NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

FRANK MEARS,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HASSOUNA SAIDI AND KIMBERLY SAIDI,	:	
	:	
	:	
Appellants	:	No. 2761 EDA 2011

Appeal from the Judgment entered August 29, 2011,
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No: 002169 Feb. Term 2009

FRANK MEARS,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KIMBERLY SAIDI,	:	
	:	
Appellant	:	No. 2762 EDA 2011

Appeal from the Judgment entered August 29, 2011,
in the Court of Common Pleas of Philadelphia County,
Civil Division, at No: 002169 Feb. Term 2009

BEFORE: LAZARUS, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.: Filed: March 13, 2013

In these consolidated appeals, Hassouna Saidi and Kimberly Saidi (collectively, the Saidis) appeal from the judgment entered on August 29, 2011, following a jury verdict in favor of Frank Mears and against the Saidis in this slip-and-fall case. We affirm.

*Retired Senior Judge assigned to the Superior Court.

Succinctly, the facts of the case are as follows. On February 18, 2007, Mears slipped and fell on ice and snow covering the sidewalk in front of property owned by Mrs. Saidi, suffering serious injuries to his shoulder and wrist. Mears sued Mrs. Saidi, who testified at her deposition that Mr. Saidi was responsible for the snow removal at the property in question. Mears filed another action naming both Saidis as defendants. After a two-day trial of the consolidated cases, a jury returned a $175,000 verdict in favor of Mears, finding Mrs. Saidi 60% responsible and Mr. Saidi 40% responsible. The Saidis filed post-trial motions which were denied by order of August 29, 2011, which also entered judgment in favor of Mears at both docket numbers. The Saidis filed timely notices of appeal at each docket number, and both the Saidis and the trial court complied with Pa.R.A.P. 1925. This court consolidated the two appeals *sua sponte*.

The Saidis present the following questions for our review, which we have re-ordered to correspond with the trial court's opinion.[1]

> [A.] Was there evidence of significant elevations or the size and character of snow and ice?
>
> [B.] Was it error to allow a new factual theory barred by the statute of limitations?
>
> [C.] Did [Mears] prove choice of way?

[1] The Saidis raised two additional issues in their 1925(b) statement, addressed by the trial court at parts D and I of its opinion, which they have abandoned on appeal.

[E.] Was it error to allow a new factual theory barred by the statute of limitations?

[F.] Does Restatement 2nd Torts §324A create spousal liability?

[G.] Was it error to allow testifier to opine on causation?

[H.] Was administrative finding [that Mears was] able to engage in light duty work relevant?

[J.] Was it error to enter a duplicate judgment at separate dockets on a single jury verdict?

Saidis' Brief at 3 (trial court answers omitted).

Following our review of the certified record, the briefs for the parties, and the relevant law, we conclude that the opinion of the Honorable Patricia A. McInerney thoroughly and correctly addresses and disposes of the Saidis' issues and supporting arguments. Accordingly, we adopt the trial court's opinion of December 19, 2011 as our own, and affirm the court's disposition of the Saidis' issues on the basis of that opinion. The parties shall attach a copy of the trial court's December 19, 2011 opinion in the event of further proceedings.

Judgment affirmed.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

FRANK MEARS	:	DECEMBER TERM, 2007
	:	
v.	:	NO. 4085
	:	
KIMBERLY SAIDI	:	

FRANK MEARS	:	FEBRUARY TERM, 2009
	:	
v.	:	NO. 2169 (Lead Case)
	:	
HASSOUNA SAIDI and KIMBERLY SAIDI	:	

OPINION

BY: Patricia A. McInerney, J. December 19, 2011

Judgment having been entered, this is an appeal from, *inter alia*, the orders denying the defendants' motions for post-trial relief.

I. BACKGROUND

On December 27, 2007, Frank Mears (sometimes, "Plaintiff") commenced an action against Kimberly Saidi for a slip and fall he allegedly suffered on February 18th of that year. In the complaint, Plaintiff averred that at or about 1:00 p.m. that day he was walking on a sidewalk adjacent to a property owned and/or controlled by Mrs. Saidi "when he was caused to slip, trip and/or fall as a result of hills and ridges of ice which had formed on a portion of said sidewalk." (Compl., 12/27/07, ¶¶ 3-4.) The property Mrs. Saidi was alleged to own or control was 1600-02 S. 22nd Street, Philadelphia, PA.

On February 16, 2009, Plaintiff commenced a second action for the aforementioned slip and fall he allegedly suffered on February 18, 2007. This time he named Kimberly Saidi and her husband, Hassouna Saidi, as defendants (collectively, "Defendants"). In this complaint, Plaintiff averred Mrs. Saidi and/or Mr. Saidi owned and/or controlled the property. Plaintiff, however, also averred Mr. Saidi was acting as Mrs. Saidi's agent, servant, workman and/or employee at all times material to the complaint. Alternatively, Plaintiff further averred that prior to the date of the incident, Mr. Saidi "gratuitously, contractually, and/or for consideration, undertook to inspect, supervise, manage and/or maintain said premises including the abutting sidewalk, on behalf of [Mrs. Saidi], and to keep it in reasonably safe condition...." (Compl., 02/16/09, ¶ 18.)

On June 2, 2009, counsel for Plaintiff file a motion to consolidate the cases. Plaintiff's motion was subsequently granted and the cases were consolidated for purposes of discovery and trial. On April 5, 2011, the cases proceeded to trial before this court and a jury.

At trial, Plaintiff first called Mrs. Saidi. Mrs. Saidi testified her husband owns two pizza shops under the name "South Side Pizza." (N.T., 4/5/11, p. 5.) She also testified she was currently unemployed and had last worked years ago for her husband's pizza shops. (N.T., 4/5/11, pp. 4-5.)

Mrs. Saidi was asked about the 1600 S. 22nd Street property. Mrs. Saidi testified she purchased the basically abandoned property for $30,000 in August of 2003. (N.T., 4/5/11, p. 5-6.) She further testified that the property was purchased with the intention of putting a pizza shop or something similar there. (N.T., 4/5/11, p. 6.) The property Mrs. Saidi purchased was within a few blocks of an existing South Side Pizza location. (N.T., 4/5/11, pp. 6-9.)

With regard to the maintenance of the property, Mrs. Saidi testified as follows:

> Q. Mrs. Saidi, isn't it true that your husband was responsible for maintaining the building that we see there that you purchased back in 2003?

A. Yes.
Q. Isn't it true that whenever there would be snow, it was your husband who you relied upon to remove the snow from the property, correct?
A. Yes.
Q. Isn't it true that there were no other subcontractors or snow removal services that would ever remove any snow from that property other than your husband, correct?
A. Just my husband.

(N.T., 4/5/11, pp. 9-10.) When asked whether she understood when she purchased the property that she was required to remove snow from the sidewalk after it snowed, Mrs. Saidi testified: "No, not really. No." (N.T., 4/5/11, p. 10.) When asked "Who did you think was going to remove the snow?" Mrs. Saidi answered, "My husband." (N.T., 4/5/11, p. 10.)

In terms of ownership of the property, Mrs. Saidi testified as follows:

Q. Now, does your husband own the building?
A. No.
Q You claim that you own that property by yourself, right?
A. Yes.

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Q. It's fair to say that you were married at the time you purchased this building for $30,000, correct?
A. Yes.
Q. You weren't working anywhere, correct?
A. I was working with my husband.
Q. Did your husband actually pay the $30,000 for the building?
A. He gave me some money.
Q. Like $30,000?
A. He gave me money. He gave me money.
Q. You don't know who pays the taxes on that building; isn't that true?
A. I guess I pay the taxes on it. My husband takes care of this.
Q. Because it's his building, right?
A. No. It's mine.
Q. When ... asked ... at your deposition ... who paid the taxes, you didn't know who paid the taxes back then. Did you find that out after the deposition?
A. No, but I have to pay the taxes.

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Q. But you didn't know who actually paid the taxes, right?
A. No. I paid the taxes.
Q. You do recall at your deposition that you didn't know who paid the taxes.
A. No, I don't recall.

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Q. Can you turn to Page 17, please. Actually, turn to Page 18, if you could. Line 6 you were asked the question: "The property referred to in S-1, 1600-02 South 22nd Street Philadelphia, who pays the taxes on the property?"
Do you see your answer?
ANSWER: "I don't know."
QUESTION: "You don't pay it?"
ANSWER: "No."
Do you recall ... that testimony...?
A. No, I don't recall.
Q. As part of the purchase of this property, there was a change of zoning application filed, correct? Do you see that paperwork?

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Q. Down at the bottom left-hand corner says:
"Owner, Hassouna Saidi." That's your husband, right?
A. Yes.
Q. Do you know why, when the zoning application was applied for, your husband was listed as the owner of the property?
A. No.

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Q. Under the scope of work, the alterations that were requested, says that your husband wanted to put in a pizza shop and office on the second floor. Do you see that?
A. Yes.
Q. Do you have any idea why your husband would want to open a pizza --
A. I cannot speak for my husband.
Q. You don't know?
A. No.

(N.T., 4/5/11, pp. 10-14.)

Mrs. Saidi was also asked a series of questions about renovations which had been done to the building subsequent to her purchase. Here, Mrs. Saidi testified she did not who had painted the building, stating her husband had someone paint it. (N.T., 4/5/11, p. 15.) She also testified she did not know who had retrofitted the windows, stating her husband had someone do it. (*See* N.T., 4/5/11, p. 15.)

Plaintiff's next witness at trial was Mr. Saidi. Mr. Saidi testified that he is the owner of two South Side Pizza shops in Philadelphia. (*See* N.T., 4/5/11, p. 22.) According to Mr. Saidi, he opened the first of these shops in 1996 at 920 S. 20th Street. (N.T., 4/5/11, p. 23.) The second

one is located on Point Breeze Avenue about a half block from his wife's building at 1600 S. 22nd Street. (N.T., 4/5/11, p. 22.) Mr. Saidi, however, then testified that he sold the Point Breeze location some seven or eight years ago, before his wife purchased 1600 S. 22nd Street. (N.T., 4/5/11, pp. 23-24.)

Regarding the purchase and renovation of 1600 S. 22nd Street, Mr. Saidi testified as follows:

> Q. Did you use the money from [the sale of the Point Breeze location] to purchase the building at 1600 South 22nd Street?
> A. My wife bought South 22nd Street.
> Q. I understand.
> Q. Did she use the money you gave to her?
> A. Does she use to purchase?
> Q. Somebody paid $30,000 for the building. Was that your money?
> A. That's my wife.
> Q. She said that she got the money from you or got some money from you.
> A. She got some.
> Q. How much of the 30,000?
> A. I don't remember.
> Q. Was it more than half of the money?
> A. I don't remember.
>
> ***
>
> Q. Your wife, when I was asking her questions, said she didn't know who did all the renovations to the property that we referenced between Exhibit 9 and Exhibit 13.
> A. She was. I take care of that.
> Q. You hired all the contractors?
> A. Yes.
> Q. You paid for all that?
> A. Yes.

(N.T., 4/5/11, pp. 23-27.)

Regarding snow removal at 1600 S. 22nd Street, Mr. Saidi testified that when his wife purchased the property he let her know that she had to have snow removed from the sidewalk and that he would take care of removing it for her after it snowed. (*See* N.T., 4/5/11, pp. 27-28.) Mr. Saidi testified he never hired anyone to remove snow, but rather would take someone who

worked for him and the two would go shovel the snow. (*See* N.T., 4/5/11, pp. 28-29.) When asked about snow removal in February of 2007, Mr. Saidi said every time it snowed he would take someone and go shovel. (N.T., 4/5/11, p. 29.) Mr. Saidi, however, said he had no records to show he removed snow and ice from the property in February of 2007. (N.T., 4/5/11, p. 29.) Mr. Saidi further testified that his wife never removed snow from the property.

Lastly, Mr. Saidi confirmed that property was currently for sale. (N.T., 4/5/11, p. 30.) When asked if the money from a sale would go to both himself and his wife, Mr. Saidi testified he did not know. (N.T., 4/5/11, p. 30.)

The next witness at trial was the plaintiff, Frank Mears. Mr. Mears testified he was injured on February 18, 2007 when he slipped and fell on snow covered lumpy ice which was located on the sidewalk in front of the 1600 S. 22nd Street property. (*See* N.T., 4/5/11, pp. 36-43.) More specifically, Mr. Mears testified at the time of the incident he was on his way to visit a friend who lived about four blocks away from him. (N.T., 4/5/11, p. 37.) He explained that it was cold on the date of the incident, but that it was not raining or snowing at the time. (N.T., 4/5/11, p. 38.) He stated the last time it snowed or rained was about four days earlier, which he remembered because he and his neighbors had been out shoveling the sidewalks in front of their properties after that snowfall. (*See N.*T., 4/5/11, p. 38.)

Mr. Mears identified a photograph which showed his apartment at the time and the route he was planning to take to visit his friend. (N.T., 4/5/11, p. 38.) Using the photograph, Mr. Mears explained that the sidewalk in front of his house as well his neighbors' houses was clear "because everybody did their pavement." (*See* N.T., 4/5/11, p. 39.) Mr. Mears testified he did not have any problems walking from his house until he got to the sidewalk in front of the

defendant's building. (*See* N.T., 4/5/11, pp. 39-40.) Mr. Mears was then asked to explain what happened, and testified as follows:

> A. I walked up on the sidewalk. I thought it was snow. When I got on top of it it was lumpy, felt, like, real lumpy. I just, like, lost my balance.
> Q. What was the lumpy stuff that you are describing?
> A. It was ice.
> Q. Could you see the ice?
> A. Like, covered with snow, but the ice was underneath it. It was, like, lumps.
> Q. Did you try to walk across that?
> A. Yes, I tried.
> Q. Did you know there was ice there before you crossed across the crosswalk?
> A. No.
> Q. When you found out there was this ice underneath the snow, did you do anything?
> A. I tried to get off. You know, when you slip -- can I get up and show you?
> Q. Did you end up falling?
> A. Yes.
> Q. Was it because of the ice?
> A. Yes.

(N.T., 4/5/11, pp. 40-41.)

Regarding the snow and ice on the sidewalk in front of the 1600 S. 22nd Street property, Mr. Mears explained that after he fell he sat there and observed what he had slipped on. (N.T., 4/5/11, pp. 43-44.) He referred to it as "lumpy ice." (N.T., 4/5/11, p. 43.) Mr. Mears also stated that it did not look like anyone had tried to shovel or that anyone had applied any type of snow and ice melt. (N.T., 4/5/11, p. 43.)

Regarding the fall itself, Mr. Mears testified he fell backwards and, having extended his arm to try and catch himself, hit his right wrist, shoulder, and head on the ground. (*See* N.T., 4/5/11, pp. 42-43.) When he was eventually able to get back up, he testified he walked back to his house. (N.T., 4/5/11, pp. 42-45.) At home, Mr. Mears stated he tried to treat himself with hot towels, aspirin, and rest. (N.T., 4/5/11, p. 46.) Mr. Mears, however, explained that the pain got progressively worse so he went to the hospital the next day. (N.T., 4/5/11, pp. 46-47.) There

he stated the doctors x-rayed his arm and shoulder, put his arm in a sling, and gave him Percocet for the pain and a referral form so that he could go see an orthopedic doctor. (*See* N.T., 4/5/11, pp. 47-48.) When Mr. Mears later saw the orthopedic doctor, the orthopedic doctor put his arm in a hard cast. (*See* N.T., 4/5/11, p. 50.)

Mr. Mears also testified he received pain management treatments for six months. (N.T., 4/5/11, p. 52.) He described the injections he would get in the back of his right shoulder. (N.T., 4/5/11, pp. 52-53.) He stated the injections did not really help, and in fact would subsequently irritate his arm throughout the day. (N.T., 4/5/11, pp. 52-53.)

At trial, Mr. Mears testified he continues to experience right arm and shoulder pain. (N.T., 4/5/11, pp. 68-70.) According to Mr. Mears, he has troubling sleeping as a result of his pain and takes medication to help him sleep. (N.T., 4/5/11, p. 68.) He also stated doctors have recommended that he undergo shoulder surgery, but he worries surgery might make the problem even worse. (N.T., 4/5/11, p. 69.)

At trial, Mr. Mears also testified that he lost both of his jobs as the result of not being able to effectively use his right arm. Prior to February 18, 2007, Plaintiff testified he had worked part-time as "security" at a local supermarket and part-time in hotel maintenance. (N.T., 4/5/11, pp. 33-34.) He testified he was paid $120 per week for the security job and $9.00 per hour for the maintenance work. (*See* N.T., 4/5/11, pp. 33-34.) According to Mr. Mears, he had a 6th grade education and is not able to read or write. (N.T., 4/5/11, p. 35.) Mr. Mears stated his lack of education did not prevent him being able to work as a security guard or from doing maintenance work. (N.T., 4/5/11, pp. 35-36.)

According to Mr. Mears, he tried to resume his maintenance work following the accident, but was unable to do so because certain work such as buffing floors required him to be able to

use both arms. (*See* N.T., 4/5/11, pp. 57-59.) Mr. Mears also testified he tried to resume his security job, but was eventually let go from that job as well, a job he had held for approximately twenty-two years, because with the effective use of just one arm, he could no longer satisfactorily stop shoplifters. (*See* N.T., 4/5/11, pp. 63-65.) Plaintiff testified he never fully regained the use of his right arm following the accident and cannot lift weights or extend his arm over his head like he could before he fell. (*See* N.T., 4/5/11, p. 66.)

Finally, Plaintiff presented by videotape the testimony of his expert, Paul J. Sedacca, M.D. (N.T. 4/5/11, p. 112.) Dr. Sedacca was offered to testify as an expert in the areas of internal medicine and disability evaluation. (Sedacca Dep. pp. 10.) During the *voir dire* direct examination, Dr. Sedacca testified he graduated from a Mexican medical school in 1976. (Dep. of Paul J. Sedacca, M.D. ("Sedacca Dep.") p. 6, May 19, 2010.)[1] Thereafter he successfully completed a transitionary program at Queens Hospital Center in New York for American born, foreign educated doctors before beginning his three-year residency training in the field of general internal medicine at Episcopal Hospital in Philadelphia. (Sedacca Dep. pp. 6-7.)

Dr. Sedacca testified he has been licensed to practice medicine in Pennsylvania since 1978 and that he is currently an attending physician at Methodist and Thomas Jefferson University hospitals in Philadelphia. (*See* Sedacca Dep. pp. 7-8.) Dr. Sedacca also stated he is currently on staff at Frankford Hospital. (Sedacca Dep. p. 8.) In addition to being a practicing physician, Dr. Sedacca testified he is also a (1) disability evaluator and (2) panel physician for the Philadelphia Fraternal Order of Police under the Pennsylvania Heart and Lung Act. (*See* Sedacca Dep. p. 8.)

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[1] The transcript of Dr. Sedacca's videotaped deposition was marked at trial as "Plaintiff's Exhibit 17."

According to Dr. Sedacca, his area of specialty is internal medicine. (Sedacca Dep. p. 8.) Dr. Sedacca explained that the field of internal medicine encompasses multiple areas including cardiology, rheumatology, and neurology. (Sedacca Dep. p. 9.) He testified he customarily sees people who have suffered shoulder and wrist injuries and that he also treats patients who have nerve injuries which affect their extremities. (Sedacca Dep. p. 9.) He further testified he sometimes refers patients out to specialists depending on the circumstances and would rely upon their reports in making his own diagnoses and recommending treatment. (*See* Sedacca Dep. p. 9.)

On *voir dire* cross-examination, Dr. Sedacca testified he has had exposure to the field of neurology and neurosurgery in his residency training and in his continuing medical education classes. (Sedacca Dep. p. 12.) As an internist, Dr. Sedacca testified he does not read x-rays, MRIs, or CT scans, but he customarily relies upon reports from radiologists in treating his patients. (Sedacca Dep. p. 13.)

Regarding disability evaluation, Dr. Sedacca testified he is a fellow of the American Academy of Disability Evaluation Physicians. (Sedacca Dep. p. 15.) He explained the testing by that organization included testing in neurology and orthopedics. (*See* Sedacca Dep. pp. 17-18.) As a disability evaluator, he also explained he would customarily rely on reports from neurologists who actually perform EMG and nerve conduction tests in reaching his clinical diagnosis. (*See* Sedacca Dep. pp. 17-18.) Dr. Sedacca further testified that in making disability evaluations for the Heart and Lung Act as a panel physician he actively evaluates police officer patients, and then based upon the compilation of the patient's history, physical, and test results determines fitness to return to work. (*See* Sedacca Dep. p. 18.)

On direct examination, Dr. Sedacca testified Plaintiff presented to his office on January 22, 2009 for a physical. (Sedacca Dep. pp. 19-20.) Having reviewed certain medical records for Plaintiff prior to that time, Dr. Sedacca testified he took a history and conducted a physical examination of Plaintiff. (Sedacca Dep. pp. 19-20.)

In terms of the medical records he reviewed, Dr. Sedacca explained to the jury that MRIs taken after the fall showed a tear of the scapholunate ligament in Plaintiff's right wrist and a tear of the supraspinatus muscle in Plaintiff's right shoulder. (Sedacca Dep. pp. 23-24.) Using a schematic drawing of a shoulder, he explained to the jury where the supraspinatus muscle is located and how it was torn as seen in the MRI film. (Sedacca Dep. p. 25.) The doctor testified a torn supraspinatus muscle is an injury consistent with someone falling and putting their arm out in order to try and break their fall as the forces from the impact travel through the arm to the shoulder. (Sedacca Dep. pp. 25-26.) Regarding Plaintiff's wrist, the doctor noted the x-ray from the emergency room did not show a fracture, but that the MRI showed a tear of the scapholunate ligament. (Sedacca Dep. p. 26.) Again, the doctor testified this injury is consistent with someone putting their arm out in order to try and break a fall. (Sedacca Dep. p. 26.)

Dr. Sedacca also explained to the jury that he reviewed the report of Dr. Steven Grossinger, a board certified neurologist who performed EMG and nerve conduction velocity ("NVC") tests on Plaintiff in July of 2007. He testified he is familiar with how these tests are performed and customarily relies on the reports from these tests in formulating his own diagnoses as part of his practice. (*See* Sedacca Dep. pp. 30-31.) Dr. Sedacca explained to the jury these reports indicated Plaintiff had a right upper trunk brachial plexopathy. (Sedacca Dep. p. 31.) In layman's terms he explained that diagnosis indicates an injury to the nerves which run

across the shoulder region. (Sedacca Dep. pp. 31-32.) He said this injury is consistent with Mr. Mears' complaints of numbness and tingling in his right hand. (Sedacca Dep. p. 32.)

Based upon the history he obtained, the physical examination he performed, and his review of various medical records, including objective diagnostic studies, Dr. Sedacca opined to a reasonable degree of medical certainty that Plaintiff suffered an internal derangement to both his right shoulder and right wrist as a result of the fall. (*See* Sedacca Dep. pp. 37-38, 42.) Dr. Sedacca further opined the injuries from the fall are permanent in the absence of surgical intervention. (Sedacca Dep. p. 38.) The doctor stated without the surgery Plaintiff has near full loss of the use of his right arm for lifting and carrying purposes. (Sedacca Dep. p. 39.) He, however, further opined surgery is not a guaranteed fix for the tears that Mr. Mears has and will not correct Mr. Mears nerve injuries. (Sedacca Dep. p. 38.) Regarding disability, Dr. Sedacca opined Plaintiff has been and remains unable to work primarily due to the nerve injury and the derangement of his right shoulder. (Sedacca Dep. p. 40.)

Following the conclusion of the two-day trial, the jury found Defendants were negligent and their negligence caused injuries to Plaintiff in the amount of $175,000. Finding Plaintiff to be free of any contributory negligence, the jury apportioned Mrs. Saidi with 60% of the causal negligence and Mr. Saidi with 40%. Presumably because the two underlying actions had been consolidated, Defendants filed two identical motions for post-trial relief. Both motions sought to have this court modify or change the verdict for Plaintiff and enter judgment for Defendants. By orders dated August 22, 2011 and docketed August 29, 2011, this court denied the motions and entered judgment in favor of Plaintiff.

On September 26, 2011, Defendants filed timely notices of appeal and this court ordered Defendants to file a Pa. R. App. P. 1925(b) statement. Separate 1925(b) statements were filed

for each of the underlying actions. As they relate to matters concerning the actions or inactions of this court, the 1925(b) statements are the same and Defendants complained:

> 1. The trial court erred in refusing a nonsuit, in refusing to direct a verdict and/or in refusing to instruct the jury of the necessity to find significant elevations and/or testimony of the size and character of snow and/or ice.
>
> 2. The trial court erred in refusing a nonsuit, in refusing to direct a verdict and/or in refusing to instruct the jury that plaintiff had introduced a new cause of action of a localized patch of snow or ice subsequent to the running of the statute of limitations.
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> 3. The trial court erred in refusing a nonsuit, in refusing to direct a verdict and/or in refusing to instruct the jury that plaintiff had failed to prove choice of way.
>
> 4. The trial court erred in allowing evidence of a prior zoning application.
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> 5. The trial court erred in allowing plaintiff to compel the testimony of defendants against their spouse.
>
> 6. The trial court erred in refusing a nonsuit, in refusing to direct a verdict and in instructing the jury on supposed liability under Restatement of Torts 2nd §324A and/or imposing liability on husband defendant arising out of a supposed gratuitous undertaking.
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> 7. The trial court erred in allowing the testimony of disability evaluator Dr. Paul J. Sedacca based exclusively upon the opinions and medical reports of other medical providers.
>
> 8. The trial court erred in allowing the testimony of disability evaluator Dr. Paul J. Sedacca as lacking qualifications to read and interpret relevant orthopedic and neurologic testing.
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> 9. The trial court erred in precluding evidence of the findings of the social security administration that plaintiff was at all times subsequent to February 18, 2007 medically capable of engaging light duty work.
>
> 10. The jury award was excessive under all of the evidence, there being insufficient evidence of pain and suffering, surgery and permanency.
>
> 11. The trial court erred in the entry of duplicate jury verdicts against Kimberly Saidi at separate court terms and numbers.

(Defs.' 1925(b) Statement, No. 0912-2169, ¶¶ 2-12 (renumbered above as "1-11"); Def. Kimberly Saidi's 1925(b) Statement, No. 0712-4085, ¶¶ 2-12 (renumbered above as "1-11").)[2]

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[2] Two pre-trial orders of the Honorable Gary F. DiVito are also complained of on appeal. The substance of Judge DiVito's orders will not be addressed in this opinion.

II. DISCUSSION

Judgment n.o.v. is an extreme remedy and should only be entered in the clearest of cases. *Moure v. Raeuchle*, 604 A.2d 1003, 1007 (Pa. 1992). "[T]he evidence must be considered in the light most favorable to the verdict winner, and [the verdict winner] must be given the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his [or her] favor." *Id.* (quotations omitted). Moreover, "a judge's appraisement of evidence is not to be based on how [the judge] would have voted had he [or she] been a member of the jury, but on the facts as they come through the sieve of the jury's deliberations." *Id.*

"There are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." *Id.* (citations omitted). "With the first a 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." *Id.*

In this case, considering the evidence in the light most favorable to Plaintiff, Defendants are not entitled to judgment n.o.v. Nor are Defendants entitled to any other relief.[3] Accordingly, this court's orders denying the motions for post-trial relief should be affirmed.

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[3] In their post-trial motions, Defendants only asked this court to modify or change the verdict, and enter judgment in their favor. The proper requested remedy for most of Defendants' complaints, however, appears to be a new trial. In the event that the Superior Court does not find Defendants' should be bound by their election, this court addresses all of the matters Defendants complain of on appeal, including those where the proper remedy is a new trial. *See, e.g.*, *Loughery v. Barnes*, 124 A.2d 120 (Pa. Super. Ct. 1956) (in deciding not to grant a new trial, stating: "Here, ... the defendant definitively elected to stand on her motion for judgment n.o.v. and take her chances on that motion alone. Under the circumstances we are all of the opinion

A. Hill and ridges doctrine.

Defendants complain this court "erred in refusing a nonsuit, in refusing to direct a verdict and/or in refusing to instruct the jury of the necessity to find significant elevations and/or testimony of the size and character of snow and/or ice." (Defs.' 1925(b) Statements ¶ 2, as renumbered above "1.") Here, Defendants intimate the "hills and ridges" doctrine and argue it was applicable because "these cases involve a claim pertaining to an alleged snow covered, icy sidewalk[.]" (Defs.' Mem. p. 2.) Then Defendants primarily argue Plaintiff's evidence failed to meet the standard because Plaintiff just testified "that the alleged ice and snow was 'lumpy.'" (Defs.'s Mem. p. 5.)

The hills and ridges doctrine provides:

> that an owner or occupier of land is not liable for general slippery conditions, for to require that one's walks be always free of ice and snow would be to impose an impossible burden in view of the climatic conditions in this hemisphere. Snow and ice upon a pavement create merely transient danger, and the only duty upon the property owner or tenant is to act within a reasonable time after notice to remove it when it is in a dangerous condition.

Harmotta v. Bender, 601 A.2d 837, 841 (Pa. Super. Ct. 1992), *quoting Gilligan v. Villanova Univ.*, 584 A.2d 1005, 1007 (Pa. Super. Ct. 1991). To recover for a slip and fall on an ice- or snow-covered sidewalk under the hills and ridges doctrine, a plaintiff must prove:

> (1) that snow and ice had accumulated on the sidewalk in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians travelling thereon; (2) that the property owner had notice, either actual or constructive, of the existence of such condition; (3) that it was the dangerous accumulation of snow and ice which caused the plaintiff to fall.

Harmotta, 601 A.2d at 841.

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she should be bound by her election...."). *See also* Pa. R.C.P. 227.1(d) ("A motion for post-trial relief shall specify the relief requested and may request relief in the alternative.").

The doctrine, however, is not without limitations. *Id.* at 842. A significant limitation to the doctrine is that proof of "hills and ridges," is only necessary "'when it appears that the accident occurred at a time when general slippery conditions prevailed in the community....'" *Id., quoting Tonik v. Apex Garages, Inc.*, 275 A.2d 296, 298 (Pa. 1971). The doctrine does not apply when accident occurred as the result of a localized patch of ice. *Harmotta*, 601 A.2d at 842.

In this case, proof of hills and ridges was not necessary because it did not appear from the evidence presented that the accident occurred at a time when general slippery conditions prevailed in the community. Rather, it appeared the accident occurred as the result of a localized patch of ice on the sidewalk in front of the 1600 S. 22nd Street property.

At trial, Plaintiff testified that he was injured when en route to visit a friend who lived about four blocks away from him, he slipped and fell on snow covered lumpy ice which was located on the sidewalk in front of 1600 S. 22nd Street. (*See* N.T., 4/5/11, pp. 36-43.) Plaintiff testified that it was cold on the date of the incident, but that it was not raining or snowing at the time. (N.T., 4/5/11, p. 38.) He further testified the last time it snowed or rained was about four days earlier, which he remembered because he and his neighbors had been out shoveling the sidewalks in front of their properties after that snowfall. (*See N*.T., 4/5/11, p. 38.)

Using a photograph, Plaintiff testified at trial that the sidewalk in front of his house as well his neighbors' houses was clear "because everybody did their pavement." (*See* N.T., 4/5/11, p. 39.) Plaintiff further testified he did not have any problems walking from his house until he got to the sidewalk in front of the defendant's building. (*See* N.T., 4/5/11, pp. 39-40.)

Plaintiff's testimony established he fell on a localized patch of snow covered ice which was not the result of a recent snowfall. His testimony also established he did not fall during a period of generally slippery conditions. Accordingly, the hills and ridges doctrine did not apply.

"A trial court must instruct the jury on the correct legal principles applicable to the facts presented at trial." *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 550 (Pa. Super. Ct. 2009). As pertinent here, "[e]rror in a charge is sufficient ground for a new trial, if the charge as a whole is inadequate...." *Stewart v. Motts*, 654 A.2d 535, 540 (Pa. 1995). "A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to fundamental error." *Id.* (quotations omitted). As the doctrine did not apply, there was no error in this regard.

Moreover, even assuming *arguendo* the doctrine was applicable, Defendants are not entitled to judgment n.o.v. as Plaintiff's testimony was sufficient to establish proof of hills and ridges. At trial, Plaintiff testified that he fell as the result of snow covered ice that "was lumpy, felt, like, real lumpy." (N.T., 4/5/11, pp 40-41.) Plaintiff also testified that it did not look like anyone had tried to shovel or that anyone had applied any type of snow and ice melt. (N.T., 4/5/11, p. 43.)

Plaintiff did not describe some smooth area of ice, which was the result of some recent precipitation. Rather, Plaintiff described ice which accumulated in ridges and elevation of such character as to unreasonably obstruct travel and constitute a danger to pedestrians travelling thereon. Accordingly, judgment n.ov. for Defendants would be entirely inappropriate.

B. Localized patch of snow or ice.

Related to the hills and ridges issue addressed above, Defendants also complain this court "erred in refusing a nonsuit, in refusing to direct a verdict and/or in refusing to instruct the jury

that plaintiff had introduced a new cause of action [for] a localized patch of snow or ice subsequent to the running of the statute of limitations." (Defs.' 1925(b) Statements ¶ 3, as renumbered above "2.") Relying on the fact that both complaints averred Plaintiff "was caused to slip, trip and/or fall as a result of hills and ridges of ice which had formed on a portion of said sidewalk," (Compl., 12/27/07, ¶ 4; Compl., 02/16/09, ¶ 7), Defendants argue not requiring Plaintiff to satisfy the requirements of the hills and ridges doctrine allowed Plaintiff to impermissibly introduce a new cause of action after the running of the statute of limitations. (*See* Defs.' Mem. pp. 6-7.) Defendants' argument has no merit for two reasons.

First, case law dictates it would be error to require Plaintiff to prove hills and ridges just because he alleged in his complaints that he fell as the result thereof. In *Williams v. Shultz*, 240 A.2d 812 (Pa. 1968), the plaintiff alleged in her complaint that she slipped and fell on hills and ridges of ice located on a sidewalk. *See id.* at 813. Her case proceeded to trial wherein she presented evidence that she fell on a localized patch of ice which was covered by leaves. *Id.* She also presented evidence that the last snow or rain fall was five days prior to the accident and that the general vicinity was free from snow and ice except for some snow on surrounding lawns. *Id.* At the conclusion of her case-in-chief, the trial court granted a compulsory nonsuit on the basis that the plaintiff failed to establish the existence of hills and ridges of ice upon the sidewalk as she alleged in her complaint, and that the existence thereof is a prerequisite to recover for a slip and fall on an ice- or snow-covered sidewalk. *See id.*

On appeal, the Supreme Court of Pennsylvania concluded "proof of hills and ridges is necessary only when it appears that the accident occurred at a time when general slippery conditions prevailed in the community as a result of recent precipitation." *Id.* The Court then

held that under the facts and circumstances of the case, "it was error for the court below to require proof or hills and ridges." *Id.* at 814.

Williams is on all fours with this case. As discussed above, the evidence here was not that general slippery conditions prevailed in the community as a result of recent precipitation. Rather, the evidence was the last snow or rain fall was approximately four days earlier and the general vicinity was free and clear from snow and ice. Accordingly, it would have been error to require proof of hills and ridges even though Plaintiff alleged the existence thereof in his complaints.

Second, contrary to Defendants' argument, Plaintiff was not allowed to introduce a new cause of action beyond the expiration of the statute of limitations. In both lawsuits, Plaintiffs cause of action was negligence. Hills and ridges is not a cause of action in and of itself. When applicable, it is the burden of evidence required to establish negligence for a slip and fall on an ice- or snow-covered sidewalk. *See Heasley v. Carter Lumber*, 843 A.2d 1274, 1277 (Pa. Super. Ct. 2004) (in granting the plaintiffs a new trial where hills and ridges had erroneously been charged, stating the plaintiffs were prejudiced as "[t]he doctrine held [them] to a higher burden of proof than would otherwise have been required....").

C. Choice of ways.

Defendants next claim this court "erred in refusing a nonsuit, in refusing to direct a verdict and/or in refusing to instruct the jury that plaintiff had failed to prove choice of way." (Defs.' 1925(b) Statements ¶ 4, as renumbered above "3.")

The "choice of ways" doctrine provides, "[w]here a person, having a choice of two ways, one of which is perfectly safe, and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence...." *O'Brien v. Martin*,

638 A.2d 247, 249 (Pa. Super. Ct. 1994). "The rule requiring a person to select a safe route in favor of a dangerous one is nothing more than a formulation of the general rule that a person is contributorily negligent if his conduct falls short of the standard to which a reasonable person should conform in order to protect himself from harm." *Id.* The rule, however, "is not meant to impose unreasonable restrictions on travel...." *Id.*

To warrant an instruction on "choice of ways," "there must be evidence that the plaintiff made an unreasonable decision which exposed him to a hazard that he knew or should have known existed." *Id.* "There must be evidence of (1) a safe course, (2) a dangerous course, and (3) facts which would put a reasonable person on notice of the danger or actual knowledge of the danger." *Id.*

In this case, Plaintiff testified he was unaware of the condition of the sidewalk in front of 1600 S. 22nd Street until after he crossed the street. (N.T., 4/5/11, pp. 40-41.) When he was asked by defense counsel why he did not walk on the other side of the street, Plaintiff explained that there was a construction project and fence on the other side of the street which blocked that sidewalk. (*See* N.T., 4/5/11, p. 72.)

There was only evidence in this case of the second element of choice of ways, a dangerous course. The suggestion by Defendants that Plaintiff should have attempted to walk in the street is absurd. (*See* Defs.'s Mem. p. 14 ("There is no evidence the street was dangerous or that he could not have walked another route.").)

As stated above, "[a] trial court must instruct the jury on the correct legal principles applicable to the facts presented at trial." *Gaudio*, 976 A.2d at 550. Here, as with hills and ridges, the choice of ways doctrine was not applicable. Accordingly, there was no error as Defendants contend.

Moreover, the jury's verdict supports this conclusion. While the jury might not have been charged on choice of ways, the jury was charged on comparative negligence. The jury, however, attributed no comparative negligence to Plaintiff, suggesting the jury found his actions to be reasonable.

D. Zoning application.

Here, Defendants complain this court "erred in allowing evidence of a prior zoning application." (Defs.' 1925(b) Statements ¶ 5, as renumbered above "4.") Defendants, however, waived this argument by failing to object to this evidence during the trial.

"It is axiomatic that, in order to preserve an issue for review, litigants must make timely and specific objections during trial and raise the issue in post-trial motions." *Harman v. Borah*, 756 A.2d 1116, 1124 (Pa. 2000) (emphasis added). "[A] party waives an issue concerning perceived trial court error, if the party fails both to preserve the issue with a timely and specific objection at trial and present it in post-trial motions." *Id.* at 1126. Having failed to make a timely and specific objection at the trial to Plaintiff's use of the zoning application, (N.T., 4/5/11, p. 13), Defendants have waived the issue.

Moreover, there was no error in permitting the use of the zoning application. The decision to admit or exclude evidence lies within the sound discretion of the trial court; absent an abuse of discretion or error of law the decision will not be overturned. *Winschel v. Jain*, 925 A.2d 782, 794 (Pa. Super. Ct. 2007). "Generally, a trial judge should admit all relevant evidence unless a specific rule bars its admission." *Valentine v. Acme Mkts.*, 687 A.2d 1157, 1160 (Pa. Super. Ct. 1997). "Evidence is relevant if it tends to make the fact at issue more or less probable or intelligible or to show the origin and history of the transaction between the parties and explain

its character." *Id.* "To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful to the complaining litigant." *Id.*

In this case, the zoning application was relevant to show the relationship between Mr. Saidi and the 1600 S. 22nd Street property. Additionally, Defendants do not even allege any harm as the result of the admission of this evidence. As such, there is no reversible error related to the zoning application.

E. Spousal privilege.

Next, Defendants complain this court "erred in allowing plaintiff to compel the testimony of defendants against their spouse." (Defs.' 1925(b) Statements ¶ 6, as renumbered above "5.") According to Defendants, "Plaintiff was permitted to compel the testimony of Kimberly Saidi against her husband" based on, *inter alia*, the contention that he gratuitously undertook to remove snow and ice from the sidewalk for her. (*See* Defs.' Mem. p. 15.) Citing 42 Pa. C.S. § 5924(a), Defendants argue this was error. (Defs.' Mem. p. 15.) Section 5924(a) provides, "neither husband nor wife shall be competent or permitted to testify against each other" in a civil matter. 42 Pa. C.S. § 5924. For the reasons that follow, there was no error in allowing Mrs. Saidi's testimony.

First, Mrs. Saidi waived this testimonial privilege by voluntarily testifying against her husband at her deposition. The issue of spousal privilege was the subject of a motion *in limine* filed by Defendants prior to trial. In response to this motion Plaintiff included a portion of Mrs. Saidi's deposition testimony, and asserted she "never asserted this privilege during her deposition when she was explaining how her husband was responsible for maintaining the property." (Pl.'s Mem. in Resp. to MIL (Spousal Privilege) p. 3.) Her testimony regarding her husband's responsibility for maintaining the property included:

Q. Who maintained the property?
A. My husband.
Q. Did you ask him to take care of it for you?
A. Yes.

***

Q. Have you ever sprinkled salt on the property...?
A. No.
Q. Is there a reason why you don't sprinkle salt or shovel that sidewalk?
A. It is my husband, he sort of maintains the place.
Q. Now you rely on him to maintain the place?
A. Yes, for maintenance.

(Attach. 1, Kimberly Saidi Dep. pp. 10-11, 26, Mar. 11, 2009.) It was because of, *inter alia*, this testimony Plaintiff asserted that he filed the second lawsuit which named both Mr. and Mrs. Saidi as defendants. (Pl.'s Mem. in Resp. to MIL (Spousal Privilege) p. 2.)

It is the law in Pennsylvania that:

> The failure to assert a privilege constitutes a waiver thereof. A claim of privilege may be waived in discovery proceedings as well as during the trial of an action. Preclusion of disclosure in discovery proceedings on the ground that a matter is privileged is not automatic; the privilege must be claimed, and a failure to claim the privilege waives it.

Commw. v. Kauffman, 605 A.2d 1243, 1248 (Pa. Super. Ct. 1992) (quotations omitted). While it may not have been Mrs. Saidi's intent to implicate her husband with this testimony, but rather just explain why she did not take it upon herself to remove snow and ice from the property's sidewalk, by voluntarily testifying as she did she waived the privilege.

Second, Section 5924(a) "is inapplicable to a defendant-wife who is testifying on her own behalf even though her testimony has an adverse effect on her husband's interests." *Ebner v. Ewiak*, 484 A.2d 180, 183 (Pa. Super. Ct. 1984). In *Ebner*, "the Ebners and the Ewiaks agreed to construct a home for the Ebners on property owned by the Ewiaks. The Ewiaks, Mrs. Ebner's parents, also agreed to deed over the home and underlying property to the Ebners once construction was completed." 484 A.2d at 182. However, once the construction was completed

and the Ebners moved in, Mr. Ewiak refused to deliver the deed. *Id.* Subsequently, the Ebners brought an action against both Mr. and Mrs. Ewiak for breach of contract and harassment. *Id.* Following a trial, the jury returned a verdict against Mr. Ewiak, but not Mrs. Ewiak. *Id.*

On appeal from the denial of his motion for a new trial, Mr. Ewiak complained that "his wife was erroneously allowed to present testimony against him at trial in violation of 42 Pa.C.S.A. § 5924(a)." *Id.* at 183. In affirming the denial of the motion for a new trial, the Superior Court held Section 5924(a) "is inapplicable to a defendant-wife who is testifying on her own behalf even though her testimony has an adverse effect on her husband's interests." *Id.* In so holding, the court stated "Mrs. Ewiak was a defendant in [the Ebners'] breach of contract action against her and her husband and, in order to exculpate herself, testified that [Mr. Ewiak] agreed to deed over the property when the home was completed and that [he] threatened and harassed [the Ebners.]" *Id.* (citations omitted). As a result of this testimony, the court noted "the jury found that she was not liable for either breach of contract or harassment." *Id.* The court further noted that if it was "to hold that Mrs. Ewiak's testimony was barred by § 5924(a), Mrs. Ewiak would [have been] left without a way of presenting a defense on her own behalf." *Id.*

Mrs. Saidi having waived the privilege, Mr. Saidi cannot now complain Plaintiff was permitted to compel the testimony of his wife against him. As the Superior Court held in *Ebner*, Section 5924(a) is inapplicable to a defendant-wife who is testifying on her own behalf even though her testimony has an adverse effect on her husband's interests. Like in *Ebner*, both husband and wife were defendants in this case. By testifying as she did, Mrs. Saidi exculpated herself of 40% of the causal negligence in this case. Holding Mrs. Saidi's testimony barred by Section 5924(a) would have left her without a way of presenting a defense on her own behalf in contravention of *Ebner*.

Third, the spousal privilege is not without other exceptions, including communications between husband and wife as to business or property. *See Commw. v. Darush*, 420 A.2d 1071, 1076 (Pa. Super. Ct. 1980) (stating knowledge or communications between husband and wife as to matters of business or property are generally not privileged in the absence of contrary indications). Here, the testimony at trial involved both business and property. Mrs. Saidi testified she purchased the property with the intention of putting a pizza shop or something similar there. (N.T., 4/5/11, p. 6.) She also testified that she elicited Mr. Saidi to be responsible for the maintenance of that property. (N.T., 4/5/11, pp. 9-10.)

"The prohibition against the competency of husband and wife to testify against each other operates only within proper bounds." *Kine v. Forman*, 209 A.2d 1, 3 (Pa. Super. Ct. 1965). It was not intended to supply a means of shielding one spouse or the other from liability in transacting business. *See id.* There was no error in allowing Mrs. Saidi's testimony regarding her husband's involvement with her business property, which was clearly significant, bordering on exclusive.

F. Restatement (Second) of Torts § 324A/gratuitous undertaking.

Defendants next complain this court "erred in refusing a nonsuit, in refusing to direct a verdict and in instructing the jury on supposed liability under Restatement of Torts 2nd §324A and/or imposing liability on husband defendant arising out of a supposed gratuitous undertaking." (Defs.' 1925(b) Statements ¶ 7, as renumbered above "6.") In their post-trial motions, Defendants argued Section 324A "is predicated upon misfeasance, and not nonfeasance." (Defs.' Mem. p. 19.) Defendants then primarily asserted it was error to instruct the jury on liability under Section 324A because "[t]he sole evidence [P]laintiff has adduced is

that husband and wife expected husband would shovel if there was snow."[4] (Defs.' Mem. p. 19 (emphasis added).) Essentially, Defendants are arguing that while Mr. Saidi may have agreed to be responsible for clearing snow and ice from the sidewalk at 1600 S. 22nd Street, and may have actually done so for years, because he did not go out and do so on this occasion he cannot be liable to Plaintiff as this is nonfeasance, not misfeasance.

Here, there was no error as having (1) agreed to do so on a continuing basis and having (2) actually done so for years prior to the incident, Mr. Saidi did undertake the responsibility of clearing snow and ice from the sidewalk, and the jury could properly find liability predicated on his misfeasance. Comments and illustrations to Section 324A make this clear.

Section 324A, entitled "Liability to Third Person for Negligent Performance of Undertaking," has been adopted by the courts of Pennsylvania and provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Reeser v. NGK N. Am., Inc., 14 A.3d 896, 898 (Pa. Super. Ct. 2011), *quoting* Restatement (Second) of Torts § 324A. In terms of the scope of this section, Comment b states it applies to:

> any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking, or his failure to exercise reasonable care to complete it, or to protect the third person when he discontinues it, results in physical harm to the third person or his things. It applies both to undertakings for consideration, and to those which are gratuitous.

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[4] Defendants at least do not appear to contest there was an agreement.

Restatement (Second) of Torts § 324A cmt. b.

In this case, the evidence showed Mr. Saidi undertook to render services to another (Mrs. Saidi). Accordingly, he was within the scope on Section 324A. Moreover, the evidence also showed a *prima facie* case that he was negligent in the performance of his undertaking (not removing snow and ice from the sidewalk in February 2007 as he had agreed to do) or, at a minimum, not protecting the third party (Plaintiff) when he discontinued his services. Therefore, he could also properly be found liable under Section 324A.

Defendants act like Mr. Saidi would have had to formally agree to go remove snow and ice after every snow or rain fall during the course of every winter in order for there to be any potential liability on his part. That is clearly not the case. Comment d to Section 324A provides:

> *Undertaking duty owed to third person.* Even where the negligence of the actor does not create any new risk or increase an existing one, he is still subject to liability if, by his undertaking with the other, he has undertaken a duty which the other owes to the third person. Thus a managing agent who takes charge of a building for the owner, and agrees with him to keep it in proper repair, assumes the responsibility of performing the owner's duty to others in that respect. He is therefore subject to liability if his negligent failure to repair results in injury to an invitee upon the premises who falls upon a defective stairway, or to a pedestrian in the street who is hurt by a falling sign. Such liability is in addition to that which he may have to the person to whom he has agreed to render the services.

Restatement (Second) of Torts § 324A cmt. d.

Mr. Saidi's undertaking in this case is analogous to the undertaking of the managing agent who takes charge of a building for the owner as described in comment d. Here, rather than a negligent failure to repair, we have a negligent failure to remove snow and ice. There is no indication from this comment or common sense that in order for there to be potential liability on his part, the managing agent would have to contact the owner before every repair and say, for example, "One of the building's front steps is broken, I agree to make this repair" and then go negligently make the repair. Rather, the comment and common sense dictate that the

undertaking to keep the building in proper repair is of a continuing nature, just like in this case, and that a negligent failure to even attempt to make a repair could subject the managing agent to liability.

The evidence in this case established that from the time Mrs. Saidi purchased the property in August 2003 through the time of Plaintiff's fall in February 2007, Mr. Saidi agreed to be responsible not for just snow and ice removal, but all maintenance of the property. Moreover, the evidence established Mr. Saidi actually did remove snow and ice and maintain the property on occasions throughout the entire time. Any assertion that Mr. Saidi cannot be liable just because he did not go out and shovel snow and ice on this occasion lacks merit and boarders on incredulous.

G. Testimony of Paul J. Sedacca, M.D.

Defendants assert two complaints which relate to the testimony of Dr. Sedacca. First, Defendants argue this court "erred in allowing the testimony of [Dr.] Sedacca [as it was] based exclusively upon the opinions and medical reports of other medical providers." (Defs.' 1925(b) Statements ¶ 8, as renumbered above "7.") Second, Defendants argue this court "erred in allowing the testimony of [Dr. Sedacca] as [he] lack[ed] [the] qualifications to read and interpret relevant orthopedic and neurologic testing." (Defs.' 1925(b) Statements ¶ 9, as renumbered above "8.")

Addressing Defendants arguments in turn, first, Dr. Sedacca was not a mere conduit of the opinions of non-testifying experts. Rather, Dr. Sedacca expressed opinions based, in part, upon the reports and opinions of other experts whose reports and opinions are of a type customarily relied upon by experts in his field. Accordingly, there was no error in allowing his testimony.

While it is true that "an expert may not act as a 'mere conduit or transmitter of the content of an extrajudicial judicial source[,]'" *Woodward v. Chatterjee*, 827 A.2d 433, 444 (Pa. Super. Ct. 2003), an expert may express an opinion based, in part, upon reports or the opinions of other experts provided such reports or opinions are of a type customarily relied upon by experts in the field, *see, e.g.*, *Wegner v. Pennsboro Twp.*, 868 A.2d 638, 645 (Pa. Commw. Ct. 2005). In sum:

> An "expert" should not be permitted simply to repeat another's opinion or data without bringing to bear on it his own expertise and judgment. Obviously in such a situation, the non-testifying expert is not on the witness stand and truly is unavailable for cross-examination. The applicability of the rule permitting experts to express opinions relying on extrajudicial data depends on the circumstances of the particular case and demands the exercise, like the admission of all expert testimony, of the sound discretion of the trial court. Where ... the expert uses several sources to arrive at his or her opinion, and has noted the reasonable and ordinary reliance on similar sources by experts in the field, and has coupled this reliance with personal observation, knowledge and experience, ... the expert's testimony should be permitted.

Primavera v. Celotex Corp., 608 A.2d 515, 521 (Pa. Super. Ct. 1992) (footnote omitted). *See also* Pa. R.E. 703 (note) (outlining the history of Pennsylvania law in this area).

Here, contrary to Defendants' assertion, Dr. Sedacca did not base his opinions exclusively on the opinions and medical reports of other medical providers. Rather, Dr. Sedacca based his opinions on the history he obtained, the physical examination he performed, and his review of various medical records—including objective diagnostic studies—all of which necessarily entails his personal knowledge and experience. (*See* Sedacca Dep. pp. 37-38, 42.) Moreover, he testified the various medical records he reviewed, including the reports of other doctors, are precisely the type of medical records he customarily relies upon in his own practice of medicine and as a disability evaluator. (*See* Sedacca Dep. pp. 10, 17-18, 30, 37-38, 42, 48, 53, 63.)

Dr. Sedacca is an internist and a disability evaluator who routinely uses reports of other doctors in formulating his own opinions and diagnoses. Defendants' complaint here really goes more to the weight of the evidence rather than its admissibility. *See Primavera*, 608 A.2d at 523 (stating that "[w]hile the fact that the testifying expert may have based his opinion, in part, on the ... opinions of other experts may impact on the weight the jury assigns to his ultimate opinion, this fact alone does not require exclusion."). Weighing the opinions of the experts, however, was a function for the jury. While Defendants might not be happy with the jury's conclusion, Dr. Sedacca did not merely repeat other doctors' opinions without bringing to bear his own expertise and judgment and, accordingly, there was no error in allowing his testimony.

Second, Dr. Sedacca was also qualified to testify in this case as he had a reasonable pretension to specialized knowledge regarding the neurologic and orthopedic reports and tests he reviewed.

Pennsylvania Rule of Evidence 702 provides: "If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." Pa. R.E. 702. It is well settled the test for qualifying an expert witness in Pennsylvania is a liberal one. *Miller v. Brass Rail Tavern*, 664 A.2d 525, 528 (Pa. 1995). The test to be applied "is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation." *Id.* It is also well settled that there is no requirement that the witness possess "all of the knowledge in a given field ... ." *Id.* Rather, the witness need only "possess more knowledge than is otherwise within the ordinary range of training, knowledge, intelligence or experience." *Id.*

In this case, Dr. Sedacca testified at length about his qualifications and specifically stated he received training in various aspects of medicine, including neurology. (*See* Sedacca Dep. pp. 6-9.) Dr. Sedacca also testified he routinely treats patients with orthopedic injuries; is a licensed medical doctor who has been practicing medicine for over 30 years; and that, although he routinely refers patients out to doctors who specialize in other areas of medicine, he customarily relies on the their reports in formulating his own opinions and diagnoses. (*See* Sedacca Dep. pp. 9-13, 39.)

Regarding the neurologic and orthopedic reports and tests he reviewed, Dr. Sedacca clearly had more knowledge than is otherwise within the ordinary range of training, knowledge, intelligence, or experience. Therefore, he was qualified to testify as an expert in this case[5] and there was no abuse of discretion in allowing his testimony.[6] Again, Defendants' complaint here really goes more to the weight of the evidence rather than its admissibility.

H. Findings of the Social Security Administration.

Next, Defendants complain this court "erred in precluding evidence of the findings of the social security administration [("SSA")] that plaintiff was at all times subsequent to February 18, 2007 medically capable of engaging [in] light duty work." (Defs.' 1925(b) Statements ¶ 10, as renumbered above "9.")

This is at best a "have your cake and eat it too" argument which entitles Defendants to no relief. Prior to trial Defendants filed a motion *in limine* wherein they asked this court "to exclude

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[5] This was not a medical malpractice case wherein there are sometimes more stringent standards for the admissibility of medical expert testimony such as that the expert practices in the relevant specialty.

[6] "The decision to permit a witness to testify as an expert rests with the sound discretion of the trial court, and, absent an abuse of that discretion, the decision will not be disturbed on appeal." *Flanagan v. Labe*, 690 A.2d 183, 185 (Pa. 1997), overruled on other grounds by *Freed v. Geisinger Med. Ctr.*, 971 A.2d 1202 (Pa. 2009).

certain testimony by [P]laintiff's disability evaluator Dr. Paul J. Sedacca of permanent disability, at pages 79 to 98 of the trial deposition[,] and [preclude] [P]laintiff from introducing the evidence of the decision of the [SSA]...." (Defs.' MIL (Social Security Disability) pp. 1-2.) Therein Defendants argued the SSA disability award "is unrelated to any alleged injuries in this [case]" and such "[e]vidence by Dr. Sedacca will mislead the jury rather than aide in finding the truth, is inadmissible and should be excluded." (Defs.' MIL (Social Security Disability) ¶¶ 18-19.) Post-trial Defendants are now arguing "the testimony of Dr. Sedacca and his reliance upon the decision of the SSA should not have been excluded." (Defs.' Mem. p. 36.)

At trial, the testimony of Dr. Sedacca wherein he discussed the SSA decision was in fact excluded from the jury's consideration just as Defendants had requested. (*See* Sedacca Dep. pp. 79-81, 87-98.) It is nonsensical for Defendants through their counsel to now argue "the testimony of Dr. Sedacca and his reliance upon the decision of the SSA should not have been excluded[,]" (Defs.' Mem. p. 36), or that there was any error in precluding evidence of the SSA decision, (Defs.' 1925(b) Statements ¶ 10, as renumbered above "9").

Wading through Defendants' murky argument, the only thing this court can conclude is that Defendants think that as portions of Dr. Sedacca's testimony were excluded, there was some error in then preventing them from cross-examining Plaintiff with bits and pieces of the SSA's findings. At trial, defense counsel, in spite of the above-referenced motion *in limine* and the arguments made therein, wanted to cross-examine Plaintiff with just the finding of the administrative law judge that with Plaintiff's wrist and shoulder injuries, he was still medically capable of engaging in light duty work. (*See* N.T., 4/5/11, pp. 96-100.) By way of background, Plaintiff applied for Social Security Disability benefits. The administrative law judge found that

Plaintiff's physical problems limited him to light duty work, but his mental limitations left him without the residual functional capacity to sustain any regular full time work related activities. In other words, Plaintiff was approved for Social Security Disability benefits based on a combination of physical and mental limitations.

Looking past their inconsistency in argument and apparent waiver, Defendants are still not entitled to any relief.

> The standard of review in assessing an evidentiary ruling of a trial court is extremely narrow. The admission or exclusion of evidence is a matter within the sound discretion of the trial court, which may only be reversed upon a showing of a manifest abuse of discretion. To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.

Potochnick v. Perry, 861 A.2d 277, 282 (Pa. Super. Ct. 2004) (citations and quotations omitted).

Here, the exclusion of evidence that the SSA found Plaintiff medically capable of engaging in light duty work was not prejudicial to Defendants as both Plaintiff and Dr. Sedacca testified consistent with the same.

At trial, Plaintiff testified he had a 6th grade education and is not able to read or write. (N.T., 4/5/11, p. 35.) Plaintiff, however, testified his lack of education did not prevent him being able to work as a security guard or from doing maintenance work. (N.T., 4/5/11, pp. 35-36.) Plaintiff further testified at trial that: (1) he tried to resume his maintenance work following the accident, but was unable to do so because certain work such as buffing floors required him to be able to use both arms and (2) he tried to resume his security job, but was eventually let go because he could no longer satisfactorily stop shoplifters with the effective use of just one arm. (*See* N.T., 4/5/11, pp. 57-59, 63-65.) At trial, Dr. Sedacca opined Plaintiff has been and remains unable to work primarily due to the nerve injury and the derangement of his right shoulder. (Sedacca Dep. p. 40.)

Nothing in Plaintiff's or Dr. Sedacca's testimony suggested Plaintiff was medically incapable of engaging in light duty work. Rather, it was clear from the testimony elicited at trial Plaintiff was just unable to perform any of his past, physically rather than mentally intensive work because of the injuries he sustained in this case, and because of his limited mental status he had always earned a living through physically intensive work.

Moreover, any relevancy of this evidence would have been outweighed by the confusion of the issues and the misleading of the jury. Pennsylvania Rule of Evidence 403 provides that evidence may be excluded, even if relevant, "if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Pa. R.E. 403. Here, allowing the use of the SSA findings in the severely limited manner Defendants sought, would have led to confusion of the issues and misleading the jury.

I. The jury's award.

Defendants complain the jury's award was excessive. (Defs.' 1925(b) Statements ¶ 11, as renumbered above "10.")

Remittitur or a new trial based on excessiveness of the verdict may only be granted where the trial court determines that "'the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption' and articulates the reason supporting a reduction of the verdict." *See Refuse Mgmt. Sys. v. Consolidated Recycling and Transfer Sys.*, 671 A.2d 1140, 1149 (Pa. Super. Ct. 1996), *quoting Haine v. Raven Arms*, 652 A.2d 1280, 1281 (Pa. 1995). The denial of remittitur or a new trial based on excessiveness is reviewed for abuse of discretion. *Graham v. Campo*, 990 A.2d 9, 17 (Pa. Super. Ct. 2010). Beginning "with the premise that large verdicts are not necessarily excessive verdicts[,]" the Superior Court "will not find a verdict excessive unless it is so grossly excessive as to shock [its]

sense of justice." *Id.*

In this case there was evidence, including objective evidence, that Plaintiff suffered tears to the scapholunate ligament in his right wrist and to the supraspinatus muscle in his right shoulder. (Sedacca Dep. pp. 23-24.) There was also evidence Plaintiff suffered an injury to the nerves which run across the shoulder region. (Sedacca Dep. pp. 31-32.)

Further, Dr. Sedacca testified that without surgery Plaintiff will have near full loss of the use of his right arm for lifting and carrying purposes. (Sedacca Dep. p. 39.) He, however, also opined that surgery is not a guaranteed fix for the tears and will not correct Plaintiff's nerve injuries. (Sedacca Dep. p. 38.) Moreover, Dr. Sedacca opined Plaintiff has been and remains unable to work primarily due to the nerve injury and the derangement of his right shoulder. (Sedacca Dep. p. 40.)

Furthermore, Plaintiff himself testified as to the pain he has suffered and the pain he continues to suffer; the treatments he has had to endure; the continuing nature of some of his injuries; the jobs he has lost; and the impediments to future employment. (*See* N.T., 4/5/11, pp. 33-66.)

The damage award when assessed against the evidentiary record does not suggest that the jury was influenced by passion or prejudice so as to shock this court's sense of justice. Accordingly, there was no abuse or error in denying remittitur or a new trial based on excessiveness.

J. Entry of the verdict.

Finally, Defendants complain this court "erred in the entry of duplicate jury verdicts against Kimberly Saidi at separate court terms and numbers." (Defs.' 1925(b) Statements ¶ 12, as renumbered above "11.")

Regarding this complaint, Defendants referenced *lis pendens* and *res judicata* in their post-trial motions. (See Defs.'s Mem. pp. 38-39.) Not being entirely sure what Defendants argument is, this court will just briefly address the issue and say it does not provide a basis for judgment n.o.v. There is only one verdict in this case, it was merely docketed in each of the consolidated cases.

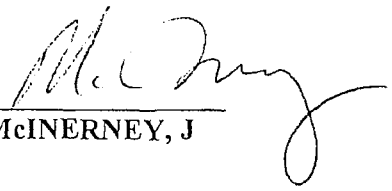
The doctrine of *lis pendens* generally has the purpose of protecting a defendant from harassment by having to defend several suits on the same cause of action at the same time. *Hillgartner v. Port Auth.*, 936 A.2d 131, 137 (Pa. Commw. Ct. 2007). "[*L*]*is pendens* requires more than a mere allegation of a pending suit; it requires proof the prior case is the same, the parties are substantially the same, and the relief requested is the same." *Id.*

Res judicata, or claim preclusion, on the other hand, "prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication." *Wilkes v. Phoenix Home Life Mut. Ins. Co.*, 902 A.2d 366, 376 (Pa. 2006). "The doctrine of *res judicata* developed to shield parties from the burden of re-litigating a claim with the same parties, or a party in privity with an original litigant, and to protect the judiciary from the corresponding inefficiency and confusion that re-litigation of a claim would breed." *Id.*

Contrary to defense counsel's suggestion, neither doctrine is applicable. Regarding *lis pendens*, the cases fail to satisfy the strict requirements of the identity test as Mrs. Saidi was the only defendant in the first case, while both she and her husband were defendants in the second case. Moreover, the consolidation of the cases protected her from harassment by having to defend several suits separately. *Res judicata* on the other hand was inapplicable as there was no prior, concluded litigation. The cases were tried together and concluded at the same time.

WHEREFORE, for the above mentioned reasons, this court's orders denying the motions for post-trial relief should be affirmed.

BY THE COURT:



McINERNEY, J