NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

STEVEN DELAVERN AND SHARAYAH DELAVERN, HUSBAND AND WIFE	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
HEALTH SERVICES OF CLARION, INC., CLARION HEALTHCARE SYSTEM, INC., NICOLE CARROLL, D.O.; AND KARLA LYNN WILSON, PA-C	:	
	:	No. 858 WDA 2024
Appellants	:	

Appeal from the Judgment Entered June 27, 2024
in the Court of Common Pleas of Clarion County Civil Division
at No(s): 704-CD-2022

BEFORE: BOWES, J., BECK, J., and BENDER, P.J.E.

MEMORANDUM BY BOWES, J.: **FILED: January 6, 2025**

Health Services of Clarion, Inc. ("Health Services"), Clarion Healthcare System, Inc. ("CHS"), Nicole Carroll, D.O., and Karla Lynn Wilson, PA-C[1] (collectively "Appellants") appeal from the judgment entered against them and in favor of Steven and Sharayah Delavern in this medical malpractice action. We affirm.

The underlying facts, viewed in the light most favorable to the Delaverns as the verdict winners, are as follows. In July 2019, Mr. Delavern, then aged thirty-one, went to Health Services, a family practice, with complaints of rectal pain and bleeding along with other bowel issues. He was seen by PA Wilson,

[1] "PA-C" indicates physician assistant-certified.

a physicians' assistant who was supervised by Dr. Carroll. PA Wilson diagnosed Mr. Delavern with internal hemorrhoids and prescribed suppositories. Mr. Delavern returned to the practice in February 2020, at which time PA Wilson provided him with more steroids and additional recommendations for treating his then-worsened symptoms. Mr. Delavern saw PA Wilson a third time in July 2020, reporting increased pain, and was referred to general surgery for evaluation and possible hemorrhoidectomy. A colonoscopy procedure the following month revealed that Mr. Delavern had stage four rectal cancer that had metastasized to his lungs.

The Delaverns initiated the instant action against Appellants by writ of summons on August 2, 2022.[2] In their subsequent complaint, they alleged that the failure of Dr. Carroll or PA Wilson to diagnose Mr. Delavern's rectal cancer, and the resultant thirteen-month delay in treatment, caused him to suffer life-threatening injuries that could have been avoided. In particular, Mr. Delavern alleged professional negligence by PA Wilson and Dr. Carroll, vicarious liability on the part of Health Services and CHS for the negligence of those individuals as their employees, agents, or ostensible agents, and direct corporate negligence on the part of Health Services and CHS.[3]

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[2] The Delaverns also sued Butler Health System, Inc., which had acquired Health Services in 2019, but that defendant was dismissed with prejudice without opposition at summary judgment.

[3] Ms. Delavern pled a derivative claim of loss of consortium.

Prior to trial, Health Services and CHS moved for summary judgment as to the claims of corporate negligence, asserting that the Delaverns lacked sufficient evidence to proceed to trial. Specifically, the corporate defendants asserted that the Delaverns had no evidence that the entities had actual or constructive knowledge of a defect or that it breached any non-delegable duty that caused harm to Mr. Delavern. The trial court agreed as to CHS, but disagreed as to Health Services. The court concluded that the evidence proffered by the Delaverns in opposition to the motion, notably the deposition testimony of Dr. Carroll, PA Wilson, as well as that of Health Services' corporate designee, and the opinion of the Delaverns' family practice medicine expert, created genuine issues of material fact to be resolved by the jury.

Trial began in April 2024. Pertinent to this appeal, the Delaverns called Thomas Cartwright, M.D. to testify as an expert in medical oncology. Dr. Cartwright opined that, given the short duration Mr. Delavern's symptoms and the information contained in his medical records and pathology, his cancer was probably at stage one or two when he first presented at Health Services in July 2019. Dr. Cartwright further testified that Appellants' failure to timely diagnose him harmed him by, *inter alia*, allowing the cancer to proceed to incurable stage four such that his five-year survival rate decreased from eighty to ninety percent down to ten percent. On cross-examination, when presented with hypotheticals about what stage Mr. Delavern's cancer would have been in at various points of time between July 2019 and July 2020, Dr. Cartwright

indicated that, "exactly what [it was] staged when -- it's kind of speculation." N.T. Trial, 4/18/24, at 75.

Appellants moved for a compulsory nonsuit at the close of the Delaverns' case in chief, arguing that Dr. Cartwright's opinion was not offered with the requisite certainty to satisfy their burden to prove causation. The trial court denied the motion, concluding that, while Dr. Cartwright's testimony about the fact of what stage Mr. Delavern's cancer was in at the time he presented to Appellants for care was not certain, he nonetheless offered a reasonably certain opinion that the delay in diagnosis harmed Mr. Delavern. ***See*** N.T. Trial, 4/25/24, at 101.

During closing arguments, the Delaverns' counsel on several occasions suggested that this case was an example of a system failure that was unacceptable in Clarion County. When Appellants finally objected, contending that the argument violated the court's pretrial order granting their "golden rule" motion *in limine*, the court sustained the objection.[4] Appellants did not request a curative instruction, and none was given. Nor did Appellants move for a mistrial.

Ultimately, the jury found Dr. Carroll, PA Wilson, and Health Services all negligent, that their negligence harmed the Delaverns, and that their

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[4] "The 'golden rule' argument involves an appeal to the jury to place itself in the shoes of one of the parties and ask themselves what each of them would have done under the circumstances of the case." ***Millen v. Miller***, 308 A.2d 115, 117 (Pa.Super. 1973).

respective percentages of causal negligence were thirty, twenty, and fifty percent. The jury awarded a total of $6,970,783 in economic and non-economic damages, including $2,000,000 to Ms. Delavern for loss of consortium.

The Delaverns filed a post-trial motion for delay damages, while Appellants sought post-trial relief in the form of (1) judgment notwithstanding the verdict ("JNOV") based upon the insufficiency of Dr. Cartwright's causation testimony; (2) a new trial because of the improper closing remarks of the Delaverns' counsel; and (3) a new trial due to the impropriety of the verdicts of corporate negligence given the inadequacy of the expert testimony against it and the fact that Health Services "is not the type of facility to which a corporate negligence claim can apply."[5] Post-trial Motion, 5/8/24, at 14. Appellants also sought remittitur of the verdict, contending that the jury's award was driven by passion and prejudice.

By opinion and order of June 18, 2024, the trial court denied Appellants' post-trial motion. The following day, it granted the Delaverns' request for delay damages. The Delaverns filed a praecipe to enter judgment in the amount of $7,291,398.51, resulting in the entry of judgment in that amount on June 27, 2024. This timely appeal followed. The trial court directed Appellants to file a Pa.R.A.P. 1925(b) statement of errors complained of on

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[5] Critically, as we discuss *infra*, Appellants did not request JNOV based upon the corporate negligence issue.

appeal, and they timely complied. The trial court thereafter authored a Rule 1925(a) opinion to supplement its prior opinion and order.

Appellants present the following questions for our consideration:

I. Did the trial court abuse its discretion when it denied [Appellants'] motion for a directed verdict due to the Delaverns' failure to provide competent, medically certain expert testimony to prove causation?

   A. Did the trial court abuse its discretion in failing to strike Dr. Cartwright's testimony and enter judgment in favor of [Appellants] where Dr. Cartwright's opinions were not supported by scientific authority?

   B. Did the trial court abuse its discretion when it denied [Appellants'] motion for a directed verdict despite Dr. Cartwright admitting that the underpinnings of his opinions were based on "speculation" and "estimates" instead of medically certain facts?

II. Did the trial court abuse its discretion when it concluded that the Delaverns' prejudicial closing argument did not necessitate a new trial, despite acknowledging that the Delaverns' "counsel appealed to the jurors' emotions in his closing remarks" and despite the trial court failing to provide a curative instruction after sustaining [Appellants'] objection to the Delaverns' prejudicial remarks?

III. Did the trial court abuse its discretion when it concluded that [Health Services] is the type of facility to which a corporate negligence claim may apply based on facts and conclusions not supported by the record?

IV. Did the trial court abuse its discretion when it concluded that the Delaverns presented sufficient evidence to prove causation of corporate negligence, even though the Delaverns' expert offered nothing more than conclusory, non-specific statements detached from the actual operations of [Health Services]?

Appellants' brief at 5-6.

We begin with Appellants' contention that they were entitled to judgment based upon deficiencies in Dr. Cartwright's testimony. The following principles apply to our review:

> In reviewing a trial court's decision whether to grant judgment in favor of one of the parties, we must consider the evidence, together with all favorable inferences drawn therefrom, in a light most favorable to the verdict winner. Our standard of review when considering motions for a directed verdict and [JNOV] are identical. We will reverse a trial court's grant or denial of a [JNOV] only when we find an abuse of discretion or an error of law that controlled the outcome of the case. Further, the standard of review for an appellate court is the same as that for a trial court.
>
> There are two bases upon which a directed verdict can be entered; one, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first, the court reviews the record and concludes that, even with all factual inferences decided adverse to the movant, the law nonetheless requires a verdict in his favor. Whereas with the second, the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

Morrissey v. St. Joseph's Preparatory School, 323 A.3d 792, 802 (Pa.Super. 2024) (cleaned up).

Pertinent to Appellants' challenge to the legal sufficiency of Dr. Cartwright's expert opinion:

> A plaintiff in a medical negligence case must present an expert witness who will testify, to a reasonable degree of medical certainty, regarding the standard of care (duty); that the physician deviated from the standard of care (breach); and that such deviation was the proximate cause of the harm suffered. Further, the expert's medical opinion need only demonstrate, with a reasonable degree of medical certainty, that the defendant physician's conduct increased the risk of the harm actually

> sustained, and the jury then must decide whether that conduct was a substantial factor in bringing about the harm.
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> In determining whether the expert's opinion is rendered to the requisite degree of certainty, we examine the expert's testimony in its entirety. That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty. Accordingly, an expert's opinion will not be deemed deficient merely because he or she failed to expressly use the specific words, "reasonable degree of medical certainty." Nevertheless, an expert fails this standard of certainty if he testifies that the alleged cause possibly, or could have led to the result, that it could very properly account for the result, or even that it was very highly probable that it caused the result.

Mazzie v. Lehigh Valley Hospital-Muhlenberg, 257 A.3d 80, 87–88 (Pa.Super. 2021) (cleaned up).

This Court has observed as follows regarding the basis of the opinion testimony:

> The exercise of scientific expertise requires inclusion of scientific authority and application of the authority to the specific facts at hand. Thus, the minimal threshold that expert testimony must meet to qualify as an expert opinion rather than merely an opinion expressed by an expert, is this: the proffered expert testimony must point to, rely on or cite some scientific authority—whether facts, empirical studies, or the expert's own research—that the expert has applied to the facts at hand and which supports the expert's ultimate conclusion. When an expert opinion fails to include such authority, the trial court has no choice but to conclude that the expert opinion reflects nothing more than mere personal belief.

Garced v. United Cerebral Palsy of Philadelphia & Vicinity, 307 A.3d 103, 117–18 (Pa.Super. 2023) (cleaned up).

Here, Appellants challenge Dr. Cartwright's opinion that Mr. Delavern was harmed by the delayed diagnosis resulting from their negligence. The

trial court explained its rejection of Appellants' request for JNOV on this basis thusly:

> Dr. Cartwright expressed his opinion that the delay in diagnosing [Mr. Delavern's] cancer resulted in being diagnosed at an advanced stage—stage [four]—generally considered incurable based on the fact of relatively short duration of symptoms. Rectal cancer has symptoms early on including pain and bright red bleeding. He estimated from reviewing the records and how much disease [Mr. Delavern] had when he was diagnosed, that the stage when [PA] Wilson examined [him] in July 2019 was probably stage [one] or [two].
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> Dr. Cartwright testified that to determine a stage he asks patients how long they have had symptoms. In his [forty-five] years of experience, if a patient has had symptoms for months or years it is often stage [four]. Here, [Mr. Delavern] first saw [PA Wilson] in July 2019. He said he had symptoms for a couple of months. The diagnosis in August 2020 was [thirteen] months late[r].
>
> On cross examination by [Appellants'] counsel, the doctor stated he determined [that Mr. Delavern] was stage [one] or [two] in July 2019 based on his years of experience treating patients at [those stages], treating patients based on the duration of symptoms, and treating patients based on medical trials. He agreed he can't and wouldn't stage a patient in his medical practice based just on experience; he uses objective data, almost always imaging and biopsy. He did not have that here, since no tests were obtained in July 2019.
>
> Dr. Cartwright explained that he made his opinion based on the subsequent scans, the size of the tumor—when there was an x-ray and biopsy—his experience knowing the natural history of colon and rectal cancer and how it progresses and spreads with time.
>
> . . . .
>
> The doctor continued and testified that there are retroactive data studies he is aware of regarding types of cancer—some are fast growing—based on hundreds of patients. This is the information he used in determining the stage of [Mr. Delavern's]

> cancer in July 2019. He based his opinion on [forty] years of treating patients and how long they have had symptoms. The retrospective data shows [*sic*] that patients with [stage four] have had symptoms for six months. Those with [stage one or two] have had symptoms for six to eight weeks. This is according to published data. He based his opinion not only on information about [Mr. Delavern] and his years of experience, but also on published data.

Trial Court Opinion, 8/23/24, at 3-4 (cleaned up).

Appellants maintain that Dr. Cartwright's causation opinion, "[b]y [his] own admission, was unreliable and incompetent." Appellants' brief at 29. They focus upon the testimony recounted hereinabove that his hindsight staging of Mr. Delavern's cancer at any particular point prior to its discovery through imaging and pathology was speculative and assert that the lack of certainty undermines his opinion that Mr. Delavern progressed from a curable stage to a non-curable stage as a result of the delayed diagnosis. Appellants argue as follows:

> [Appellants] do not dispute that no doctor could say for certain whether Mr. Delavern would have survived stage [one] or [two] cancer, and they even agree that Mr. Delavern had an increased risk of death at stage [four] than he did when he was at stage [one] or [two]. Where they find fault, however, is in Dr. Cartwright's failure to demonstrate to a reasonable degree of medical certainty that Mr. Delavern's cancer was in fact stage [one] or [two] (curable) in July 2019 when under [their] care. The presence of this fact—or lack thereof—was essential to Dr. Cartwright's ultimate conclusion regarding increased risk of harm and, therefore, the law required more than estimation, conjecture, or speculation.

Id. at 44-45 (cleaned up).

The Delaverns acknowledge that Dr. Cartwright did not clinically or pathologically stage Mr. Delavern's cancer as of July 2019 as he would in staging one of his own patients. They observe that no one can clinically stage the cancer at that point in time because Appellants' negligence resulted in an absence of images or pathology. However, they maintain that "is beside the point." Delaverns' brief at 21. Dr. Cartwright was not attempting to clinically stage Mr. Delavern's cancer for purposes of treating him, but to estimate based upon the available data at what stage he initially presented to PA Wilson. ***Id***. As cancer is a disease that does not jump from stage to stage but progresses over time, some cancers more rapidly than others, the exact stage in July was not the issue. Rather, the question here is whether Appellants' professional negligence increased the risk of harm, in light of their omissions making it impossible to establish causation with certainty. In this vein, Dr. Cartwright testified that, to a reasonable degree of medical certainty, the thirteen-month delay reduced Mr. Delavern's life expectancy and necessitated procedures that negatively impacted his quality of life. ***Id***. at 22.

Upon reviewing the trial transcript and the applicable precedent, we agree with the trial court and the Delaverns that Dr. Cartwright's testimony, when examined in its totality, stated with requisite certainty the fact-based scientific opinion that Appellants' negligence increased the risk of harm to Mr. Delavern. We find our decisions in ***Vicari v. Spiegel***, 936 A.2d 503

(Pa.Super. 2007),[6] and ***Rolon v. Davies***, 232 A.3d 773 (Pa.Super. 2020), instructive.

In ***Vicari***, the patient was treated by the defendants for tongue cancer, which subsequently metastasized, causing the patient's death. Mrs. Vicari's estate sued, contending that the defendants failed to advise her of the risk of metastasis and availability of follow-up chemotherapy. At trial, the plaintiff's causation expert, Dr. Berman, testified that the defendants' failure to refer the patient for chemotherapy "deprived [her] of the significant opportunity for treatment[,] which significantly increased the risk" of the reoccurrence of cancer and "may have prevented her from having [a] disease free interval and large survival life." ***Id***. at 512. The trial court granted the defense motion for a compulsory nonsuit on the basis that Dr. Berman did not offer legally sufficient causation testimony. This Court disagreed.

We observed that, under Pennsylvania law, "[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." ***Id***. at 512 (quoting ***Billman***

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[6] Our Supreme Court granted allowance of appeal on a different issue and affirmed this Court's disposition of the case. ***See Vicari v. Spiegel***, 989 A.2d 1277 (Pa. 2010) (ruling that oncologist with different board certification and practice subspecialty was qualified to testify as to the standard of care).

v. Saylor, 761 A.2d 1208, 1212 (Pa.Super. 2000)). The defense and trial court pointed to the expert's use of "may" in opining that the patient would have had a more favorable outcome had the defendants adhered to the standard of care in challenging the adequacy of the evidence. We eschewed both the narrow focus upon, and the import of, the uncertainty in the testimony as follows:

> Dr. Berman's testimony, taken in its entirety, reveals a steadfast opinion, based on facts of record including the risk factors for metastases, that Mrs. Vicari should have "absolutely" been referred to a medical oncologist and that the failure to do so "deprived" her of a "significant opportunity for treatment which significantly increased" the risk of harm. Of course, it is impossible to determine if, had Mrs. Vicari undergone chemotherapy, she would have had a "disease free interval and large survival life," thereby explaining Dr. Berman's use of the word "may" in this context. However, . . . all that [the p]laintiff needs to establish is that the defendants' conduct increased the risk of harm. Moreover, our focus is, again, on the totality of Dr. Berman's testimony, which reveals an opinion rendered to the requisite degree of certainty such that the grant of nonsuit was improper on this basis and the case should have been allowed to proceed to the jury.

Id. (cleaned up).

The ***Rolon*** Court relied upon ***Viscari*** in reaching the same result. In ***Rolon***, Decedent had an emergency surgery to repair a perforated bowel. A few weeks later, she returned to the defendants' emergency department with a swollen and blue leg and complaints of pain on her right side from her back down her leg. Finding no signs of a deep vein thrombosis ("DVT") or arterial blockage in the leg, the defendant discharged Decedent, who died an hour

later from a pulmonary embolism due to a DVT in her pelvic area. At trial, Decedent's expert offered the following evidence:

> Dr. Campbell testified that DVT is common in patients who are immobile after surgery. He also testified that a lung or heart problem would cause symptoms in both legs, whereas Decedent had symptoms in only one. Since Decedent underwent surgery less than three weeks before returning to the ER, since she had symptoms in only one leg, and since an ultrasound revealed no DVT in her lower leg but pointed to a problem higher up, Dr. Campbell opined that [the defendants] should have checked for a problem higher up. Dr. Campbell testified that an isolated clot in the pelvic area is rare but much more likely to cause death than a clot lower down. Dr. Campbell opined that the ultrasound of Decedent's lower leg pointed to a problem in the pelvic region, and under these circumstances [the defendants] "had to" rule out a pelvic clot. Further, Dr. Campbell testified that [the defendants'] diagnosis did not explain Decedent's symptoms[, as it] would have explained blue discoloration in Decedent's toes, but not her whole leg. A dose of Heparin and anticoagulant would have significantly lessened the chance that Decedent would die from a pulmonary embolism.

Rolon, 232 A.3d at 778–79 (cleaned up). On this last point, the specific testimony was as follows:

> Q. Doctor, do you have an opinion to within a reasonable degree of medical certainty as to whether or not the failure to follow up and get the necessary study as you indicated increased the risk of harm and was a substantial factor in the patient's ultimate death?
>
> A. I do.
>
> Q. And what is your opinion?
>
> A. Well, my opinion is that if the diagnosis of DVT had been made, and the large dose of Heparin given right away, even if the patient had thrown that pulmonary emboli while in the hospital, the risk of mortality would have been significantly less. So I think it was the factor that led to the death.

> Q. And what would, in fact, be the course of treatment for a patient like this if DVT in the pelvis was found?
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> A. You would have given them a large dose of Heparin and anticoagulant.
>
> Q. And would that – what is the likelihood then that the patient would survive with this clot at that point in time?
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> A. You – you can – you can't say with absolute certainty, but you can say more likely than not, if it was treated, and the Heparin was on board, that the way an embolism causes death is it causes vasoconstriction of the pulmonary arteries when it lands and we know that it's part of our treatment of the disease. The first thing you need to do is get some Heparin into them to vasodilate them. And if you can do that right away, the outcomes are better.
>
> So I think it's more likely than not that she could have survived if she had had that treatment at that time.
>
> Q. Even with the – with the thrombosis still present in the pelvis?
>
> A. Oh, yes. If the thrombosis had broken off after she had started treatment, I think the outcome of death from a pulmonary emboli was much, much, much less likely.

Id. at 779-80

The defendants challenged Dr. Cambell's testimony on the basis that he used less-than-certain terminology, and the trial court granted a nonsuit. We reversed, noting that the defendants viewed particular statements in isolation rather than considering the testimony as a whole. We acknowledged that "Dr. Campbell used conditional language when discussing the possibility that Heparin and an anticoagulant would have helped," but concluded that "[c]onditional language was necessary because . . . it was impossible to state with absolute certainty that treatment would have worked." ***Id***. at 782.

However, overall, Dr. Campbell opined with certainty that the defendants' negligence increased the risk of harm to the patient and "provided a thorough explanation of how he arrived at that opinion given the evidence before him." ***Id***.

Turning to the testimony at issue in the case *sub judice*, Dr. Cartwright explained that the cancer progresses from stage zero where the cancer is in the lining of the colon, to stage one in which "the small tumor [has] just started to invade into the tissue," to stage two "when it's more advanced," to stage three "when it breaks through the wall of the colon into the surrounding organs," to stage four "when it spreads to the other organs." N.T. Trial, 4/18/24, at 27. In other words, the cancer continues to grow and spread over time. The earlier the stage when treatment begins, the greater the five-year survival rate, from eighty to ninety percent for stages one and two, "less" for stage three, and down to ten percent at stage four. ***Id***. at 22.

Dr. Cartwright further detailed that, through his forty years of treating and observing patients, as well as based upon published data, he learned that the stage of rectal cancer corresponds with how long the patient has had symptoms such as constipation and bleeding. A person with stage one or two rectal cancer of the most common type that Mr. Delavern developed had experienced symptoms for six to eight weeks, while a person presenting with stage three or four cancer, on the other hand, typically had symptoms for six to nine months. ***Id***. at 72-73.

As in ***Vicari*** and ***Rolon***, Appellants' omissions have made it impossible for the Delaverns to establish with certainty the precise staging of Mr. Delaven's cancer in July 2019 such that timely treatment would have cured Mr. Delavern or obviated the need for the extensive surgeries and other procedures he underwent after the subsequent diagnosis. However, also as in ***Vicari*** and ***Rolon***, Dr. Cartwright opined with a reasonable degree of certainty that allowing the cancer to progress untreated for thirteen months increased the risk that Mr. Delavern would experience those negative outcomes. We are unpersuaded by Appellants' arguments that it was mere speculation to conclude that Mr. Delavern was any worse off from the more-than-a-year delay because Dr. Cartwright could not be certain that Mr. Delavern did not already have stage four rectal cancer when he presented to Appellants after two months of symptoms. Rather, pursuant to ***Vicari*** and ***Rolon***, we conclude that Dr. Cartwright's testimony, viewed as a whole, offered sufficient proof of an increased risk of harm caused by Appellants' negligence to put the issue of causation to the jury.

Appellants next claim that the trial court abused its discretion in declining to award them a new trial based upon the closing arguments of the Delaverns' counsel that Appellants' maintain appealed to the jurors' emotions. By way of background, before trial began Appellants filed a motion in limine asking the court to preclude "golden rule arguments." Motion in Limine to Preclude Golden Rule Arguments, 3/25/24, at 2. The Delaverns opposed the

motion, contending, *inter alia*, that Appellants' motion did "not identify, or refer in any way to, the evidence sought to be excluded at trial," but "merely lays out the legal framework for a decision" if and when anything inappropriate was stated, at which time Appellants could raise the appropriate objection. ***See*** Response in Opposition to Motion in Limine to Preclude Golden Rule Arguments, 4/2/24, at 2. The trial court granted Appellants' motion.

On appeal, Appellants contend that counsel repeatedly violated the court's order during his closing argument, beginning with the following:

> We try cases in the community where they occur for a reason -- because it is the jury's job to decide how people act within the walls of their community. In this case you have to decide the level of care that you want for Clarion County relative to family medicine.

N.T. Trial, 4/29/24, at 115-16. Appellants stated no contemporaneous objection to this argument. The Delaverns' counsel continued: "And you've heard the scope of family medicine. It affects everyone in this community -- babies all the way through the elderly. The way our system is set up -- it is the entry point. That's where people need to go with their concerns." ***Id***. at 116. Again, there was no objection raised.

Shortly thereafter, counsel posited:

> If what you saw here is acceptable for Clarion County, say so in your verdict.
>
> But remember this -- actions rewarded are actions repeated. If what you saw in this case is against what you believe should be in this county, give me about [fifteen] more minutes and let me tell you how to fix it.

Id. Appellants still did not object.

Counsel returned to the topic of what Clarion County would accept a while later in his argument:

> What did they do that they say they meet the standard of care? Somewhere in the record that [c]ounsel showed you says -- and it's all -- we see it all the time. If persists, worsens, come back.
>
> That's not what he needed. He needed a doctor to tell him what was going on. And he never had it. He needed a facility to make sure that somebody was telling him what's going on. And he didn't have it. Nothing.
>
> Dr. Carroll signed off [on] that note in less than three minutes with PA Wilson sitting next to her and didn't even say hey, [PA Wilson], what's going on with this. Did you give him the education? Did you talk? She just assumed. Dr. Carroll just assumed.
>
> What did PA Wilson do? Just assumed. What did the facility do? They just assumed. This whole system assumed everybody else was doing their job. And when you assume and assume and assume and assume you get this. You get a failure. You get a system failure.
>
> Nobody was watching anybody. Everybody was assuming. And this guy's going to die. And they want to pick and choose on records and notes and say did you meet the standard of care. Clarion County cannot have this.

Id. at 122-23. Appellants did not raise any objection.

After discussing more of PA Wilson's interactions with Mr. Delavern, counsel argued: "We have the complete system here in this county that needs to be fixed from the top to the bottom. That's what we had. And that's what we need to do." ***Id***. at 125. At this point, the following exchange occurred:

> [APPELLANTS' COUNSEL]: Your Honor, may we approach? (Indiscernible) exactly why we make the golden rule argument

and make the argument that you cannot make the argument that this jury is doing anything for anybody other than the plaintiff and with respect to the care provided by these three defendants.

What he's saying -- and he's done it four or five times. And I'm calling it now because I tolerated it before. But he's telling the jury you need to do something to fix something system-wide.

That is not the role here. That is not the issue in this case. And that is exactly what our motions in *limine* were about. And we were told it wasn't going to happen. And here we have it.

[DELAVERNS' COUNSEL]: Golden rule. It was damages. This is not a golden rule at all. He brought up the community in his closing statement. And he brought up all about how much they care and the background of the medical field. All I'm doing is responding to that. That's it.

[APPELLANTS' COUNSEL]: That's not in response to that.

[DELAVERNS' COUNSEL]: He can't stand up and say that they care about this community.

THE COURT: No; you're saying they need to fix the system.

[DELAVERNS' COUNSEL]: I'm not saying anything. I'm saying they have a system that's failed.

THE COURT: I thought that's what you were saying.

[APPELLANTS' COUNSEL]: That's exactly what he said, Your Honor.

THE COURT: They needed to fix the system.

[APPELLANTS' COUNSEL]: That's exactly --

[DELAVERNS' COUNSEL]: They did. I'll move on.

[APPELLANTS' COUNSEL]: -- fix it (indiscernible).

THE COURT: The objection is sustained.

Id. at 125-26. The Delaverns' counsel thereafter proceeded with his argument. As noted above, Appellants did not request that the trial court give a curative instruction, and the court did not issue one *sua sponte*. Appellants did not move for a mistrial.

In their post-trial motion, Appellants cited the above-quoted portions of the Delaverns' closing argument as the basis for their entitlement to a new trial. Appellants claimed that the remarks violated the order granting their golden rule motion *in limine* such that the trial court had been required "to take affirmative steps to attempt to cure harm." Post-trial Motion, 5/8/24, at 12 (quoting ***Siegal v. Stefanyszyn***, 718 A.2d 1274, 1277 (Pa.Super. 1998)). They claimed that they were entitled to a new trial because the trial court failed to provide a curative instruction and, in any event, the harm was incurable. ***Id***. at 13.

The trial court opined that Appellants waived the claim for a new trial by failing to request a curative instruction or move for a mistrial, and the interests of justice did not mandate the grant of a new trial despite the waiver. ***See*** Opinion and Order, 6/18/24, at 4-8. Accordingly, it denied Appellants' motion.

On appeal, Appellants assert that the trial court abused its discretion in so ruling. They maintain that their challenges to the statements to which they did not offer contemporaneous objections were preserved by their motion *in limine*, such that the trial court should have *sua sponte* issued curative

instructions. ***See*** Appellants' brief at 51-55. Appellants further argue that they did not waive their right to a new trial for waiting until their post-trial motion to ask for one and the trial court should have granted a new trial in the interests of justice.[7] ***Id***. at 55-63.

For their part, the Delaverns insist that that the challenged remarks were not golden rule arguments, but proper response to the closing remarks of Appellants' counsel, who pointed out that Dr. Carroll and PA Wilson grew up in the Clarion County community and "chose to return to provide medical care for people in the community." Delaverns' brief at 28 (quoting N.T. Trial, 4/29/24, at 89). The Delaverns contend that Appellants' objections were not preserved by their motion *in limine*, and they waived any right to a new trial by not moving for a mistrial. ***Id***. at 29-34. Further, they argue that Appellants suffered no prejudice from any of the challenged remarks. ***Id***. at 37-39.

The following legal principles guide our review of this issue. The decision whether to grant a new trial is within the discretion of the trial court. We will

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[7] Appellants note that the jury during deliberations asked if the Delaverns' lawyers would be paid out of the verdict, and, after the trial court instructed it not to consider that factor, requested a calculator. Appellants cite this as proof that the golden rule argument violation resulted in an artificial inflation of the damages award. ***See*** Appellants' brief at 62-63. They then argue: "This error demands a new trial and, at bottom, remittitur for reduction of the jury's award." ***Id***. at 63. We observe that Appellants in their post-trial motion did not cite this alleged inflation of the verdict as a basis for a new trial, but only as grounds for remittitur. Further, Appellants have not challenged the court's denial of their remittitur request in this appeal. Accordingly, we do not consider the jury questions in reviewing the court's denial of Appellants' request for a new trial, nor will we review the denial of remittitur.

not reverse the trial court's decision absent an abuse of that discretion, namely when the court committed an error of law or "where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." ***Temple Estate of Temple v. Providence Care Ctr., LLC***, 233 A.3d 750, 764 (Pa. 2020) (cleaned up).

A question of whether waiver applies to a request for a new trial is one of law subject to *de novo*, plenary review. ***Id***. at 760. As to waiver, Pa.R.Civ.P. 227.1(b) provides that, with exceptions not relevant here:

> [P]ost-trial relief may not be granted unless the grounds therefor,
>
> (1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and
>
> (2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

Pa.R.Civ.P. 227.1(b). When the relief sought is a new trial, the request for such must have been timely made during trial though a motion for a mistrial. ***See Temple***, 233 A.3d at 762-63 ("Providence waived its ability to ask for a new trial where the remedy sought was not timely pursued." (cleaned up)). This is true even where the asserted basis for relief was a blatant violation of the trial judge's ruling on the matter at hand. ***See McMillen v. 84 Lumber, Inc.***, 649 A.2d 932, 934 (Pa. 1994).

Our High Court has recognized a narrow exception to the strict waiver rule "when a strong, public interest outweighs the need to protect the judicial system from improperly preserved issues." ***Id***. at 934 (cleaned up). However, this exception is implicated only in extreme situations, such as capital criminal cases, not in "routine civil case[s]." ***Id***. Further, a trial court has the authority to *sua sponte* order a new trial when the interests of justice require it. ***See Temple***, 233 A.3d at 765. As with exceptions to waiver, "the interest of justice standard remains a very high threshold, the invocation of which should occur only in rare circumstances." ***Id***. (cleaned up).

Turning to the instant case, we agree with the trial court and the Delaverns that, pursuant to ***McMillen*** and ***Temple***, Appellants waived their right to request a new trial by failing to move for a mistrial after the court sustained their objection. Appellants opted to sit back and allow counsel to move on with his argument, the court to instruct the jury, and the jury to return its verdict, without suggesting to the court that a curative instruction was necessary or that the remarks caused such prejudice that the trial could not continue. To conduct review of their belated request for a new trial "would substantially eviscerate the waiver principle and, taken to its logical conclusion, would result in endless retrials and endless appeals." ***McMillen***, 649 A.2d at 934.

Additionally, Appellants have not convinced us that the court abused its discretion in declining to *sua sponte* give a curative instruction or declare a

mistrial. The court aptly observed that this, like ***McMillen***, "is a fairly routine civil case," not a rare circumstance in which a public interest such that the issue must be addressed to protect the judicial system. ***See*** Trial Court Opinion, 8/23/24, at 9 (cleaned up). The basis for the belated new trial request in ***McMillen*** was testimony elicited in direct defiance of a trial court's ruling that a witness could not be questioned about a certain matter, yet our Supreme Court declined to bypass application of waiver. ***See McMillen***, 649 A.2d at 570-72. The remarks in the instant case were not patently verboten by the court's prior ruling.[8]

Moreover, this Court has applied waiver in an analogous situation in which the defense counsel's argument included reference to the alleged "malpractice crisis" and its impact upon doctors, where an objection was sustained and the appellants did not request a curative instruction or a mistrial, and further opined that "the remark was not such as would have

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[8] The remarks highlighted by Appellants did not squarely constitute "golden rule" arguments. The Delaverns' counsel argued that PA Wilson's negligence, the failure of Dr. Carroll to catch PA Wilson's negligence, and the failure of Health Services to enforce policies that would have caught those failures, indicated that Appellants' system of providing health care failed Mr. Delavern. Counsel then asked the jury to decide whether that defective system was acceptable in Clarion County, or whether it would encourage its continuation by failing to find for the Delaverns. While the court was within its discretion to rule in favor of Appellants when they finally objected, we cannot conclude that the statements plainly, let alone defiantly, violated the court's order by asking the jury to do unto the Delaverns what they would wish to have done unto themselves if they were in their shoes.

warranted the award of a mistrial even if one had been timely requested." ***Spino v. John S. Tilley Ladder Co.***, 671 A.2d 726, 740 (Pa.Super. 1996).[9]

Hence, neither the limited exception to waiver doctrine nor mandatory exercise of the court's inherent power to award a new trial is implicated here. Appellants thus are not entitled to relief on the court's denial of their post-trial request for a new trial based upon counsel's closing remarks.

Appellants' remaining issues concern the court's denial of their post-trial motion for a new trial as to the corporate liability of Health Services. We begin with a summary of the relevant law:

> Corporate negligence is a doctrine under which a hospital owes a direct duty to its patients to ensure their safety and well-being while in the hospital. ***Thompson v. Nason Hospital***, 591 A.2d 703, 708 (Pa. 1991) (adopting the corporate negligence doctrine in Pennsylvania jurisprudence). Under a corporate negligence theory, four general, non-delegable duties are imposed on the hospital:
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> (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment;
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> (2) a duty to select and retain only competent physicians;
>
> (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and
>
> (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.
>
> . . . A cause of action for corporate negligence arises from the policies, actions or inaction of the institution itself rather than the

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[9] Our Supreme Court granted allowance of appeal on a different issue and affirmed this Court's disposition of the case. ***See Spino v. John S. Tilley Ladder Co.***, 696 A.2d 1169 (Pa. 1997).

> specific acts of individual hospital employees. Thus, under this theory, a corporation is held directly liable, as opposed to vicariously liable, for its own negligent acts.
>
> . . . To establish a claim for corporate negligence against a hospital, a plaintiff must show that the hospital had actual or constructive knowledge of the defect or procedures that created the harm. Moreover, to make out a viable ***Thompson*** claim, a plaintiff must prove that the hospital knew or should have known of the mistake or deficiency. In a corporate negligence action against a hospital, the element of actual or constructive notice is critical because the corporate negligence doctrine contemplates a kind of systemic negligence in the actions and procedures of the hospital itself rather than in the individual acts of its employees.

Ruff v. York Hosp., 257 A.3d 43, 49–50 (Pa.Super. 2021) (cleaned up).

Initially, the application of ***Thompson*** to allow direct liability against health care corporations other than hospitals was unclear, with this Court reaching divergent conclusions based upon whether each type of entity offered comprehensive care akin to a hospital. ***See Hyrcza v. West Penn Allegheny Health Sys.***, 978 A.2d 961 (Pa.Super. 2009) (ruling direct claim was available against corporation composed of doctors in multiple disciplines hired to oversee and run rehabilitation center); ***Sutherland v. Monongahela Valley Hosp.***, 856 A.2d 55, 62 (Pa.Super. 2004) (holding ***Thompson*** claim was not viable against orthopedic physicians' practice group); ***Shannon v. McNulty***, 718 A.2d 828, 835-36 (Pa.Super. 1998) (concluding HMO was sufficiently analogous to a hospital where it "interject[ed] itself into the rendering of medical decisions affecting a subscriber's care").

However, in ***Scampone v. Highland Park Care Ctr., LLC***, 57 A.3d 582 (Pa. 2012), our Supreme Court rejected the sufficiently-hospital-like litmus

test for determining whether the corporation in question had a non-delegable duty to the patient in question. Instead, whether a direct duty of care exists is determined by traditional tort principles focused upon the relationship between the parties. ***Id***. at 606-07 (referencing Restatement (Second) of Torts § 323 and ***Althaus v. Cohen***, 756 A.2d 1166 (Pa. 2000)).[10]

With these principles in mind, we turn to Appellants' twofold challenge to the imposition of corporate liability upon Health Services. First, they assert that Health Services is not a "type subject to a corporate negligence claim" because "physician's offices do not perform the role of a 'comprehensive health center with responsibility for arranging and coordinating the total health of its patients.'" Appellants' brief at 63-64 (quoting ***McClure v. Parvis***,

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[10] The referenced Restatement provision states as follows:

> 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 such harm, or
> >
> > (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323. The factors impacting the existence of a duty enumerated in ***Althaus*** are: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." ***Althaus***, 756 A.2d at 1169.

294 F.Supp.3d 318, 326 (E.D.Pa. 2018)). Second, Appellants contend that the evidence was insufficient to establish the notice and causation elements of a corporate negligence claim identified in ***Thompson***. ***Id***. at 66-68.

We discern that Appellants' challenges suggest their entitlement to judgment as a matter of law, not a new trial. ***See Scampone***, 57 A.3d at 600 (indicating that the existence of a duty is a legal question); ***Butler v. Flo-Ron Vending Co.***, 557 A.2d 730, 736 n.6 (Pa.Super. 1989) ("[The appellant] has cited no authority, and we have found none, which authorizes the remedy of a new trial where the evidence is found to be insufficient. On the contrary, where the evidence is insufficient, the remedy which is granted in civil cases is a [JNOV]."). Accordingly, Appellants arguably waived their claims related to corporate liability by failing to move for JNOV in their post-trial motion.

Even if we do not find waiver on that basis, we nonetheless conclude Appellants waived these final issues. First, in challenging the viability of ***Thompson*** liability to Health Services, Appellants cite a federal district court case of ***McClure*** for the proposition that "[t]o determine whether a non-hospital entity can be held liable for corporate negligence, courts should determine whether the corporate defendant exercises oversight and control of the medical professional providing care." Appellants' brief at 64. Appellants do not in their principal brief mention the controlling ***Scampone*** decision, let alone discuss its mandate to apply § 323 of the Restatement and the ***Althaus*** factors or argue why we should conclude that the specific relationship between

Health Services and Mr. Delavern was such that it owed him no non-delegable duty.[11] Moreover, the non-binding federal ***McClure*** decision rejected the contention of a physician's practice group that it did not owe the patient a direct duty of care. ***See McClure***, 294 F.Supp.3d at 328. This Court will not scour the record and make Appellants' arguments for them. ***See***, ***e.g.***, ***Coulter v. Ramsden***, 94 A.3d 1080, 1088 (Pa.Super. 2014). Consequently, Appellants waived their challenge to the trial court's conclusion that Health Care owed a direct duty of care to Mr. Delavern.

As for their contentions that the Delaverns offered insufficient evidence to prove the elements of their ***Thomson*** claim, Appellants waived their right to post-trial relief by failing to move for a nonsuit or directed verdict on that basis.[12] ***See Haan v. Wells***, 103 A.3d 60, 68 (Pa.Super. 2014) ("[I]t is clear that, in order to preserve a challenge to the sufficiency of the evidence, the Haans first were required in this non-jury trial to move either for a nonsuit or a directed verdict."); ***Bennyhoff v. Pappert***, 790 A.2d 313, 317 (Pa.Super. 2001) (deeming evidentiary sufficiency claim waived when it was not raised

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[11] Appellants belatedly acknowledge ***Scampone*** in their reply brief, but still fail to offer a meaningful analysis in accordance with that decision's mandates. ***See*** Appellants' reply brief at 24-25.

[12] The Delaverns, in arguing for a finding of waiver, repeatedly cite unpublished memorandum decisions filed by this Court prior to May 2, 2019. ***See*** Delaverns' brief at 42-44. We admonish counsel that, with exceptions not pertinent herein, such decisions may not be cited for any purpose. ***See*** 210 Pa. Code § 65.37(B). Accordingly, we have not considered those decisions in conducting our review.

in a motion for a directed verdict, but rather for the first time in a post-trial motion seeking a new trial rather than JNOV). Thus, no relief is available.

For the foregoing reasons, Appellants have provided this Court with no basis to disturb the jury's verdict or the judgment entered upon it. Therefore, we affirm.

Judgment affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 01/06/2025