased the risk of harm and that such increased risk was a substantial factor in bringing about the harm actually inflicted upon Mrs. Jones, whether or not the medical testimony as to causation was expressed in terms of certainty or probability. Undoubtedly, an unsuccessful effort to prove that appellees' conduct was the direct and only cause of harm might well have succeeded in persuading the jury that appellees' conduct *at least* increased the risk of the particular harm inflicted and was a substantial factor in bringing it about.

Id. at 417, 431 A.2d at 924. Because sufficient evidence was presented by both parties to raise the issue of increased risk, the Court concluded that appellants were entitled to a charge on increased risk.

As ***Jones*** illustrates, a plaintiff is not disqualified from obtaining a charge on the doctrine of increased risk of harm by attempting to proffer evidence of direct causation. The main issue at trial in the instant case was

whether appellees were negligent in failing to timely and adequately treat Darryl's hernia and whether the negligent failure to timely and adequately treat the hernia caused Darryl's bowel to die. Weaver claimed Darryl's dead bowel developed during the three days that Darryl was at the hospital and was not operated on. Weaver's expert, Dr. Eli Wayne, testified the operation to correct the hernia should have occurred at the latest on the morning of July 3, 1989, the morning after Darryl arrived at the hospital to prevent a piece of intestine that has been entrapped in the hernia sac from losing its blood supply, and that appellees breached the standard of care by waiting to operate until July 5th. R.R., 506a-511a.

Appellees claimed that the dead bowel had already developed by the time Darryl had arrived at the hospital on July 2, thus any alleged delay in surgery was immaterial. Appellees presented expert testimony that Darryl came in with a part of his bowel irreversibly damaged, and there is no reason to believe Darryl would not have had the same complications following an operation July 3rd that he had following the actual operation on July 5th. R.R., 692a-693a.

As the trial court correctly notes, Weaver's expert, Dr. Wayne, testified to a direct causal connection.[2] However, Dr. Wayne's conclusion that

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[2] The following exchange occurred between Weaver's counsel and Dr. Wayne:

appellees' failure to timely treat Darryl caused his bowel to die was dependent on his belief that Darryl's bowel died during his hospital stay and not beforehand. Dr. Wayne conceded the possibility that bowel injury occurred prior to Darryl's coming under appellees' care. R.R., 551a-552a. Appellees' expert, Dr. Marchildon, also acknowledged there was no way to tell outside of performing an operation whether Darryl had a compromised bowel by the time he arrived at the hospital on the night of July 2, 1989. R.R., 724a-725a. Because both parties' experts conceded that it was uncertain whether the harm to Darryl occurred by the time he arrived at the hospital, this case presented a situation where it was difficult for the physicians to testify to a reasonable degree of certainty that appellees' actions directly caused Darryl harm.

Q: Doctor, can you tell the jury if there is a direct relationship between Darryl's short gut syndrome and the failure to adequately repair the hernia on July second and third?

A: Yes, I think so. Because if his hernia had been fixed on a timely basis, like either the night he came in or the next morning, the bowel wouldn't have been dead; and he would have gone home the same day. . . . So the failure to do the operation here is what caused him to have all these problems.

Q: Is that an opinion that you hold to a reasonable degree of medical certainty?

A: Yes, it is.

R.R., 521a-522a.

As was stated in ***Jones, supra***, an unsuccessful effort to prove that appellees' conduct was the direct and only cause of harm might well have succeeded in persuading the jury that appellees' conduct at least increased the risk of the particular harm inflicted. A review of the record reveals Weaver presented evidence to raise the issue of increased risk, thus entitling him to a jury charge on the doctrine. Dr. Wayne testified as follows:

> Q. By delaying the surgery after the third of July, did that delay increase the risk of Darryl having bowel die?
>
> A. Yes.
>
> Q. Is that an opinion that you hold to a reasonable degree of medical certainty.
>
> A. Yes.

R.R., 507.

When the facts are disputed a trial court should instruct the jury on any theory or defense that has support in the evidence. ***Clementi v. Procacci***, 2000 Pa Super. 297. Once there is testimony that there was a failure to treat Darryl in a timely fashion, and such failure increased the risk that Darryl would have suffered harm, then it was a question for the jury whether they believed, by a preponderance of the evidence, that the acts or omissions of appellees were a substantial factor in bringing about the harm. Dr. Wayne's testimony supports a charge on increased risk of harm, and the trial court's exclusion of a charge on the doctrine was erroneous.

The trial court also found any error to instruct on the doctrine of

increased risk of harm was harmless in light of the fact that the jury found the appellees' negligence did not directly cause Darryl's harm. However, "an inadequate jury instruction may amount to reversible error if it has a tendency to mislead the jury or if it omits material, which is basic and fundamental." ***McClintock v. Works***, 716 A.2d 1262, 1264 (Pa. Super. 1998). Here, the failure to inform the jury that a causal connection between the appellees' omissions in failing to perform surgery earlier and Darryl's short gut syndrome could be established if appellees' omissions increased the risk of the syndrome was fundamental to the jury's determination regarding causation. Without a complete instruction on the doctrine of increased risk of harm, it cannot be said the trial court's omission was harmless. As the jury might have reached its decision as a result of an incomplete instruction, we conclude that a new trial is warranted.

As a final matter Weaver asserts that remand for a new trial should be limited to the issues of causation and damages. Weaver maintains because the jury's verdict on negligence is supported by the evidence, a new trial on the issue of negligence is not warranted. In support of his argument Weaver relies on case law which provides for a new trial on remand limited to the issue of damages where liability has been fairly determined. ***See*** Weaver's Brief at 37. In the cases upon which Weaver relies the remand was required based on inadequacy of the verdict. In those cases because liability had been fairly determined a new trial was necessary only on the

issue of damages. Those cases are inapposite because liability was not determined in the present case. While the jury found that Dr. Dunn was negligent it did not impose liability because it found causation lacking. Therefore, a new trial is required on negligence, causation and damages.

Judgment reversed. Remanded for a new trial. Jurisdiction relinquished.