**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| EDWARD ZAWATSKI, AS EXECUTOR OF THE ESTATE OF SHARON ZAWATSKI, DEC'D, AND EDWARD ZAWATSKI, INDIVIDUALLY<br><br>Appellee<br><br>v.<br><br>GEORGE VALENTA, M.D. AND GEISINGER CLINIC<br><br>Appellants | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 161 MDA 2012 |

Appeal from the Judgment Entered December 30, 2011
In the Court of Common Pleas of Luzerne County
Civil Division at No(s): 10804-2006

BEFORE: BOWES, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.: Filed: March 6, 2013

Appellants, George Valenta, M.D. and Geisinger Clinic, appeal from the judgment entered in the Luzerne County Court of Common Pleas in favor of Appellee, Edward Zawatski, as Executor of the Estate of Sharon Zawatski, dec'd, and Edward Zawatski, individually, in this medical malpractice action. We affirm.

The relevant facts and procedural history of this appeal are as follows.

> [Decedent] presented at Geisinger Wyoming Valley Medical Center on July 9, 2004 with abdominal pain at which time a large cyst in her pelvic area was discovered. [Appellant] George Valenta, M.D., employed by [Appellant], Geisinger Clinic, scheduled an exploratory laparotomy for July 12, 200[4] to determine if the cyst was cancerous and if so, to stage the cancer and perform a total hysterectomy and

> bilateral salpingo oophorectomy—the removal of all reproductive organs. A biopsy performed during surgery confirmed endometrioid adenocarcinoma of the ovary and surgery continued as scheduled. Despite the surgery, [D]ecedent's cancer eventually recurred and she underwent multiple treatments including chemotherapy, radiation and experimental drugs over the course of several years. Decedent eventually succumbed to the disease and passed away in June 2008.
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> [Appellee] filed a medical malpractice suit against [Appellants] alleging, among other things, Dr. Valenta was negligent in failing to remove [D]ecedent's left ovary and tube. Surgical operative reports did not describe the removal of the left ovary, the left ovary was not listed in the specimen record and two pathologists were unable to find a left ovary among the removed specimens. [Appellee argued] failure to remove the left ovary increased the risk of recurrence of cancer and failure to properly stage [Decedent] and inform her of vital information prior to and after the surgery further increased her risk of harm.
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> [Appellants denied] any negligence because the left ovary was not found at an autopsy performed on June 17, 2008, and also [argued] that the treatment for the suggested difference in the patient's staging was the same. A jury trial was scheduled and on April 18, 2011, the jury returned its verdict for [Appellee] in the amount of $1,967,200.00.[1]

(Trial Court Opinion, filed December 30, 2011, at 1-2) (internal footnotes omitted).

Appellants timely filed post-trial motions on April 27, 2011. Appellants' filing included a motion for judgment notwithstanding the verdict, alleging Appellee failed to establish that the left ovary was retained

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[1] Appellee subsequently filed a motion for delay damages, which the court granted. The total judgment amounted to $2,361,402.29.

after the surgery. Absent more, Appellants insisted Appellee did not establish the element of causation under any theory of negligence. Appellants' filing also included a motion for new trial, alleging the court erred in permitting Appellee's expert to opine on matters which exceeded the scope of his expertise. Appellants also complained that the court allowed Appellee's counsel "to suggest to the jury that the cancer consumed [Decedent's] allegedly retained left ovary when not supported by competent expert testimony," and the court "erred in refusing to instruct the jury on the degree of reasonable certitude required of expert testimony." (Post-Trial Motions, filed 4/27/11, at 5, 7; R.R. at 1101a, 1103a). Additionally, Appellants argued the court should have granted a mistrial or taken other remedial action in light of multiple irregularities that occurred during Appellee's closing argument. Appellants further argued that the court engaged in judicial misconduct, demonstrating a bias against them and their attorney. On December 30, 2011, the court denied Appellants' post-trial motions. In a separate order entered December 30, 2011, the court entered judgment in favor of Appellee for $2,361,402.29.

Appellants timely filed a notice of appeal on January 19, 2012. On January 30, 2012, the court ordered Appellants to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellants filed a Rule 1925(b) statement on February 21, 2012.

Appellants raise five issues for our review:

> DID THE TRIAL COURT ERR IN DENYING JNOV OR A NEW TRIAL WHEN, IN THE ABSENCE OF EXPERT TESTIMONY RECONCILING [APPELLEE'S] THEORY OF A RETAINED LEFT OVARY WITH THE ADMITTED FACT THAT THERE WAS NO TRACE OF THE LEFT OVARY AT AUTOPSY, THE JURY EITHER IMPERMISSIBLY IGNORED THE ADMITTED FACT THAT IT WAS NOT PRESENT AT AUTOPSY OR SPECULATED AS TO HOW THE OVARY VANISHED?
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> WHEN [APPELLEE] WAS PRECLUDED FROM PRESENTING EXPERT TESTIMONY AS TO HOW THE ALLEGEDLY RETAINED LEFT OVARY HAD VANISHED BY THE TIME OF AUTOPSY, DID THE TRIAL COURT ERR IN DENYING A NEW TRIAL DUE TO [APPELLEE'S] COUNSEL'S SUGGESTION TO THE JURY THAT THE LEFT OVARY WAS CONSUMED BY CANCER?
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> DID THE TRIAL COURT ERR IN DENYING A NEW TRIAL FOR THE ADMISSION OF UNQUALIFIED EXPERT TESTIMONY AND [APPELLEE'S] COUNSEL'S MISREPRESENTATION OF THE RECORD EVIDENCE REGARDING THE RECURRENCE OF THE CANCER ON THE LEFT SIDE OF [DECEDENT'S] PELVIS?
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> DID THE TRIAL COURT ERR IN DENYING A NEW TRIAL FOR ITS FAILURE TO INSTRUCT THE JURY THAT MORE THAN A MERE POSSIBILITY IS REQUIRED TO ESTABLISH CAUSATION WHEN [APPELLEE'S] EXPERTS COULD NOT TESTIFY AS TO CAUSATION WITH ANY DEGREE OF CERTAINTY?
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> DID THE TRIAL COURT ERR IN DENYING A NEW TRIAL FOR THE COURT'S HOSTILITY TOWARD DEFENSE COUNSEL AND ITS LENIENCY TOWARD [APPELLEE'S] COUNSEL DURING CLOSING THAT DEPRIVED [APPELLANTS] OF A FAIR TRIAL?

(Appellants' Brief at 6).

The standard by which we review the denial of a post-trial motion for JNOV and/or a new trial is as follows:

> A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict…. Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact…. A JNOV should be entered only in a clear case.
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> Our review of the trial court's denial of a new trial is limited to determining whether the trial court acted capriciously, abused its discretion, or committed an error of law that controlled the outcome of the case. In making this determination, we must consider whether, viewing the evidence in the light most favorable to the verdict winner, a new trial would produce a different verdict. Consequently, if there is any support in the record for the trial court's decision to deny a new trial, that decision must be affirmed.
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> An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused. A new trial is granted only where the verdict is so contrary to the evidence as to shock one's sense of justice, not where the evidence is conflicting or where the court might have reached a different conclusion on the same facts.

***Braun v. Target Corp.***, 983 A.2d 752, 759-60 (Pa.Super. 2009), *appeal denied*, 604 Pa. 701, 987 A.2d 158 (2009) (quoting ***J.W.S. Delavau, Inc. v. Eastern America Transport & Warehousing, Inc.***, 810 A.2d 672, 679-

80 (Pa.Super. 2002), *appeal denied*, 573 Pa. 704, 827 A.2d 430 (2003)) (internal citations omitted).

In their first issue, Appellants contend Appellee's "core theory" of liability was that Dr. Valenta failed to remove Decedent's left ovary, and the retained left ovary caused the cancer to recur. Appellants assert, however, the left ovary was not present at the time of Decedent's autopsy. Appellants argue Appellee's retained-ovary theory could not be reconciled with the fact that the pathologist did not find the left ovary during the autopsy. Appellants emphasize Appellee presented no direct evidence to establish that Dr. Valenta failed to remove the left ovary, and Appellee presented no expert testimony to explain how the left ovary vanished before the autopsy. Absent more, Appellants insist the jury: 1) impermissibly speculated that Dr. Valenta failed to remove the left ovary; or 2) ignored the undisputed fact that the left ovary disappeared before the autopsy. Moreover, Appellants maintain Appellee had no viable theory of causation to support any alternative negligence theories. Appellants conclude Appellee failed to offer any proof of causation, and the court should have granted their post-trial motions on this basis. We disagree.

"Because medical malpractice is a form of negligence, to state a *prima facie* cause of action, a plaintiff must demonstrate the elements of negligence: a duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the proximate cause of the harm

suffered, and the damages suffered were a direct result of harm." ***Griffin v. University of Pittsburgh Medical Center—Braddock Hosp.***, 950 A.2d 996, 999-1000 (Pa.Super. 2008), *appeal denied*, 601 Pa. 680, 970 A.2d 431 (2009) (internal quotation marks omitted). "If a plaintiff is able to establish that the defendant breached some duty of care owed to the plaintiff, it must also be shown that there exists a causal connection between the defendant's conduct and the plaintiff's injury." ***Feeney v. Disston Manor Personal Care Home, Inc.***, 849 A.2d 590, 594 (Pa.Super. 2004), *appeal denied*, 581 Pa. 691, 864 A.2d 529 (2004). "The causal connection referred to as proximate cause can be established by evidence that the defendant's negligent act or failure to act was a substantial factor in bringing about the plaintiff's harm." ***Id.*** at 594-95.

"With all but the most self-evident medical malpractice actions there is…the…requirement that the plaintiff must provide a medical expert who will testify as to the elements of duty, breach, and causation." ***Griffin, supra*** at 1000.

> Thus, expert testimony is required in a medical malpractice case where the circumstances surrounding the malpractice claim are beyond the knowledge of the average layperson[.] The 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.

***Id.*** (internal citations and quotation marks omitted).

"Although it is clear that a jury is not permitted to reach a verdict based upon guess or speculation, it is equally clear that a jury may draw inferences from all of the evidence presented." ***First v. Zem Zem Temple***, 686 A.2d 18, 21 (Pa.Super. 1996), *appeal denied*, 549 Pa. 701, 700 A.2d 441 (1997).

> It is not necessary, under Pennsylvania law, that every fact or circumstance point unerringly to liability; it is enough that there be sufficient facts for the jury to say reasonably that the preponderance favors liability…. The facts are for the jury in any case whether based upon direct or circumstantial evidence where a reasonable conclusion can be arrived at which would place liability on the defendant. It is the duty of [the] plaintiffs to produce substantial evidence which, if believed, warrants the verdict they seek.
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> [W]hen a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deductible therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith.

***Id.*** (quoting ***Cade v. McDaniel***, 679 A.2d 1266, 1271 (Pa.Super. 1996)).

Instantly, the pathologist conducted Decedent's autopsy on June 17, 2008. At that time, the pathologist did not find Decedent's left ovary. Nevertheless, Appellee presented evidence to demonstrate that Dr. Valenta did not actually remove the left ovary during the 2004 surgery. Deborah Lisman, a nurse who assisted Dr. Valenta with the surgery, testified that her

duties included writing down the specimens that Dr. Valenta removed from Decedent's body. Nurse Lisman explained that she could only write down the specimens identified by Dr. Valenta, and she had to record the doctor's words verbatim. Significantly, Nurse Lisman stated that the specimen list did **not** identify Decedent's left ovary as having been removed.[2]

Following surgery, Dr. William Michalak, M.D., examined the specimens to prepare a pathology report. Dr. Michalak initially inspected the specimen list and noticed that it did not include the left ovary. Dr. Michalak subsequently examined the specimens that Dr. Valenta had submitted, and Dr. Michalak did not find the left ovary among the specimens. The parties stipulated that Dr. Michalak "thoroughly examined and reported on all surgical specimens submitted to him by Dr. Valenta." (***See*** Stipulation, filed 4/4/11, at 1; R.R. at 776a.)

Appellee presented Dr. Richard Penson, M.D., a gynecological medical oncologist. Although Dr. Penson served as Decedent's treating physician beginning in 2006, he also testified as an expert in the field of gynecological medical oncology. On cross-examination, Dr. Penson stated Decedent did not receive "optimal surgery" from Dr. Valenta. (***See*** N.T. Trial, 4/11/11-4/18/11, at 216; R.R. at 158a.) Based upon the clinical information he

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[2] The list identified the "right ovary, FS," right adnexa, uterus, right iliac node and "omental biopsy" as the specimens removed from Decedent. (***See*** N.T. Trial at 86; R.R. at 44a.)

obtained while treating Decedent, as well as his review of Decedent's medical charts and pathology reports, Dr. Penson opined that Dr. Valenta failed to remove Decedent's left ovary during the 2004 surgery. (***Id.*** at 216, 223; R.R. at 158a, 165a).

Appellee also presented Dr. Joel Cooper, M.D., an expert in the field of gynecology. On direct examination, Dr. Cooper testified that he had reviewed Decedent's hospital records, follow-up care records, the deposition transcripts, and other expert reports. Dr. Cooper opined within a reasonable degree of medical certainty that Dr. Valenta failed to remove Decedent's left ovary during the 2004 surgery. Dr. Cooper further opined that Dr. Valenta's treatment of Decedent did not conform to the standard of care, because the "operation was inadequate, there was no staging [of the cancer], and the left tube and ovary were not removed." (***Id.*** at 333; R.R. at 242a). Dr. Cooper concluded Dr. Valenta's deviation from the standard of care caused Decedent to suffer injuries:

> By performing an inadequate operation, the patient went from about a 90, 92 percent cure rate for ovarian cancer to just about a zero percent rate with leaving behind the left tube and ovary performing inadequate staging.

(***Id.*** at 334; R.R. at 243a).

Contrary to Appellants' claim, Appellee provided evidence to establish the element of causation. Appellee's experts opined that Dr. Valenta failed to remove Decedent's left ovary following the 2004 surgery, which caused Decedent to suffer the recurrence. The experts' opinions were sufficient to

advance Appellee's malpractice claim. ***See Griffin, supra***; ***Feeney, supra***. Further, the testimony from Nurse Lisman and Dr. Michalak provided circumstantial evidence to support Appellee's theory of the retained left ovary. In light of this evidence, the jury did not base its verdict upon guesses or speculation. ***See First, supra***. To the extent Appellants emphasize that the pathologist did not discover Decedent's left ovary during the autopsy, we reiterate that every fact or circumstance need not point unerringly to liability. ***Id.*** Consequently, Appellants are not entitled to relief on their first claim.

In their second issue, Appellants assert Appellee originally sought to present expert testimony to advance a theory that post-surgery radiation treatments had obliterated Decedent's retained left ovary before her death. Appellants maintain Appellee agreed not to advance this theory after the court announced that it would have to conduct a ***Frye***[3] hearing before allowing expert testimony on the topic. Nevertheless, Appellants complain that Appellee's counsel improperly introduced the theory during closing arguments, stating Decedent's pelvis "was filled with cancer" during the four-year period between the surgery and the autopsy. Appellants argue counsel's statement provided an explanation for how the left ovary could have disappeared before the autopsy, which effectively circumvented their

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[3] ***Frye v. United States***, 293 F. 1013 (D.C.Cir. 1923).

burden of producing expert testimony on the matter. Appellants conclude they suffered undue prejudice from counsel's comment, and they are entitled to a new trial on this basis. We disagree.

"The extent to which final argument may be permitted in a civil case is addressed to the discretion of the trial judge." ***Federal Land Bank of Baltimore v. Fetner***, 410 A.2d 344, 349 (Pa.Super. 1979), *cert. denied*, 446 U.S. 918, 100 S.Ct. 1853, 64 L.Ed.2d 273 (1980). "Trial counsel must be expected to advance a spirited argument to support his client's cause…." ***O'Malley v. Continental Ins. Co.***, 451 A.2d 542, 546 (Pa.Super. 1982). "Regarding statements during opening and closing arguments, our Supreme Court has held that '[s]o long as no liberties are taken with the evidence, a lawyer is free to draw such inferences as he wishes from the testimony and to present his case in the light most suited to advance his cause and win a verdict in the jury box.'" ***Hyrcza v. West Penn Allegheny Health System, Inc.***, 978 A.2d 961, 977 (Pa.Super. 2009), *appeal denied*, 604 Pa. 706, 987 A.2d 161 (2009) (quoting ***Wagner v. Anzon, Inc.***, 684 A.2d 570, 578 (Pa.Super. 1996), *appeal denied*, 549 Pa. 704, 700 A.2d 443 (1997)).

"However, this latitude does not include discussion of facts not in evidence which are prejudicial to the opposing party." ***Hyrcza, supra*** at 977 (quoting ***Wagner, supra*** at 578). "It is well established that any statements by counsel, not based on evidence, which tend to influence the jury in resolving issues before them solely by an appeal to passion and

prejudice is improper and will not be countenanced." ***Hyrcza, supra*** at 977 n.10 (quoting ***Young v. Washington Hospital***, 761 A.2d 559, 563 (Pa.Super. 2000), *appeal denied*, 566 Pa. 668, 782 A.2d 548 (2001)). "In general, any prejudicial remarks made by counsel during argument can be handled 'within the broad powers and discretion of the trial judge and his actions will not be disturbed on appeal unless there is an obvious abuse of discretion.'" ***Hyrcza, supra*** at 977 (quoting ***Wagner, supra*** at 578).

Instantly, Dr. Penson testified that Decedent underwent a CT scan on April 23, 2007. The scan revealed "recurrent disease" with "new abnormalities in the liver and thickenings at the line of the abdomen as well as some lymph nodes near the lining of the abdomen, all very typical of recurrent ovarian cancer." (***See*** N.T. Trial at 144; R.R. at 86a.) At that time, Dr. Penson conducted a physical examination of Decedent, which confirmed the thickening on the left side of Decedent's pelvis. Dr. Penson explained the significance of thickening on one side of the pelvis as follows:

> [DR. PENSON]: So we almost always think of thickening as meaning that there's some persistence of her cancer. So cancer is sometimes round balls of tumor, but for most tumors it infiltrates and it's called cancer because of the crab-like legs that it grows into tissue with. So whenever we feel thickening we worry that that is something you can't easily see on scan because it's thin but a film of tumor that you can feel that's harder, thickening to the tissue.
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> [APPELLEE'S COUNSEL]: And that's something you feel with your own hands?
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> [DR. PENSON]: Right.

[APPELLEE'S COUNSEL]: And which side was that on?

[DR. PENSON]: On the left.

(***Id.*** at 150; R.R. at 92a). Further, Dr. Cooper described Decedent's pelvic area as "a solid mass" at the time of her death. (***Id.*** at 329; R.R. at 238a.)

In light of this evidence, Appellee's counsel's closing argument included the following statement:

> The autopsy was performed four years ago. [Decedent] had a recurrence of cancer during that four-year time. You've heard testimony that her pelvic region was filled with cancer.

(***Id.*** at 1203; R.R. at 433a). Appellants' counsel objected. The court, however, overruled the objection.

Counsel's statement amounted to a logical inference that the recurrent cancer had spread throughout Decedent's pelvis. Counsel based his statement on the testimony from Dr. Penson, who described how the cancer began to spread and "thicken" on the left side of Decedent's pelvis. Likewise, Dr. Cooper described the pelvis as "a solid mass" at the time of Decedent's death. Here, the experts' testimony enabled counsel to draw the logical inference that the cancer had filled Decedent's pelvic region. ***See Hyrcza, supra***. Consequently, Appellants are not entitled to relief on their second issue.

In their third issue, Appellants claim Appellee presented Dr. Cooper as an expert in the field of gynecology. Appellants contend Dr. Cooper

provided improper opinion testimony that exceeded the scope of his expertise. Specifically, Appellants assert the court permitted Dr. Cooper to offer an opinion regarding the site of the cancer recurrence based upon Dr. Cooper's interpretation of radiology, oncology, and colonoscopy reports. Appellants maintain Dr. Cooper was not an expert in the fields of radiology or oncology; therefore, the court should have found Dr. Cooper unqualified to testify about "the intricate nuances of the radiologic evidence of recurrence of cancer or fact-specific aspects of ovarian cancer recurrence." (Appellants' Brief at 21).

Appellants complain the court compounded this error when it allowed Appellee's counsel to inform the jury that all of the Geisinger physicians who examined Decedent post-surgery agreed that the cancer recurred on the left side of her pelvis. Appellants argue counsel's statement exceeded any reasonable inference from the Geisinger medical records, and it strayed into the realm of expert interpretation of medical issues. Appellants conclude they are entitled to a new trial in light of Dr. Cooper's highly prejudicial testimony, as well as counsel's mischaracterization of the record. We disagree.

"Whether a witness has been properly qualified to give expert witness testimony is vested in the discretion of the trial court. It is well settled in Pennsylvania that the standard for qualification of an expert witness is a liberal one." ***Vicari v. Spiegel***, 936 A.2d 503, 512 (Pa.Super. 2007),

*affirmed*, 605 Pa. 381, 989 A.2d 1277 (2010) (quoting ***Wexler v. Hecht***, 847 A.2d 95, 98 (Pa.Super. 2004), *affirmed*, 593 Pa. 118, 928 A.2d 973 (2007)). "Thus, we may reverse the trial court's decision regarding admission of expert testimony only if we find an abuse of discretion or error of law. Furthermore, because the issue regarding an expert's qualifications under the [Medical Care Availability and Reduction of Error ("MCARE")] Act involves statutory interpretation, our review is plenary." ***Vicari, supra*** at 512-13 (quoting ***Jacobs v. Chatwani***, 922 A.2d 950, 956 (Pa.Super. 2007), *appeal denied*, 595 Pa. 708, 938 A.2d 1053 (2007)).

The MCARE Act governs the qualifications of expert witnesses as follows:

> **§ 1303.512. Expert qualifications**
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> **(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.
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> **(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:
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> (1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.
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> (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.

"In the field of medicine, specialties sometimes overlap and a practitioner may be knowledgeable in more than one field." ***Rettger v. UPMC Shadyside***, 991 A.2d 915, 930 (Pa.Super. 2010), *appeal denied*, 609 Pa. 698, 15 A.3d 491 (2011) (quoting ***George v. Ellis***, 820 A.2d 815, 817 (Pa.Super. 2003), *appeal denied*, 575 Pa. 686, 834 A.2d 1143 (2003)). "Doctors will have different qualifications and some doctors will be more qualified than others to provide evidence about specific medical practices. **However, it is for the jury to determine the weight to be given to expert testimony in light of the qualifications presented by the witness**." ***Rettger, supra*** at 930 (quoting ***George, supra*** at 817) (internal citation omitted) (emphasis in original).

Instantly, the court accepted Dr. Cooper as an expert in the field of gynecology, which is the same subspecialty as Dr. Valenta. On direct examination, Dr. Cooper opined within a reasonable degree of medical certainty that Dr. Valenta failed to remove Decedent's left ovary during the 2004 surgery. Dr. Cooper explained the basis for his opinion as follows:

> [APPELLEE'S COUNSEL]: And what are you basing that on, doctor?
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> [DR. COOPER]: On everything that happened. It wasn't found in pathology. Everything recurred on the left side such as what Dr. Donovan thought, what Dr. Hou

> thought who did the biopsy, as well as Dr. Donovan, as I said, and Dr. Rashid's findings at colonoscopy. Everything points to left side of recurrence, and that would be my opinion on that.[4]

(***See*** N.T. Trial at 331; R.R. at 240a.)

Additionally, Dr. Cooper commented on the findings of Dr. Donovan and Dr. Rashid. Dr. Donovan found an oval-shaped soft tissue mass in Decedent's pelvis, adjacent to the sigmoid colon. Dr. Donovan also discovered bleeding from Decedent's left vaginal apex. Further, Dr. Rashid's colonoscopy report documented a large mass in the sigmoid colon. Dr. Cooper explained that the sigmoid colon and left vaginal apex were on the left side of Decedent's body.

Here, Dr. Cooper provided an opinion about Dr. Valenta's surgery on Decedent, which was a matter related to Dr. Cooper's subspecialty. In formulating his opinion, Dr. Cooper's statements about other doctors' findings did not amount to testimony on matters outside the scope of his expertise. Rather, Dr. Cooper described certain aspects of Decedent's anatomy to clarify the medical records already in evidence. Further, Dr. Cooper provided a proper explanation of the facts that formed the basis for his expert opinion. ***See Gillingham v. Consol Energy, Inc.***, 51 A.3d 841

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[4] Dr. Donovan, a medical oncologist, Dr. Hou, a radiologist, and Dr. Rashid, a gastroenterologist, each participated in Decedent's treatment following the 2004 surgery. Appellee presented Dr. Hou's deposition as part of his case-in-chief. Appellee also introduced office notes from Dr. Donovan and a colonoscopy report from Dr. Rashid.

(Pa.Super. 2012) (stating expert's testimony cannot be based upon conjecture or surmise; expert's opinions must be based upon such facts as jury would be warranted in finding from evidence). To the extent that Dr. Cooper's testimony about gynecological issues might have overlapped with matters relating to other subspecialties, the jury was free to evaluate the weight of such testimony in light of Dr. Cooper's qualifications. ***See Rettger, supra***.

Regarding Appellants' complaint that Appellee's counsel mischaracterized the content of Decedent's medical records, the court determined that counsel properly commented on the evidence of record:

> [Appellants] further complain [Appellee] "mischaracterized" Dr. Donovan's report as showing the cyst near the left ureter when the report also references the right side. [Portions of Dr. Donovan's report] were read into the record and specifically say that [Dr. Donovan] was concerned that the mass was close to the "left ureter," "left upper apex," and "left vaginal apex," as well as adjacent [to] the sigmoid colon, which Dr. Cooper testified was on the left side. Arguing that the recurrence of cancer was on [Decedent's] left side was consistent with the evidence, and provided the basis for a jury inference of such. [Appellee's] counsel is allowed to highlight the best aspects of his case during trial and in closing argument, and had the evidence to support his position.

(***See*** Trial Court Opinion at 12-13) (internal citations to the record omitted). We agree with the court's conclusion that counsel did not mischaracterize the evidence; instead, counsel merely highlighted substantiated facts most favorable to Appellee's case. ***See Hyrcza, supra***. Thus, Appellants are not entitled to relief on their third issue.

In their fourth issue, Appellants contend a plaintiff must prove the element of causation based upon something more than a mere possibility. Relying on ***Walsh v. Snyder***, 441 A.2d 365 (Pa.Super. 1981), Appellants requested the following instruction to clarify the burden of proof regarding causation:

> If you find that the conduct of a defendant is merely a possible cause of plaintiff's injuries such that the matter remains one of pure speculation and conjecture, you must find in favor of the defendant.

(Appellants' Brief at 24). Appellants complain the court did not provide the requested instruction, because it determined Appellee's experts had "stated with adequate certainty that the left ovary was retained and caused the cancer to recur." (***Id.*** at 24). Given that the pathologist did not find Decedent's left ovary during the autopsy, Appellants maintain Appellee's experts could not opine with an adequate degree of certainty that Decedent's left ovary was retained during surgery. Appellants conclude a new trial is warranted due to the court's failure to provide an adequate jury instruction on the issue of causation. We disagree.

With respect to jury instructions generally:

> In reviewing a claim regarding error with respect to a specific jury charge, we must view the charge in its entirety taking into consideration all the evidence of record and determine whether…error was committed and, if so, whether that error was prejudicial to the complaining party.
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> A trial court has broad discretion in phrasing jury instructions, and may choose its own wording as long as

> the law is clearly, adequately and accurately presented to the jury for its consideration.

***American Future Systems, Inc. v. BBB***, 872 A.2d 1202, 1210 (Pa.Super. 2005), *affirmed,* 592 Pa. 66, 923 A.2d 389 (2007) (internal citations and quotation marks omitted).

Regarding the element of causation, "It is the plaintiff's burden to prove that the harm suffered was due to the conduct of the defendant." ***Hamil v. Bashline***, 481 Pa. 256, 265, 392 A.2d 1280, 1284 (1978).

> As in many other areas of the law, that burden must be sustained by a preponderance of the evidence. Whether in a particular case that standard has been met with respect to the element of causation is normally a question of fact for the jury; the question is to be removed from the jury's consideration only where it is clear that reasonable minds could not differ on the issue. In establishing a [*p*]*rima facie* case, the plaintiff need not exclude every possible explanation of the accident; it is enough that reasonable minds are able to conclude that the preponderance of the evidence shows defendant's conduct to have been a substantial cause of the harm to plaintiff.

***Id.*** at 265-66, 392 A.2d at 1284-85 (internal citations omitted).

Instantly, the court instructed the jury on the element of causation as follows:

> I previously explained to you that if you find Dr. Valenta is negligent then you must—you then must consider whether the negligence was a factual cause of the harm suffered by the patient. Under the law we call conduct that causes harm a factual cause. Negligent conduct is a factual cause of harm if the conduct played an actual real role in harming the plaintiff. **The connection between the conduct and the harm cannot be imaginary or insignificant.** There may be more than one factual cause of harm. A person remains responsible for his or her

> conduct that causes harm even if other causes contributed to the harm.
>
> 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 may be liable to the plaintiff. It is rarely possible to demonstrate that an absolute—to an absolute certainty what would have happened under circumstances that the wrongdoer did not allow to come to pass.

(***See*** N.T. Trial at 1255-57; R.R. at 486a-488a) (emphasis added).

Although the court declined to give Appellants' requested instruction, this did not render the causation instruction inadequate. The court addressed the essential elements of causation, emphasizing the connection between Appellants' conduct and Appellee's harm could not be "imaginary." The court also reiterated that the jury was to determine the credibility of Appellee's experts. Thus, the court accurately presented the law for the jury's consideration, and it did not err in refusing Appellants' proposed jury instruction. ***See American Future Systems, Inc., supra***. Under these circumstances, Appellants are not entitled to relief on their fourth issue.

In their fifth issue, Appellants claim the court repeatedly demonstrated a bias against them and in favor of Appellee. Appellants assert Appellee's counsel received favorable treatment during closing arguments. Appellants complain the court permitted Appellee's counsel to violate evidentiary stipulations, exaggerate claims, reference facts not in evidence, and improperly emphasize counsel's own version of the facts. Conversely, Appellants argue the court chastised their counsel for arguing, slowing down the proceedings, and not following the court's rulings. Appellants further argue that the court interfered with their counsel's ability to make a record for appellate review by disallowing objections and sidebars without explanation. Appellants aver the court's conduct destroyed any appearance of neutrality and caused them to suffer undue prejudice that influenced the jury.

Moreover, Appellants insist they did not waive this issue by failing to make contemporaneous objections to all instances of judicial misconduct during trial. Appellants rely on ***Harman ex rel. Harman v. Borah***, 562 Pa. 455, 756 A.2d 1116 (2000), for the proposition that a party can raise judicial misconduct claims for the first time in post-trial motions where it appears that timely objections during trial would have been meaningless. Based upon the foregoing, Appellants conclude they are entitled to a new trial. We disagree.

"[T]o preserve an issue for review, litigants must make timely and specific objections during trial and raise the issue in post-trial motions." ***Id.*** at 471, 756 A.2d at 1124. "There exists, however, an exception to the waiver doctrine." ***Id.*** at 471, 756 A.2d at 1125.

> [I]n limited circumstances, a party may raise allegations of judicial misconduct for the first time in post-trial motions. While trial counsel has an obligation to object to improper language and/or behavior in the courtroom to effectively represent his or her client, there may be circumstances in which objections have a deleterious effect on the jury or even on the judge whose behavior is extremely unprofessional.
>
> * * *
>
> Where it appears from all the circumstances that a timely objection to perceived judicial misconduct would be meaningless, a party may choose to raise the issue for the first time at post-trial motions to preserve it for appellate review. This involves some risk, which a trial counsel should not assume lightly. The burden is on the party asserting the…exception to the waiver doctrine to demonstrate that lodging a timely objection would have been meaningless. An objection would not be meaningless merely because the judge is likely to overrule it.

***Id.*** at 471-73, 756 A.2d at 1125-26 (internal footnote omitted).

"The judge occupies an exalted and dignified position; he is the one person to whom the jury, with rare exceptions, looks for guidance, and from whom the litigants expect absolute impartiality…." ***DiMonte v. Neumann Medical Center***, 751 A.2d 205, 210 (Pa.Super. 2000).

> The duty therefore lies with the judge to insure that his conduct is 'above reproach,' or minimally, is not prejudicial.

* * *

> An expression indicative of favor or condemnation is quickly reflected in the jury box and at the counsel table. To depart from the clear line of duty through questions, expressions or conduct, contravenes the orderly administration of justice. It has a tendency to take from one of the parties the right to a fair and impartial trial, as guaranteed under our system of jurisprudence. Judges should refrain from extended examination of witnesses; they should not, during the trial, indicate an opinion on the merits, a doubt as to the [witnesses'] credibility, or do anything to indicate a leaning to one side or the other, without explaining to the jury that all these matters are for them.

***Id.*** at 210-11 (internal citations omitted).

Instantly, the court concluded:

> [T]he arguments of counsel for both sides were proper, and drew appropriate inference from the facts in evidence. There was certainly nothing in these arguments which invoked the prejudice the defense claims, nor anything therein which requires grant of a new trial. Indeed, as noted above, the jury was repeatedly instructed that it was its recollection of the evidence, not counsel's, which controlled. Even if the closing arguments pushed the boundary of oratorical propriety (which they did not), these repeated instructions the [c]ourt gave were more than sufficient balm and cured any discrepancy.

(***See*** Trial Court Opinion at 15) (internal citations to the record omitted). After reviewing Appellee's counsel's closing argument in its entirety, we agree that his comments did not amount to an improper attempt to prejudice the jury unduly against Appellants. ***See Hyrcza, supra***. Thus, we see no abuse of discretion in the court's overruling of Appellants'

repeated objections during closing argument. ***See Federal Land Bank of Baltimore, supra***.

Regarding the alleged judicial misconduct, the trial court determined Appellants waived the issue. (***See*** Trial Court Opinion at 20.) Assuming Appellants preserved the issue, the record does not support their claim. During closing argument, Appellants' counsel raised twelve separate objections. For each objection, the court made a prompt ruling.[5] On three occasions, the court made additional comments regarding the propriety of the objections. After the eighth objection, the court stated, "Counsel, last time I'm going to say this. This is argument. We will have a side bar if there is another discussion, and I will do all the talking." (***See*** N.T. Trial at 1206; R.R. at 436a.) After the ninth objection, the court stated, "Counsel, that is not a proper objection. [Appellee's counsel] may argue the inferences." (***Id.*** at 1211; R.R. at 441a). After the tenth objection, the court made its lengthiest comment:

> Counsel, you had a chance for oral argument. I will not warn you again. You cannot give another closing argument to this jury, and that's what you're attempting to do. And you've been warned three times. No further

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[5] The court actually sustained two of the objections. (***See*** N.T. Trial at 1186, 1203; R.R. at 416a, 433a.) On a third occasion, the parties participated in an off-the-record sidebar. (***Id.*** at 1215; R.R. at 445a). When the sidebar ended, the court did not expressly sustain the objection, but it did instruct the jury that Appellee's counsel's argument did not amount to evidence. (***Id.*** at 1216; R.R. at 446a).

> objections from you with regard to [Appellee's] counsel arguing inferences.

(***Id.*** at 1212-13; R.R. at 442a-443a).

Despite Appellants' contention to the contrary, the court's comments did not "indicate a leaning to one side or the other." ***See DiMonte, supra***. The court took reasonable measures to ensure closing arguments progressed in an orderly and legal fashion. The court's comments to Appellants' counsel serve to advance the proceedings, not to condemn Appellants' case. The court emphasized it would permit Appellee's counsel to argue all reasonable inferences from the evidence presented. On this record, we see no court misconduct; and Appellants are not entitled to relief on their fifth issue. ***See id.*** Accordingly, we affirm.

Judgment affirmed.