Exhibit C

IN THE COURT OF COMMON PLEAS OF ARMSTRONG COUNTY, PENNSYLVANIA

ANNA C. WRIGHT,	:	
Plaintiff	:	
	:	
vs.	:	No. 2003 0578 - CIVIL
	:	
THOMAS E. CONTE, M.D.,:		
Defendant	:	

OPINION

VALASEK, J.

Before the Court for disposition is Plaintiffs motion for post-trial relief following a medical malpractice trial in which the jury returned a verdict in favor of Defendant.

The background of the case is as follows. On September 26, 2006, Plaintiff was referred to Defendant, (a general surgeon), by her treating physician, Dr. Vogan, for possible surgical intervention through the emergency room of Armstrong Memorial Hospital. Plaintiff was suffering continuing abdominal discomfort on her right flank with nausea. Plaintiff described the pain as sharp in nature and covering the right abdomen, including the right back.

Defendant diagnosed abdominal pain of unknown etiology and felt that appendicitis was a possible cause. He hospitalized Plaintiff overnight for observation and intravenous hydration. As Plaintiffs condition did not improve, Defendant performed a diagnostic laparoscopy on Plaintiff on the morning of September 27, 2002. Although the appendix looked normal, Defendant removed it to eliminate it as a potential source of future problems.[1] Defendant then encountered various adhesions in the abdomen caused by prior pelvic inflammatory disease, which he proceeded to cut, or lyse.

There were adhesions in the vicinity of the appendix, and also multiple adhesions between the dome of the liver and the right diaphragm. Defendant testified that the adhesions by the liver looked inflamed and were possibly the source of Plaintiffs pain in her upper right quadrant. Therefore, he proceeded to lyse the adhesions, which were dense and difficult to cut. In the course of lysing these adhesions, the Defendant accidentally perforated Plaintiffs right diaphragm and surgically entered her right chest.

Discovering this complication, Defendant then terminated the laparoscopic procedure and performed a procedure to repair the diaphragm and drain the right chest. After the surgery had been performed, Plaintiff was hospitalized until October 4, 2002. She was subsequently readmitted to the hospital when she developed pneumonia and an infection (empyema) in the right chest cavity. At that time, Defendant performed a thoracoscopy to remediate Plaintiffs problems.

At trial, Plaintiff alleged professional negligence by Defendant with respect to her surgery in the following respects. Dr. Richard Goldstein, Plaintiffs expert, testified that Defendant deviated from acceptable surgical medical practice as a general surgeon in failing to conduct an adequate pre-operative evaluation and workup. 12/12/06 Notes of Transcript, at 97. Goldstein indicated that Defendant had a duty to take into account all the information that could have been available, to know her history fully and to conduct a thorough workup to more precisely determine the need or lack of need for surgery. Id. at 97. He indicated that Defendants failure to do this constituted a deviation from acceptable medical practice. Id. at 97.

Goldstein testified that Defendant also deviated from acceptable medical practice in failing to properly interpret the pre-operative findings, thus performing surgery at a time that it was not indicated. Id. at 98. In addition, Goldstein testified that Defendant deviated from the standard of care by attempting to electrocauterize or lyse the adhesions between the dome of the liver and the diaphragm. Goldstein said that [b]ased on the knowledge that [defendant] had at the time of surgery and based upon the physical findings at the time of surgery and the information that would have been available, had he properly reviewed the previous records and/or spoken with Dr. [Jeffrey] David, he would have known that these adhesions could not have been the source of her abdominal pain. Id. at 99.[2] Goldstein said that Defendant had a duty to acquire information about Mrs. Wrights history, either by consulting Dr. David or by obtaining the records that would have been available from the hospital and/or Dr. Davids office and that by not having that information available prior to surgery, there was deviation from the standard of care. Id. at 100. Plaintiff had previously been treated by Dr. Jeffrey David for pelvic inflammatory disease and had undergone a laparoscopy for endometriosis and a hysterectomy during the previous year as a result. Dr. David had noted at surgery that Plaintiff had perihepatic adhesions consistent with Fitz-Hugh-Curtis syndrome.

In addition, Goldstein testified that the lyses of adhesions between the liver and diaphragm should never have been undertaken. He said attempting to lyse adhesions between the liver and the diaphragm when those adhesions are so dense, that later on you cant even free them up when the abdomen is open, means that there was no safe surgical technique for doing something that should never have been attempted by even attempting to lyse those adhesions was a deviation from the standard of care [sic]. Id. at 100.

Goldstein testified that Defendant also deviated from the standard of care and from acceptable medical surgical practice by not developing a differential diagnosis of the multiple possible causes for her pain because this meant, he was not able to properly proceed. Id. at 100-101.

Goldstein said that had the surgical procedure not been performed or had the lyse of adhesions between the liver and diaphragm not been done, there would not have been injury to the diaphragm and there would not have been subsequent pneumonia and neuralgia and chronic pain. Id. at 101. He testified that Plaintiffs contraction of pneumonia, empyema, neuralgia neuritis nerve pain, even thoracospy having permeated increased risk of additional infections having undergone all the medical treatment she had to go

was a factual and direct cause of the negligence of the defendant [sic]. Id. at 101.

In contrast, Defendants experts testified that Defendant had sufficient information to proceed with surgery, that the diagnostic laparoscopic surgery was indicated at that time, that Defendants lysing of the adhesions between the liver and the diaphragm was warranted under the circumstances, and that Defendants puncturing of the Plaintiffs diaphragm during this lysing procedure was an unfortunate complication which occurred through no fault of Defendant.

DISCUSSION

Plaintiff seeks a new trial for the following reasons.[3] Plaintiff claims the Court erred in its charge to the jury, whereby it modified Pa. Standard Civil Jury Instruction 3.25 and Pa. SSJI (Civ) 11.02(B), and also refused to charge the jury on the issue of increased risk of harm.

Plaintiff claims the Court also erred in sustaining Defendants objections to the scope of the testimony permitted by Plaintiffs expert witness, Richard S. Goldstein, M.D.

Finally, Plaintiff claims that the Court erred in overruling Plaintiffs objection to the proffered testimony of defense expert Joseph Sanfillipo, M.D., and in further permitting Sanfillipo to testify both outside the scope of the Courts earlier ruling and inconsistent with §512 of the MCARE Act.

The decision to grant or deny a request for a new trial is within the sound discretion of the Court. *Andrew v. Jackson*, 800 A.2d 959, 962 (Pa.Super. 2002), *appeal denied*, 813 A.2d 835 (Pa. 2002). A new trial is warranted where the jurys verdict is so contrary to the evidence as to shock ones sense of justice. *Neison v. Heinz*, 653 A.2d 634, 636 (Pa. 1995). There is a two-step process that a trial court must follow when responding to a request for new trial. * * * *First*, the trial court must decide whether one or more mistakes occurred at trial. These mistakes might involve factual, legal, or discretionary matters. Second, if the trial court concludes that a mistake (or mistakes) occurred, it must determine whether the mistake was a sufficient basis for granting a new trial. * * * The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake. *Harman ex rel. Harman v. Borah*, 756 A.2d 1116, 1122 (Pa. 2000) (citations omitted).

First, the Court will address its decision not to charge the jury on the issue of increased risk of harm. For a jury instruction to constitute reversible error, it must be both erroneous and harmful to the complaining party. *Anderson v. Hughes*, 208 A.2d 789, 792 (Pa. 1965). A trial judge has wide latitude in his/her choice of language when charging the jury, provided that the judge fully and adequately conveys the applicable law. *Jeter v. Owens-Corning Fiberglass Corp.*, 716 A.2d 633, 636 (Pa.Super. 1998) (citations omitted).

The proposed instruction at issue here, Pa. SSJI (Civ) 11.02, is entitled Medical Malpractice---Factual Cause. Section B states:

(B) Increased Risk of Harm [*to be read when appropriate*]

When a defendant physician **negligently** fails to act or

negligently delays in taking indicated diagnostic or

therapeutic steps, **and his or her negligence is a factual cause of injuries to the plaintiff**, that negligent defendant physician is responsible for the injuries caused.

Where the plaintiff presents expert testimony that the failure to act or delay on the part of the defendant physician has increased the risk of harm to the plaintiff, **this testimony, if found credible, provides a sufficient basis from which you may find that the negligence was a factual cause of the injuries sustained.**

If there has been any significant possibility of avoiding injuries and the defendant has destroyed that possibility, [he][she] may be liable to the plaintiff.

It is rarely possible to demonstrate to an absolute certainty what would have happened under circumstances that the wrongdoer did not allow to come to pass.

Pa. SSJI (Civ) 11.02(B) (emphasis added). The Subcommittee Note further states:

Thus there is no cause of action in Pennsylvania for an increased risk of harm. **The principle of increased risk of harm is applicable where direct evidence of causation is an impossibility. Where no expert can testify that an action or a failure to act directly caused the result** but can testify to a reasonable degree of medical certainty that the action or inaction increased the risk of the bad result occurring, **that testimony provides a factual basis from which the injury can answer the substantial factor or factual cause question, namely, did the risk increased by the malpractice actually cause the injury.**

Id., Subcommittee Note at 3 (emphasis added).

In this case, Plaintiffs expert testified that Defendant was negligent in failing to obtain available infor-mation from Dr. David or hospital records prior to performing laparoscopic surgery, in deciding to perform the diagnostic surgery, and in lysing the adhesions between the liver and the diaphragm, and that Defendants negligence was the cause of Plaintiffs injuries to a reasonable degree of medical certainty. N.O.T. at 101. Plaintiffs expert made the requisite link between Defendants negligence and the harm

suffered by Plaintiff. Thus, the increased risk of harm instruction was not warranted, and the Courts refusal to give it did not constitute error.

Moreover, the increased risk of harm instruction addressed the question of causation, not negligence. The jury found that Defendant was not negligent in any of the respects alleged by Plaintiff, and thus never reached the question of causation. Assuming for the sake of argument that the increased risk charge had been warranted, because the jury never reached the issue of causation, the Courts decision not to charge the jury on increased risk of harm is moot, or at most, harmless error.

Plaintiff also complains that the Court erred in modifying Pa. SSJI (Civ) 3.25, which contains the definition of legal cause. Plaintiff argues that because [the jury] heard the words substantial, along with significant, material, essential, and largely responsible for there was ample basis for them to construe the Plaintiffs burden on legal cause as greater than required due to the cumulative effect of the synonyms given for substantial factor. Plaintiffs Brief in Support of Post-Trial Motion at 5.

However, the Court did not modify Pa. SSJI (Civ) 3.25. To the contrary, it utilized the definition of factual cause contained in Pa. SSJI (Civ) 3.15, which replaced Pa. SSJI (Civ) 3.25 in October of 2005. See N.O.T. at 467-468, 489. At no point in the Courts charge to the jury did we give any synonyms for substantial factor. The Court is frankly perplexed as to Plaintiffs argument, and finds it to be wholly without merit.

Finally, Plaintiff objects to the Courts use of the language [i]f and only if you find the Defendant, Dr. Conte was negligent if and only if you find both Defendant, Dr. Conte, was negligent and that his negligence was the factual cause as prejudicial to Plaintiff and claims that the use of such language mislead [sic] the jury during the course of their jury deliberations. Plaintiffs Brief at 6. The Court does not see how the jury could have been misled by such language. Further-more, in the context of the instructions as a whole, the Court finds that the use of the words if and only if was not at all prejudicial. Rather, these words simply emphasized that the jury was to decide the case in stages, since the special interrogatories could be confusing if not properly explained.

Next, the Court will address Plaintiffs contention that the Court erred in sustaining Defendants objections to the scope of testimony of Plaintiffs expert, Dr. Richard Goldstein, pursuant to Pa.R.C.P. 4003.5(c).[4] The Superior Court has outlined the law on scope of testimony as follows:

The experience of this Court has been that it is impossible to formulate a hard and fast rule for determining when a particular expert's testimony exceeds the fair scope of his or her pretrial report. Rather, the determination must be made with reference to the particular facts and circumstances of each case. The controlling principle which must guide us is whether the purpose of Rule 4003.5is being served. The purpose of requiring a party to disclose, at his adversary's request, the substance of the facts and opinions to which the expert is expected to testify is to avoid unfair surprise by enabling the adversary to prepare a response to the expert testimony. *See Augustine v. Delgado*, 332 Pa.Super. at 199, 481 A.2d at 321 (Pa.R.Civ.P. 4003.5 favors liberal discovery of expert witnesses and disfavors unfair and prejudicial surprise); *Martin v. Johns-Manville Corp.*, 322 Pa.Super. at 358, 469 A.2d at 659 ([W]e have found experts' reports to be adequate ... when the report provides sufficient notice of the expert's theory to enable the opposing party to prepare a rebuttal witness.). In other words, in deciding whether an expert's trial testimony is within the fair scope of his report, the accent is on the word fair. The question to be answered is whether, under the particular facts and circumstances of the case, the discrepancy between the expert's pretrial report and his trial testimony is of a nature which would prevent the adversary from

preparing a meaningful response, or which would mislead the adversary as to the nature of the appropriate response.

Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc., 502 A.2d 210, 212-213 (Pa.Super. 1985). Plaintiff claims that the Court erred in sustaining Defendants objection to the question, Is it part of a proper evaluation and work up of a patient presurgery to discuss with the patient all of the parameters of a surgery you intend to perform, (N.O.T. at 79). However, Plaintiff did not plead a lack of informed consent in her complaint and Dr. Goldsteins report certainly did not address that issue. Therefore, this was not a proper area of testimony by Dr. Goldstein, and Defendants objection was properly sustained.

Plaintiff also claims that the Court abused its discretion by sustaining Defendants objection to Plaintiffs questioning of Goldstein about the origins of the particular bacteria which caused Plaintiffs empyema. See N.O.T. at 83-91. Plaintiff was seeking to elicit testimony at trial that the source of the infection was the large intestine, and that the bacteria had been surgically carried by Defendant to Plaintiffs chest cavity. Dr. Goldsteins report clearly did not address the source of the bacteria which caused a subsequent infection in Plaintiffs lung. It also did not opine that the empyema would not have occurred had Defendant not performed the appendectomy. As the Court noted at trial, The source of empyema is clearly something that should be stated in this report because I would imagine it could be the subject of enormous argument between two experts. N.O.T. at 131. To allow Dr. Goldstein to testify about the source of the empyema and the ramifications thereof clearly would have constituted unfair surprise and would have prejudiced Defendant. Thus, exclusion of such testimony was proper and not an abuse of discretion.[5]

Finally, Plaintiff complains that the Court erroneously precluded Dr. Goldstein from testifying about the medication Ultram and whether it causes seizures. However, there was absolutely nothing in Dr. Goldsteins report about Plaintiff suffering seizures or that the Ultram she was prescribed was the cause thereof. This being outside the fair scope of the experts report, it was clearly proper to exclude such testimony. See N.O.T. at 91-94. Moreover, as Plaintiff admitted, Plaintiff was simply attempting to prove additional damages. Id. at 92. As the jury never got to the issue of damages, the issue is moot.

Next, the Court will address Plaintiffs contention that the Court erred by allowing Dr. Sanfillipo to testify pursuant to 40 P.S. §1303.512 of the MCARE Act. That section states:

§ 1303.512. Expert qualifications

(a) General rule.--No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable. **(b) Medical testimony.--**An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:

(1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.

(2) Be engaged in or retired within the previous five years from active clinical practice or teaching. Provided, however, the court may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience. **(c) Standard of care.--**In addition to the requirements set forth in subsections (a) and (b), an expert testifying as to a physician's standard of care also must meet the following qualifications:

(1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.

(2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).

(3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).

(d) Care outside specialty.--A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that:

(1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and

(2) the defendant physician provided care for that condition and such care was not within the physician's specialty or competence.

(e) Otherwise adequate training, experience and knowledge.--A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

40 P.S. § 1303.512 (emphasis added).

It is Plaintiffs contention that because Dr. Sanfillipo was trained as an obstetrician/gynecologist and practices as a reproductive endocrinologist, not a general surgeon, he was not competent to testify as to the standard of care expected of a general surgeon in the instant case. Specifically, the issue in this case, in large part, was the attempted cutting of perihepatic adhesions during the course of the performance of what was to be a laparoscopic appendectomy. Dr. Sanfillipos expertise and training was far different than that of Dr. Conte. To allow Dr. Sanfillipo to apply his care, skill and knowledge, attained as a result of his subspecialty, to the standard of care to be applied to a general surgeon, such as Dr. Conte, was a violation of Section 512. Plaintiffs Brief at 18.

However, as Defendant points out, in this case Dr. Sanfillipo practices in a subspecialty which has a substan-tially similar standard of care for the specific care at issue. 40 P.S. §1503.512(c)(2); *see also Smith v. Paoli Memorial Hospital*, 885 A.2d 1012, 1022 (Pa.Super. 2005)(holding that general surgeon and oncologist/internist were qualified to testify regarding standard of care of gastroenterologist determining cause of gastrointestinal bleeding, since both doctors were substantially familiar with the applicable standard for the particular care at issue and practiced in a subspecialty with a substantially similar standard of care for the specific care at issue).

While qualifying Dr. Sanfillipo as an expert, counsel for Defendant specifically asked Dr. Sanfillipo if the standard of care regarding the cutting or lysing of adhesions is the same whether a gynecologist or general surgeon is performing the laparoscopic procedure. N.O.T. at 244-245. Dr. Sanfillipo testified that the standard of care was identical. Id. at 245. He further explained that laparoscopy had originally been the province of gynecologists, but subsequently general surgeons became proficient at it and now more commonly conducted the procedure. Id. at 245-246. Dr. Sanfillipo further testified that he trained and certified general surgeons in laparoscopy. Id. Under the circumstances, it is clear that Dr. Sanfillipo was familiar with the standard of care expected of general surgeons performing laparoscopy. Thus, the Courts ruling that Dr. Sanfillipo could testify as an expert regarding the standard of care was a proper exercise of its discretion.

Furthermore, the Court did limit Dr. Sanfillipos testimony to a certain degree. The doctor was permitted to testify regarding whether the adhesions found by Defendant were caused by Fitz-Hugh-Curtis syndrome, N.O.T. at 242, and also regarding whether the complication of injury to an adjacent organ can result during the lysis of adhesions despite the exercise of due care, N.O.T. at 248-249. However, the Court precluded Dr. Sanfillipo from testifying whether, under the particular circumstances of this case, it was reasonable for Defendant to elect to cut the perihepatic adhesions he encountered beside the liver, N.O.T. at 239. Dr. Sanfillipo did not do so.

Plaintiff also objects to the Court allowing Dr. Sanfillipo to visually demonstrate to the jury by means of a pelvic trainer how laparoscopic lysis of adhesions takes place. However, this demonstration was clearly permissible to educate the jury about the specific procedure, the location of the various organs involved in the surgery in question, and how the complication of injury to an adjacent organ the doctor did not intend to operate on can occur despite the exercise of reason-able care. Contrary to Plaintiffs assertions, the demonstra-tion had nothing to do with the question of whether it was reasonable under the circumstances for Defendant to cut adhesions during his laparoscopic surgery.

Plaintiff also claims that [t]o allow Dr. Sanfillipo to testify, especially where Defendants [sic] also called Harry Sell, M.D., (a Board-certified general surgeon) to testify, constituted prejudicial error to the Plaintiff warranting the granting of a new trial. Plaintiffs Brief at 18. The number of witnesses that the Court allows a party to call is within the sound discretion of the Court, and the jury was specifically instructed that the number of witnesses offered by one side or the other did not determine the weight of the evidence. N.O.T. at 478.

Moreover, in this case, Dr. Sell testified from the viewpoint of a general surgeon, while Dr. Sanfillipo testified as a gynecologist intimately familiar with Fitz-Hugh-Curtis syndrome. As the defense explained in its brief:

Dr. Sanfillipo, as a gynecologist, had the greatest experience among the experts who testified regarding the adhesions that formed secondary to Fitz-Hugh-Curtis syndrome, as Fitz-Hugh-Curtis syndrome is a result of having a sexually-transmitted pelvic inflammatory disease, a condition that a gynecologist commonly deals with. [Trial Transcript p. 254]. Dr. Sanfillipo testified to his experience with the adhesions caused by Fitz-Hugh-Curtis syndrome. [Trial Transcript pp. 260-262]. Articles cited by Dr. Sanfillipo as supportive of the proposition that Fitz-Hugh-Curtis syndrome can be painful and can be effectively treated through cutting or lysis were part of the gynecological literature. [Trial Transcript pp. 266-267]. As one of the major issues in this case was whether the adhesions caused by Fitz-Hugh-Curtis syndrome can be symptomatic and when symptomatic, whether they can be amenable to treatment by lysis or cutting, Dr. Sanfillipos expertise as a gynecologist who has commonly dealt with this condition was properly considered by the Court to be important to the jurys condition.

Defendants Brief at 16. The testimony of Defendants experts was not duplicative and the Court acted properly in allowing both to testify.

For all the above reasons, the Court finds that the issues raised in Plaintiffs post-trial motions are without merit. Therefore, the motion is denied.

An appropriate Order will be entered.

IN THE COURT OF COMMON PLEAS OF ARMSTRONG COUNTY, PENNSYLVANIA

ANNA C. WRIGHT,	:	
Plaintiff	:	
	:	
vs.	:	No. 2003 0578 - CIVIL
	:	
THOMAS E. CONTE, M.D.,:		
Defendant	:	

ORDER

AND NOW, this 6th day of December, 2007, after due consideration of Plaintiffs post-trial motion and for the reasons stated in the foregoing Opinion, it is **ORDERED, ADJUDGED AND DECREED** that the motion be and hereby is denied.

BY THE COURT,

_____J.

[1] The Plaintiff conceded that removal of Plaintiffs appendix was warranted once Defendant was already in the process of performing the laparoscopic surgery, since it is accepted medical practice to remove a persons healthy appendix under those circumstances to avoid future problems.

[2] Goldstein testified that Plaintiffs primary tenderness was in her right lower quadrant and there is no way that adhesions between the liver and the diaphragm are going to cause right lower quadrant or suprapubic or any other pain in the lower abdomen. Id. at 99.

[3] In her Motion for Post-Trial Relief, Plaintiff had alleged twenty-eight separate errors, claiming that the cumulative effect of the aforesaid rulings was prejudicial to Plaintiff. Motion, ¶ 29. However, in her brief in support of her motion for post-trial relief in the nature of a motion for new trial, Plaintiff now focuses on the following three umbrella issues.

[4] Dr. Goldsteins report is attached to Defendants Brief in Opposition to the Post-Trial Motion as Exhibit D.

[5] Plaintiff claims that the Courts error was compounded when Defendant stated in his closing remarks that he talked about this back door infection, some indication that Dr. Conte should have used different instruments. You didnt hear that from Dr. Goldstein that he should have used different instruments to perform the lysis. He told you, Dr. Conte told you that he used electrocautery. N.O.T. at 88. Although Defendants reference to this was unfortunate, given the overall testimony at trial, it was at most harmless error and not in itself enough to warrant a new trial.