SJC-12921

SETH DOULL[1] & another[2] vs. ANNA C. FOSTER & another.[3]

Franklin. October 5, 2020. - February 26, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

Negligence, Medical malpractice, Causation, Standard of care. Medical Malpractice, Standard of care, Consent to medical treatment. Practice, Civil, Instructions to jury, Amendment of complaint, Interrogation of jurors.

Civil action commenced in the Superior Court Department on May 28, 2014.

The case was tried before Mary-Lou Rup, J., and a motion for a new trial was considered by her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Krzysztof G. Sobczak for the plaintiffs.
Tory A. Weigand for the defendants.
Jennifer A. Creedon & Stephanie M. Gazda, for Massachusetts Defense Lawyers Association, amicus curiae, submitted a brief.

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[1] Individually, as personal representative of the estate of Laura Doull, and as next friend of Troy Doull.

[2] Megan Doull.

[3] Robert J. Miller.

Brendan G. Carney, Thomas R. Murphy, Kevin J. Powers, & Elizabeth N. Mulvey, for Massachusetts Academy of Trial Attorneys, amicus curiae, submitted a brief.

KAFKER, J. Causation has been a continually contested concept in tort law, confounding courts, commentators, and practitioners. In this medical malpractice case, we are asked once again to clarify our case law on causation, along with a series of other issues that are more readily decided. Specifically, we examine the use of two competing causation standards: the traditional but-for causation standard and the alternative substantial contributing factor standard. After careful review, we conclude that the traditional but-for factual causation standard is the appropriate standard to be employed in most cases, including those involving multiple alleged causes. This is the approach recommended by the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) (Restatement [Third]). In doing so, we conclude that the substantial factor test is unnecessarily confusing and discontinue its use, even in multiple sufficient cause cases. Because the jury in this case were instructed using traditional but-for causation principles, the instructions were proper. We

also reject all of the plaintiffs' other claims on appeal and affirm the order denying a new trial.[4]

1. Background. We summarize the facts that could have been found by the jury, reserving certain facts for later discussion.

a. Facts. Between 2008 and 2011, Laura Doull was a patient of Anna C. Foster, a nurse practitioner, and her supervisor, Dr. Richard J. Miller (collectively, the defendants). Miller, an internist, owned the medical practice where Doull was a patient.

In August 2008, Doull had an appointment with Foster to seek advice regarding perimenopause-related symptoms. Foster prescribed Doull a topically applied, naturally derived progesterone cream to treat the symptoms.[5] Foster admitted that she did not document any conversation that she had with Doull about the risks and benefits of, or the alternatives to, the progesterone cream, but she did testify that they discussed alternatives to it. However, Foster stated that she did not

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[4] We acknowledge the amicus briefs submitted by the Massachusetts Academy of Trial Attorneys and the Massachusetts Defense Lawyers Association.

[5] Progesterone is a hormone that humans naturally produce. Supplementing the progesterone that the human body produces is a form of hormone replacement therapy typically used to treat menopause- or perimenopause-related symptoms. Progesterone supplements come in both synthetic and naturally derived forms.

discuss the possibility with Doull that the progesterone cream could cause blood clots because she did not consider this to be a risk. Doull continued to use the progesterone cream through the spring of 2011.

Earlier that spring, Doull had visited Miller's practice on three separate occasions to complain about shortness of breath. Doull met with Foster on each visit, and Foster performed a physical examination of Doull each time. Doull had a history of asthma and allergies. At the spring 2011 visits, Foster diagnosed Doull's shortness of breath as a symptom of some combination of these long-standing conditions. Miller did not examine Doull during any of these visits.

In May 2011, Doull had a "seizure-like event" and was transported to the hospital. At the hospital, she was diagnosed with a pulmonary embolism, a condition where blood clots or other substances block portions of the pulmonary arteries in the lungs. A pulmonary embolism may cause shortness of breath as well as chronic thromboembolic pulmonary hypertension (CTEPH), a rare disease where pressure in the pulmonary artery increases and causes the heart to fail. Indeed, that May, Doull was diagnosed with CTEPH. A lung scan revealed that blood clots in Doull's lungs were chronic.

In November 2011, Doull underwent surgery in an attempt to remove the blockage from her lungs, but the procedure proved

unsuccessful. After the surgery, Doull was prescribed various medications to treat the pulmonary hypertension that had resulted from her CTEPH. None of these medications abated the disease. In 2015, Doull died from complications arising from CTEPH. She was forty-three years old.

b. Procedural history. Prior to her death, Doull and various family members (collectively, the plaintiffs) commenced this suit against the defendants, claiming negligence, failure to obtain informed consent, and loss of consortium.[6] Four months before trial, the plaintiffs moved to amend their complaint to include the manufacturer of the progesterone cream, Women's International Compounding Inc. (WIC), as a defendant. The trial judge denied the plaintiffs' motion.

At trial, the plaintiffs argued that Miller and Foster failed to obtain informed consent from Doull concerning the progesterone cream's risks and alternatives, that Foster failed to diagnose Doull's pulmonary embolism during the spring 2011 visits, and that Miller failed to supervise Foster adequately during all relevant times.

To support these claims, Dr. Paul Genecin, a primary care internal medicine physician and the plaintiffs' expert witness, testified that natural progesterone was not any safer than

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[6] Doull's estate continued to prosecute the claims after her death, amending the complaint to add a wrongful death claim.

synthetic derivations of the hormone, and that the cream likely caused Doull to develop blood clots. Genecin also testified that Foster had failed to investigate adequately Doull's shortness of breath complaints during the spring 2011 visits. He testified that diagnosis of Doull's pulmonary embolism during the spring of 2011 could have prevented the onset of CTEPH, and that Miller's failure to supervise Foster's actions constituted a breach of the duty of care.

Dr. Nicholas S. Hill, a pulmonologist and an expert for the defense, testified that there was "no evidence anywhere that indicates that progesterone cream applied to the skin increases the risk of clotting." Hill also disagreed with Genecin's assessment that Doull's CTEPH would have been preventable had Foster diagnosed it during the spring 2011 visits. Specifically, Hill testified that by the time Doull was diagnosed with CTEPH in May 2011, the disease "had been going on for a long time, probably months at least." According to Hill, the chronic nature of Doull's blood clots meant that her outcome would have remained the same had Foster diagnosed her with the disease during the spring of 2011.

The jury returned a verdict for the defendants and answered various special questions. First, the jury found that the defendants had not failed to acquire informed consent from Doull with respect to the progesterone cream. Second, although the

jury did find that Foster negligently failed to diagnose Doull's pulmonary embolism, they found that this negligence was not the cause of either the harms suffered by Doull after her seizure-like event in 2011 or her death in 2015. Finally, the jury found that Miller had been negligent in his supervision of Foster, but that this negligence, too, had not harmed Doull.

Before the jury returned its verdict, the defendants filed a motion to require judicial approval for postverdict contact with jurors, which the judge granted. After the verdict, the plaintiffs filed a motion for a new trial, which the judge denied. The plaintiffs then appealed. We transferred the case from the Appeals Court to this court on our own motion.

2. Discussion. "We review the denial of a motion for a new trial for an abuse of discretion, bearing in mind that a judge should exercise his or her discretion only when the verdict is so greatly against the weight of the evidence as to induce in his [or her] mind the strong belief that it was not due to a careful consideration of the evidence, but that it was the product of bias, misapprehension or prejudice" (quotation and citation omitted). DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 377 n.2 (2019).

a. Jury instructions. "In a civil trial, a judge should instruct the jury fairly, clearly, adequately, and correctly concerning principles that ought to guide and control their

action" (quotation and citation omitted). DaPrato, 482 Mass. at 383 n.11. "The judge is not bound to instruct in the exact language of the [parties'] requests, however, and has wide latitude in framing the language to be used in jury instructions as long as the instructions adequately explain the applicable law" (quotation and citation omitted). Id. When reviewing jury instructions, an "appellate court considers the adequacy of the instructions as a whole, not by fragments" (citation omitted). Id.

The plaintiffs argue that they are entitled to a new trial based on several allegedly erroneous jury instructions regarding the defendants' negligence. We consider these claims in turn.

i. Jury instructions on causation. The plaintiffs claim that the judge's instruction on the element of causation was erroneous. The judge instructed the jury using a but-for standard for factual causation. Specifically, the judge instructed:

> "With regard to this issue of causation, the Defendant in question's conduct was a cause of the Plaintiff's harm, that is Laura Doull's harm, if the harm would not have occurred absent, that is but for the Defendant's negligence. In other words, if the harm would have happened anyway, that Defendant is not liable."

The plaintiffs argue that the judge was required to instruct the jury on a substantial contributing factor standard, instead of this but-for standard, because there were several possible

causes of -- and multiple tortfeasors involved in -- Doull's injuries and death. The defendants disagree, contending that the instruction given was consistent with both Massachusetts law and the approach taken by the Restatement (Third).[7] Because the plaintiffs objected to the instruction given by the trial judge, we review for prejudicial error. DaPrato, 482 Mass. at 384.

We conclude that the but-for standard was the appropriate standard in this case and therefore there was no error. We also clarify infra how a jury should be instructed on causation in negligence cases involving multiple potential causes of harm.

A. But-for causation. We begin with basic causation principles. It is a bedrock principle of negligence law that a defendant cannot and should not be held liable for a harm unless the defendant caused the harm. See Wainwright v. Jackson, 291 Mass. 100, 102 (1935) ("The general rule is that one cannot be held liable for negligent conduct unless it is causally related to injury of the plaintiff"). See also Glidden v. Maglio, 430 Mass. 694, 696 (2000) (causation "is an essential element" of proof of negligence). Causation has traditionally involved two separate components: the defendant had to be both a factual cause (or "cause in fact") and a legal cause of the harm. See Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 45 (2009)

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[7] We also solicited amicus briefs on whether to adopt the factual causation standard from the Restatement (Third).

("Liability for conduct obtains only where the conduct is . . . a cause in fact of the injury and where the resulting injury is within the scope of the foreseeable risk arising from the negligent conduct"); Kent v. Commonwealth, 437 Mass. 312, 320 (2002), citing Wallace v. Ludwig, 292 Mass. 251, 254 (1935) (negligent conduct must be both "cause in fact of the injury" as well as "legal cause of the injury"). Legal causation is also commonly referred to as "proximate causation." The Restatement (Third) describes this aspect of the causation inquiry as whether the defendant's conduct was within the "scope of liability." See Restatement (Third) § 26 comment a (explaining terminology changes from prior Restatements).

Generally, a defendant is a factual cause of a harm if the harm would not have occurred "but for" the defendant's negligent conduct. See W.L. Prosser & W.P. Keeton, Torts § 41, at 265 (5th ed. 1984) ("An act or an omission is not regarded as a cause of an event if the particular event would have occurred without it"). See, e.g., Hollidge v. Duncan, 199 Mass. 121, 124 (1908) (affirming determination that plaintiff's injuries would not have occurred "but for the defendant's negligence"). See also Reporters' Note to Restatement (Third) § 26 comment b (collecting authorities demonstrating that "but-for test is central to determining factual cause"). This long-standing principle ensures that defendants will only be liable for harms

that are actually caused by their negligence and not somehow indirectly related to it. See Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 862 (Mo. 1993) ("Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictate[] that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought"). See also Paroline v. United States, 572 U.S. 434, 452 (2014) ("If the conduct of a wrongdoer is neither necessary nor sufficient to produce an outcome, that conduct cannot in a strict sense be said to have caused the outcome"); Price Waterhouse v. Hopkins, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) ("Any standard less than but-for . . . represents a decision to impose liability without causation"). Another way to think about the but-for standard is as one of necessity; the question is whether the defendant's conduct was necessary to bringing about the harm. Restatement (Third) § 26 comment b ("a factual cause can also be described as a necessary condition for the outcome"). The majority of courts around the country and all three Restatements have required but-for causation in most cases. See Reporter's Note to Restatement (Third) § 26 comment a. See also Restatement (Third) § 26; Restatement (Second) of Torts § 432(1)

(1965) (Restatement [Second]); Restatement of Torts § 432(1) (1939).

Additionally, for the defendant to be liable, the defendant must also have been a legal cause of the harm. This means that the harm must have been "within the scope of the foreseeable risk arising from the negligent conduct." Leavitt, 454 Mass. at 45. This aspect of causation is "based on considerations of policy and pragmatic judgment." Kent, 437 Mass. at 320-321, quoting Poskus v. Lombardo's of Randolph, Inc., 423 Mass. 637, 640 (1996). These considerations are separate and distinct from factual causation. Kent, supra at 320. And, together, these concepts identify which defendants can be held liable for negligent conduct. This case focuses primarily on factual causation.

B. Exceptions to but-for causation. There are several situations in which a but-for standard does not work and has been altered to avoid unjust and illogical results. See Paroline, 572 U.S. at 452 ("tort law teaches that alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes"). One is the situation involving multiple sufficient (or overdetermined) causes. See Restatement (Third) § 27 comment b ("Courts and scholars have long recognized the problem of overdetermined harm -- harm produced by multiple sufficient causes -- and the

inadequacy of the but-for standard for this situation"). The classic example involves two separate fires merging and destroying a house. See generally Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 146 Minn. 430 (1920). If either fire could have independently destroyed the home, then neither fire could be a but-for cause of the harm (because the home would have been destroyed by the other regardless), thereby relieving each of liability under a but-for standard. To avoid this unjust result, there must be a different causation standard in these cases. See Restatement (Third) § 27 comment c ("A defendant whose tortious act was fully capable of causing the plaintiff's harm should not escape liability merely because of the fortuity of another sufficient cause"). These cases, however, are exceedingly rare. Id. at § 27 comment b.

The first two Restatements devised an alternative causation standard, with its own terminology, to address this specific problem. In circumstances in which but-for did not work, they treated defendants as a cause where their conduct was not a necessary but-for cause but was rather a so-called "substantial factor" in bringing about the harm. Specifically, they provided that "[i]f two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a

substantial factor in bringing it about." Restatement (Second) § 432(2). The substantial factor terminology has, as explained infra, proved confusing, as it seems odd to describe something that may not have been a cause at all as a substantial factor. Nonetheless, the terminology was devised to address the specific problem of multiple sufficient causes where but-for causation could not be proved. It was not intended to displace but-for causation more generally. In circumstances other than multiple sufficient causes, but-for causation was required for a defendant to be held liable. Id. at § 432(1).

A number of courts, including this one, have also recognized the difficulty of proving but-for causation in toxic tort and asbestos cases. See O'Connor v. Raymark Indus., Inc., 401 Mass. 586, 588-591 (1986); Morin v. AutoZone Northeast, Inc., 79 Mass. App. Ct. 39, 42 (2011). See also, e.g., Rutherford v. Owens-Ill., Inc., 16 Cal. 4th 953, 958 (1997); Bostic v. Georgia-Pac. Corp., 439 S.W.3d 332, 353 (Tex. 2014). In these cases, it can be difficult, if not impossible, for the plaintiff to identify which particular exposures were necessary to bring about the harm. See Matsuyama v. Birnbaum, 452 Mass. 1, 30 (2008);[8] O'Connor, supra, at 588-589; Welch v. Keene Corp.,

[8] Contrary to the concurrence's suggestion, we certainly are not suggesting here that Matsuyama is an asbestos or toxic tort case, as the sentence preceding the citation makes clear. For

31 Mass. App. Ct. 157, 162 (1991). It may be clear that a toxic substance or asbestos caused the harm, and that the defendants exposed the plaintiffs to the toxic substance or the asbestos, but it may not be possible to determine which exposures were necessary to cause the harm. In this situation, as in multiple sufficient cause cases, the but-for standard is inadequate, as it could allow all defendants to avoid liability despite their negligent exposure of the plaintiffs to the substances, as it may not be possible to prove which exposures were necessary to bring about the harm and which were not. The substantial factor test again fixes this problem by relaxing the causal requirement and permitting liability in these circumstances.

Instead of limiting the substantial factor test to these two contexts where but-for causation cannot be established, however, the first two Restatements combined the substantial factor terminology and the but-for causation requirement in a confusing manner. The term "substantial factor" was employed generally in negligence cases. In other words, a defendant

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the sake of clarity, here is the language to which we are referring in Matsuyama -- "The 'substantial contributing factor' test is useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any individual defendant's conduct was a but-for cause of the harm . . . ." (emphasis added). Matsuyama, 452 Mass. at 30. This is the point we are making here as well, which is why we included a citation to Matsuyama.

could not be liable for negligence under the first two Restatements unless the defendant was a "substantial factor" in bringing about the harm. See Restatement (Second) § 431; Restatement of Torts § 431. But to be a substantial factor, the defendant also had to be a but-for cause of the harm in most cases. See Restatement (Second) § 432(1); Restatement of Torts § 432(1). The sole exception to the but-for causation requirement was for multiple sufficient cause cases. The result was to merge and confuse the but-for standard and the substantial factor test. It also blurred the line between factual and legal causation. See Restatement (Third) § 29 comment a ("The 'substantial factor' requirement . . . in the Second Restatement of Torts has often been understood to address proximate cause, although that was not intended").

C. Multiple cause cases. Against this background, the plaintiffs urge, and some of our prior cases suggest, that a substantial contributing factor standard should be used whenever there are multiple potential causes of a harm. We conclude, however, that a but-for standard is the proper standard in most negligence cases, as but-for causes can be identified and conduct that had no causal effect can be excluded.

There is a significant difference between multiple sufficient cause and toxic tort cases and other cases involving multiple potential causes. In multiple sufficient cause cases,

the existence of two independently sufficient causes means that we cannot identify a but-for cause even though there are multiple tortfeasors who would have caused the harm on their own. In the absence of one of the causes, the other cause would still have been sufficient to bring about the harm. Similarly, in toxic tort cases, although but-for causation may be theoretically sound, it is nearly impossible for a plaintiff or a jury to determine with any certainty which exposures were necessary to bring about the harm and which were not. Using a strict but-for standard in these cases may frustrate the ability of plaintiffs to recover for negligent conduct that caused their harm, because of the happenstance of multiple defendants engaging in negligent acts each of which alone may be sufficient to cause the harm, and the impossibility of proving which of the negligent acts were but-for causes. Thus, if anyone is to be held liable for these harms, there must be an exception to the but-for standard. The concern uniting these two types of cases is the great difficulty, if not impossibility, of identifying but-for causes of the harm.

This concern is not present in most cases involving multiple alleged causes, however. There is nothing preventing a jury from assessing the evidence and determining which of the causes alleged by the plaintiff were actually necessary to bring about the harm, and which had nothing to do with the harm.

Indeed, this case shows that the but-for test works well even when a plaintiff alleges that there are multiple causes of a harm. Here, the plaintiffs alleged that the various negligent acts of the defendants caused Doull's harm and eventual death. The jury were instructed on a but-for standard.[9] As explained above, the purpose of this but-for standard is to separate the conduct that had no impact on the harm from the conduct that caused the harm. The jury ultimately did just that -- it concluded that the defendants did not cause the harm even though they committed a breach of their duties by failing to diagnose her pulmonary embolism. Tort law has long made this causal connection a prerequisite for imposing liability. Here, using a but-for standard, the jury concluded that no such connection existed between the defendant's conduct and Doull's harm and death.[10] This shows how, even in a case involving multiple

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[9] The judge instructed the jury that "[the] conduct was a cause of the Plaintiff's harm, that is Laura Doull's harm, if the harm would not have occurred absent, that is but for the Defendant's negligence. In other words, if the harm would have happened anyway, that Defendant is not liable."

[10] Indeed, as described above, the defendants' expert testified that Doull's outcome would not have been different even if Foster had diagnosed her condition in May 2011. The jury appear to have credited this testimony, as it would explain why the jury concluded that Foster, despite her negligence, did not cause Doull's harm. In this way, expert testimony will often be significant in cases involving multiple potential causes, as it will help the jury distinguish between causes that were necessary to bring about the harm and causes that were not.

causes in which the plaintiffs argue it was error not to use the substantial contributing factor test, the but-for standard did what it is supposed to do and prevented the defendants from being held liable where the jury concluded that they did not cause the harm. Indeed, these types of cases, alleging multiple causes, may be where the but-for test is most important and useful, as it serves to separate the necessary causes from conduct that may have been negligent but may have had nothing to do with the harm caused.

One source of confusion is the mistaken belief that there can only be a single but-for cause of a harm.[11] Indeed, the plaintiffs argue that the presence of multiple potential causes here means that no one cause could be the "sole/but-for" cause. But there is no requirement that a defendant must be the sole factual cause of a harm. See Reporters' Note to Restatement (Third) § 26 comment c ("That a party's tortious conduct need only be a cause of the plaintiff's harm and not the sole cause is well recognized and accepted in every jurisdiction"). See also, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020) ("[But-for causation] can be a sweeping standard. Often,

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[11] For an example of this confusion, look no further than the concurrence. The concurrence thinks that by instructing the jury that there could be more than one but-for cause, we are creating a whole new standard separate and apart from the but-for standard -- a "but-for plus" standard. See post at .

events have multiple but-for causes"); June v. Union Carbide Corp., 577 F.3d 1234, 1242 (10th Cir. 2009) ("A number of factors [often innocent] generally must coexist for a tortfeasor's conduct to result in injury to the plaintiff. . . . That there are many factors does not mean that the defendant's conduct was not a cause").

In fact, there is no limit on how many factual causes there can be of a harm. Restatement (Third) § 26 comment c ("there will always be multiple . . . factual causes of a harm, although most will not be of significance for tort law and many will be unidentified"). The focus instead remains only on whether, in the absence of a defendant's conduct, the harm would have still occurred. See id. ("The existence of other causes of the harm does not affect whether specified tortious conduct was a necessary condition for the harm to occur"). This is not a high bar. See id. at § 26 comment i ("Quite often, each of the alleged acts or omissions is a cause of the harm, i.e., in the absence of any one, the harm would not have occurred"). And acknowledging the potential for multiple but-for causes "obviates any need for substantial factor as a test for

causation." Reporters' Note to Restatement (Third) § 26 comment j.[12,13]

The terminology of the substantial factor standard also leads to confusion. See Restatement (Third) § 26 comment j ("The substantial-factor test has not, however, withstood the test of time, as it has proved confusing and been misused"). See also Sanders, Green, & Powers, The Insubstantiality of the "Substantial Factor" Test for Causation, 73 Mo. L. Rev. 399, 430 (2008) (substantial factor test "gives no clear guidance to the factfinder about how one should approach the causal problem" and "permits courts to engage in fuzzy-headed thinking about what

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[12] Where multiple causes are alleged, it is appropriate to instruct a jury that there can be more than one factual cause of a harm.

[13] The Restatement (Third) introduces a novel concept referred to as "causal sets," see Restatement (Third) § 26 comment c. This concept is suggested as a helpful way to think of factual causation in a multiple cause case. It is not a separate test and is meant to be used only if it is deemed to be helpful. It is not an independent legal requirement. A causal set is defined as the group of actions or conditions that were necessary to bring about the harm. Id. ("[C]onceive of a set made up of each of the necessary conditions for the plaintiff's harm. Absent any one of the elements of the set, the plaintiff's harm would not have occurred"). So, in cases where the factual cause of a harm is an aggregate of multiple acts, omissions, or conditions, the Restatement simply labels the aggregate as a "causal set." It also explains that there may be competing causal sets. See id. at § 27 comment f. Importantly, it does not change the standard of causation -- a defendant would still only be a factual cause if the harm would not have occurred but for the defendant's actions.

sort of causal requirement should be imposed on plaintiffs" [emphasis omitted]). Unsurprisingly, it has "few supporters." Reporters' Note to Restatement (Third) § 26 comment j.[14]

The drafters of the most recent Restatement concluded that the confusing terminology has rendered the substantial factor test potentially both too strict and too lenient as a standard

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[14] Indeed, as the Restatement points out, many scholars have criticized the substantial factor test. See, e.g., Dorsaneo, Judges, Juries, and Reviewing Courts, 53 S.M.U. L. Rev. 1497, 1528-1530 (2000) (substantial factor "render[s] the causation standard considerably less intelligible"); Fischer, Insufficient Causes, 94 Ky. L.J. 277, 277 (2005) ("Over the years, courts also used the substantial factor test to do an increasing variety of things it was never intended to do and for which it is not appropriate. . . . [T]he test now creates unnecessary confusion in the law and has outlived its usefulness"); Robertson, The Common Sense of Cause in Fact, 75 Tex. L. Rev. 1765, 1776 (1997) ("By using the term ["substantial factor"] in three different senses, the Restatement [Second] of Torts has contributed to a nationwide confusion on the matter"); Stapleton, Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences, 54 Vand. L. Rev. 941, 945, 978 (2001) ("The obfuscating terminology of legal cause, proximate cause, and substantial factor should be replaced . . ."); Wright, Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility, 54 Vand. L. Rev. 1071, 1080 (2001). See also H.L.A. Hart & T. Honoré, Causation in the Law 124 (2d ed. 1985) ("Little, however, seems to be gained by describing, even to a jury, such cases in terms of the admittedly indefinable idea of a 'substantial factor'"); W.L. Prosser & W.P. Keeton, Torts § 41, at 43-45 (5th ed. Supp. 1988) ("Even if substantial factor' seemed sufficiently intelligible as a guide in time past, however, the development of several quite distinct and conflicting meanings for the term 'substantial factor' has created a risk of confusion and misunderstanding, especially when a court, or an advocate or scholar, uses the phrase without indication of which of its conflicting meanings is intended").

of factual causation. See Restatement (Third) § 26 comment j. The use of the word "substantial" imposes a more demanding standard than a traditional but-for standard. The current model jury instruction in Massachusetts explains that "substantial" means that the defendant's negligence was "not an insignificant factor" and that "it must be a material and important ingredient in causing the harm." Massachusetts Superior Court Civil Practice Jury Instructions § 4.3.4(b) (Mass. Cont. Legal Educ. 3d ed. 2014). There may be policy reasons to impose a more rigorous standard for factual cause than but-for causation, but that was not the primary purpose of the substantial factor test. See Restatement (Third) § 26 comment j.[15] Limits on liability have also been considered to be properly addressed through the lens of legal causation, not factual causation. If a defendant's conduct was necessary to bring about a harm, and the harm would not have occurred without the defendant's conduct,

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[15] The concurrence argues that the substantial contributing factor standard enhances the fairness of a negligence trial. Post at . We are not sure why this is true, particularly from the injured party's perspective, if both factual and legal causation are otherwise satisfied. The injured party has suffered a harm, and but for the defendant's conduct the harm would not have occurred. Regardless, we historically address the equities of recovery in the legal causation, not the factual causation, inquiry. See Kent, 437 Mass. at 320-321.

that defendant should be treated as a factual cause of the harm.[16]

Conversely, the confusing terminology has been found to invite jurors to skip the factual causation inquiry altogether. Although terms like "substantial factor" or "substantial contributing factor" would seem to imply some level of causal connection, their employment without a but-for causation instruction in cases in which but-for causation can be established invites the jury to skip this step in the analysis and impose liability on someone whose negligence lacks the requisite causal effect.[17] See Reporters' Note to Restatement (Third) § 26 comment j (substantial factor test "may unfairly permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm"). Absent a but-for requirement, a jury presented with negligence that is "substantial" may decide to impose liability without coming to

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[16] If the cause is truly trivial, it can be excluded from legal causation on that ground. See Reporters' Note to Restatement (Third) § 26 comment j. See also Restatement (Third) § 36. Again, the Restatement (Third) approach is more straightforward, as it allows a jury to excuse a defendant from liability on legal causation grounds where the defendant's conduct is determined to be trivial. See Restatement (Third) § 36.

[17] In fact, we indicated in O'Connor, 401 Mass. at 591, that in a case where a substantial contributing factor instruction is given, it would be error for the judge to instruct the jury in a way that requires it to find that the defendant was a but-for cause of the harm.

terms with whether the negligence was even a cause of the harm. As determining causation may be even more difficult where multiple causes are alleged, we need to be sure juries do not skip this step.

The use of substantial factor language also conflates and collapses the concepts of factual and legal causation. See, e.g., Strassfeld, If . . . : Counterfactuals in the Law, 60 Geo. Wash. L. Rev. 339, 355 (1992) (substantial factor approach "smuggles noncausal policy considerations, which normally are confined to the duty or proximate cause analysis, into the analysis of factual causation," and thus it "is either contentless, or it reintroduces and complicates [factual causation]"). See also Reporters' Note to Restatement (Third) § 26 comment a ("The conflation of factual cause and proximate cause by the Torts Restatements has been criticized since shortly after the first Restatement of Torts was published"). Instructing the jury to only consider "substantial factors" as causes inserts a high degree of subjectivity as to what is substantial and what is not, precisely the types of policy considerations that animate our legal causation jurisprudence. Such considerations, therefore, should not be incorporated into the factual causation analysis as well.

If the substantial factor test is employed whenever multiple causes are alleged, as the plaintiffs argue, the

potential for confusion is significant. Plaintiffs often allege multiple causes of a harm. Restatement (Third) § 26 comment i ("Frequently, plaintiffs allege that multiple tortious acts or omissions caused their harm. This is especially true in negligence actions because of the flexibility of the reasonable-care standard"). Moreover, defendants may inject further complexity by alleging that the plaintiffs, another defendant, or a nonparty caused the harm. If a substantial factor instruction is required whenever there is more than one potential cause, then the substantial factor standard could supplant the but-for standard as the primary standard for factual causation. What originated as an exception to but-for causation would swallow the rule.

Finally, using a different causation standard in multiple cause cases puts trial judges in difficult positions. Despite the apparent overlap, these are different standards. There is no simple, workable definition of "multiple causes" given that many cases will involve multiple potential causes. Using the substantial contributing factor test in this manner would mean that judges would have to decide which instruction is

appropriate before instructing the jury, a task rife with difficulty and potential error.[18]

In sum, although the substantial factor test has proved useful in two specific situations, it has not been widely adopted as the causation standard in all negligence cases and has been abandoned by the Restatement itself. See Restatement (Third) § 26 comment a.[19]

In light of the foregoing, we conclude that a but-for standard, rather than a substantial factor standard, is the appropriate standard for factual causation in negligence cases involving multiple alleged causes of the harm. We see no reason

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[18] The concurrence disagrees with our assessment, saying instead that we are "abandon[ing] . . . our steady and successful practice of applying substantial contributing factor in torts cases involving all sorts of fact patterns." Post at . Beyond the concurrence's own appraisal of the situation, it is not clear what evidence, empirical or otherwise, there is that the use of the standard has been "steady and successful." Our review of the record here supports our concern that having two standards places trial judges in a difficult position regarding jury instructions. Indeed, when forced to decide which standard to use, the experienced and capable trial judge in this case observed, "Well . . . I know that the law has been somewhat confused in some people's eyes . . . following the Matsuyama decision."

[19] It appears that the majority of jurisdictions -- over two-thirds -- require proof of but-for causation in the majority of cases. At least one jurisdiction has replaced the "substantial factor" standard with the Restatement (Third) approach. See Thompson v. Kaczinski, 774 N.W.2d 829, 839 (Iowa 2009).

to depart from but-for causation in these cases.[20] Thus, in the majority of negligence cases, the jury should be instructed on factual cause using a but-for standard as well as legal causation. In this case, the judge did exactly that, making the instructions proper.

D. Eliminating the substantial contributing factor test. In addition to not extending the substantial factor test to all cases involving multiple causes, there is good reason to replace it with the standard proposed in the Restatement (Third) for

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[20] The concurrence minimizes the numerous extensive critiques of the substantial factor test. To counteract all of this criticism, it relies on a passing positive reference to the standard as "useful" in dictum in Matsuyama, 452 Mass. at 30, which was focused on the utility of the standard when but-for causation cannot be established. As we have explained today, however, but-for causation works perfectly well in most cases, including those involving multiple causes.

The concurrence also suggests that we are somehow simply following academic fashion in adopting the Restatement (Third). See post at . This statement ignores that the substantial factor test originated with the Restatement and that the case law the concurrence cites, including Matsuyama, has demonstrated great respect for the development of the law as reflected by the Restatements of Torts. See, e.g., O'Connor, 401 Mass. at 591-592 (citing Restatement [Second] §§ 430, 431, and 433); Bernier v. Boston Edison Co., 380 Mass. 372, 386 (1980) (citing Restatement [Second] § 435); Quinby v. Boston & Me. R.R., 318 Mass. 438, 444 (1945) (citing Restatement of Torts §§ 431 and 433); Vigneault v. Dr. Hewson Dental Co., 300 Mass. 223, 229 (1937) (citing Restatement of Torts § 432). We turn to the Restatement not because it is fashionable to do so, but because the American Law Institute has struggled greatly with the complicated question of causation in negligence cases and is constantly trying to improve the legal standard in this area, including recognizing its own errors in this regard.

multiple sufficient cause cases.[21] If there must be an exception to but-for causation in cases where the but-for standard fails, we should simply recognize such an exception rather than adopting an entirely different causation standard with confusing terminology and unexpected difficulties. The approach proposed by the Restatement (Third) does exactly that. See State v. Tibble, 790 N.W.2d 121, 127 n.2 (Iowa 2010) (Restatement [Third]

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[21] The issue of causation in toxic tort and asbestos cases is not before us in this case. Therefore, we do not disturb our decision in O'Connor or the use of the substantial contributing factor instruction in those cases. In an appropriate case, however, we may consider whether to replace the substantial contributing factor test in these cases as well. There appears to be a variety of approaches taken in these cases, and a decision on whether to replace the substantial contributing factor test would benefit from full briefing and argument.

The concurrence misunderstands the court's hesitance to abandon the substantial contributing factor test in asbestos and other toxic tort cases. As we have explained, because of the unique features of these cases, there may be factual and scientific limitations on a plaintiff's ability to establish the requisite causal connection between the harm and an individual defendant. Thus, a but-for standard has seemed ill-suited for such cases.

It is simply not clear whether the concerns we have with the substantial contributing factor test justify eliminating it in these cases. Given the volume of these cases, their great importance, and the idiosyncrasies that make them unique with regard to factual causation, it would be unwise to apply our holding to these cases as well without first having the benefit of full briefing and argument. Our hesitance, however, should not be taken as a continuing endorsement of the substantial factor approach in toxic tort cases given the concerns we have expressed today.

§ 27 is "straightforward rule" in multiple sufficient cause cases).

Therefore, in the rare cases presenting the problem of multiple sufficient causes, the jury should receive additional instructions on factual causation. Such instructions should begin with the illustration from the Restatement (Third) of the twin fires example so that the complicated concept can be more easily understood by the jury.[22] After the illustration, the jury should be instructed, "A defendant whose tortious act was fully capable of causing the plaintiff's harm should not escape liability merely because of the happenstance of another sufficient cause, like the second fire, operating at the same time." The jury should then be instructed that when "there are two or more competing causes, like the twin fires, each of which is sufficient without the other to cause the harm and each of

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[22] That illustration is as follows:

> "Rosaria and Vincenzo were independently camping in a heavily forested campground. Each one had a campfire, and each negligently failed to ensure that the fire was extinguished upon retiring for the night. Due to unusually dry forest conditions and a stiff wind, both campfires escaped their sites and began a forest fire. The two fires, burning out of control, joined together and engulfed Centurion Company's hunting lodge, destroying it. Either fire alone would have destroyed the lodge. Each of Rosaria's and Vincenzo's negligence is a factual cause of the destruction of Centurion's hunting lodge."

Restatement (Third) § 27 comment a, illustration 1.

which is in operation at the time the plaintiff's harm occurs, the factual causation requirement is satisfied." See Restatement (Third) § 27 comment a. In such cases, where there are multiple, simultaneously operating, sufficient causes, the jury do not have to make a but-for causation finding. This approach avoids the confusing terminology presented by the terms "substantial factor" or "substantial contributing factor." It also eliminates the risk of the judge instructing the jury on the wrong standard, as this instruction supplements the but-for standard without conflicting with it.[23]

We recognize that the substantial factor test is a familiar standard in Massachusetts and that it has been used in the past, arguably with our endorsement, albeit for specific purposes.

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[23] The concurrence reads our opinion as providing "not one standard of factual causation but many," including "basic but for," "but for plus", and "the new instruction on [multiple sufficient cause] cases." Post at . This is incorrect. See parts 2.a.i.C and 2.a.i.D, supra ("in the majority of negligence cases, the jury should be instructed on factual cause using a but-for standard"; "in the rare cases presenting the problem of multiple sufficient causes, the jury should receive additional instructions on factual causation" [emphases added]). There is no "but-for plus"; we merely make clear what nearly every other jurisdiction recognizes -- that there is no requirement that a defendant be the sole factual cause of the harm. See Reporter's Note to Restatement (Third) § 26 comment c. With the exception of toxic tort cases, see note 21, supra, and the exceedingly rare multiple sufficient cause cases, the but-for standard will be the standard for factual causation. The other instructions we provide today merely clarify or expand on that concept in appropriate cases.

See, e.g., Matsuyama, 452 Mass. at 30-31. That we have used this standard before, however, does not automatically mean that we should continue to do so. In fact, given that the Restatements are the source of this standard,[24] the Restatement (Third)'s own recent criticism and rejection of this standard based on its confusing application provide good reason to reconsider its use. Having thoroughly considered these standards now, we conclude that the substantial contributing factor test should no longer be used in most negligence cases.

ii. Jury instructions on standard of care and breach. Next, the plaintiffs claim that the jury instructions improperly emphasized reliance on expert testimony for establishing the standard of care and breach regarding informed consent, citing to the following portions of the jury instructions as problematic:

> "In determining the -- the standard of care that applied at the time Nurse Practitioner Foster and Dr. Miller treated Laura Doull you must -- you must consider the testimony of the witnesses who offered their expert opinions on the applicable standard of care. That is, Dr. Genecin, Dr. Hill, Dr. Kenneth Miller and Dr. Potter. You do not decide on your own what the standard of care is or should have been, what it ought to have been. You must decide the standard of care based on the testimony of those witnesses. And obviously, as I said earlier, if there's conflict between the -- their opinions as to what the standard of

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[24] Early Massachusetts cases using a substantial factor standard relied on the first Restatement. See, e.g., Quinby, 318 Mass. at 444; Vigneault, 300 Mass. at 229; McKenna v. Andreassi, 292 Mass. 213, 218 (1935). We also relied on the Restatement (Second) in O'Connor, 401 Mass. at 592.

> care is, your role is to determine which opinion you credit in that regard.
>
> "You may also consider, and should also consider, any medical resources that may have been available to Dr. Miller and to Nurse Practitioner Foster during the time period that they were treating Laura Doull as one aspect of the skill and care required of them at the time. . . . You make that determination [of the standard of care] from all of the evidence introduced during the trial as well as, as I said, you must take into account the -- the testimony of the four medical experts and their testimony with regard to what the standard of care was."

The plaintiffs contend that the trial judge was required to instruct the jury that the standard of care could come from regulations, specifically 244 Code Mass. Regs. § 9.04(5) (2000),[25] and that breach could be established through an admission of fault. The plaintiffs conclude that the judge's failure to instruct on these points led the jury to find that the defendants had acquired Doull's informed consent regarding the progesterone cream. Because the plaintiffs objected, we review for prejudicial error. See Blackstone v. Cashman, 448 Mass. 255, 270 (2007). We conclude that the judge's instructions were not erroneous.

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[25] Title 244 Code Mass. Regs. § 9.04(5) states: "Full Disclosure. When proposing any diagnostic or therapeutic intervention which is beyond the scope of generic nursing practice, an [advanced practice nurse] shall fully disclose to the patient or to the patient's representative the risks and benefits of, and alternatives to, such intervention and shall document such disclosure in the patient's record."

A. Standard of care. "To prevail on a claim of medical malpractice, a plaintiff must establish the applicable standard of care . . . ." Palandjian v. Foster, 446 Mass. 100, 104 (2006). "In Massachusetts, 'it is entirely proper to offer in evidence . . . [an official regulation] to show the relevant standard of care.'" Campbell v. Cape & Islands Healthcare Servs., Inc., 81 Mass. App. Ct. 252, 255 (2012), quoting Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 793 (1996). See Mass. G. Evid. § 414 (2020) ("Safety rules, governmental regulations or ordinances, and industry standards may be offered by either party in civil cases as evidence of the appropriate care under the circumstances"). However, a judge need not instruct on a regulation if it is "not relevant to the facts of [the] case." Boothby v. Texon, Inc., 414 Mass. 468, 483, 484 (1993) ("A judge need not instruct the jury on every spin that a party can put on the facts").

Focusing on what was disputed here regarding the informed consent claims resolves the plaintiffs' issue with the adequacy of the standard of care instructions. At trial, it was undisputed that the defendants owed Doull a duty to inform her about the material risks of, and alternatives to, the

progesterone cream.[26] The parties disputed what constituted a material risk of the treatment, with each side putting forth conflicting expert testimony on whether natural progesterone cream applied topically would increase the chances of developing blood clots. It is unclear how further instruction on 244 Code Mass. Regs. § 9.04(5), which speaks only generally of the duty to inform, could have aided the jury in establishing the progesterone cream's material risks.[27] To establish these, jurors would have had to look to expert testimony -- exactly what the judge instructed them to do. Therefore, the standard of care instructions did not prejudice the plaintiffs.

B. Breach. The plaintiffs' argument that the trial judge erroneously failed to instruct the jury that breach could be established through a defendant's admission is equally without

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[26] In fact, the judge instructed the jury that "a medical care provider owes to his or her patient the duty to disclose, in a reasonable manner, all significant medical information that the medical care provider possesses or reasonably should possess[] that is material to an intelligent decision by the patient whether to undergo a proposed course of treatment."

[27] The plaintiffs also, somewhat obliquely, point to other policies and procedures offered in evidence as sources of the standard of care, alleging that these, too, were improperly overshadowed by expert testimony in the instruction. Because the judge told the jurors to examine all of the evidence entered during the trial when determining the standard of care, it is unclear how the instructions were improper, let alone prejudicial.

merit.[28] "Testimony concerning conclusory admissions by a malpractice defendant may suffice to sustain a jury's finding of negligence if, from the admission, the jury 'could infer an acknowledgment of all the necessary elements of legal liability.'" Collins v. Baron, 392 Mass. 565, 568 (1984), quoting Zimmerman v. Litvich, 297 Mass. 91, 94 (1937). Indeed, we have said that "a doctor's admission that an injury was 'his fault' sufficed to warrant a jury's finding of negligence. See Collins, supra, citing Tully v. Mandell, 269 Mass. 307, 308-309 (1929). No such admission, however, is at issue here.

During her testimony at trial, Foster admitted that she did not inform Doull that natural progesterone cream carried any risk of blood clotting. Yet, this admission would not have been sufficient to render Foster liable for failing to acquire informed consent from Doull: the jury would have had to find that natural progesterone cream carried a risk of causing blood clots in order for Foster to have committed a breach of her duty to inform Doull about the risk. Cf. Collins, 392 Mass. at 566 (defendant admitted that he "made a mistake during the

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[28] The plaintiffs' argument on this point is difficult to follow. They claim that the "erroneous instruction also spread to the breach portion of the case, again with overemphasis on experts." This is followed by discussion of Foster's admission discussed infra. Consequently, we interpret this argument as a claim that the judge ought to have instructed the jury that Foster's admissions could establish breach.

hysterectomy," had severed plaintiff's ureter, and was at fault). Whether the progesterone cream posed such a risk was a matter that the jury would have had to turn to the experts' testimony to determine. The jury instructions on breach, then, were proper.

b. Motion to amend. The plaintiffs contend that their motion to amend the complaint to add WIC as a defendant should have been allowed. The judge denied the plaintiffs' motion on the grounds that the discovery deadline had passed and the plaintiffs had failed to explain why they had not added WIC earlier.

"We review the denial of a motion to amend the complaint for abuse of discretion." Dzung Duy Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436, 461 (2018). Despite this standard, "leave should be granted unless there are good reasons for denying the motion." Mathis v. Massachusetts Elec. Co., 409 Mass. 256, 264 (1991). See Mass. R. Civ. P. 15 (a), 365 Mass. 761 (1974). "Such reasons include 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment . . . .'" Mathis, supra, quoting Castellucci v. United States Fid. & Guar. Co., 372 Mass. 288, 290 (1977).

The plaintiffs claim to have learned in November 2016 that the defendants had ordered from WIC the progesterone cream that Foster prescribed to Doull. The plaintiffs did not move to add WIC as a party until April 2017, approximately five months after making the discovery and four months before trial began. At the time of their motion, the plaintiffs failed to explain the delay or address that the discovery period had expired. Given these facts, the judge's denial of the plaintiffs' motion was not an abuse of discretion. See Mathis, 409 Mass. at 264-265 ("an unexcused delay in seeking to amend is a valid basis for denial of a motion to amend"); Castellucci, 372 Mass. at 292 ("When trial is as imminent as it was in this case, a judge may give weight to the public interest in the efficient operation of the trial list and to the interests of other parties who are ready for trial").

c. Posttrial contact with jurors. The plaintiffs argue that the trial judge improperly granted the defendants' motion to require judicial approval for postverdict contact with the jurors. Considering the reasons for the plaintiffs' request to initiate contact with the jurors, the judge's decision was proper.

Attorneys are generally not required to seek court approval before initiating postverdict contact with the jury. See Commonwealth v. Moore, 474 Mass. 541, 551 (2016). An attorney

may not, however, initiate postverdict contact with the jury if "the communication is prohibited by law or court order" (emphasis added). Mass. R. Prof. C. 3.5 (c) (1), as appearing in 471 Mass. 1428 (2015). See Moore, supra at 549 n.10 ("We do not question that, when appropriate, a judge in a particular case may restrict or even prohibit attorneys' unsupervised communication with jurors postverdict; such a court order is expressly contemplated by rule 3.5 [c] [1]"). A judge may bar postverdict contact with the jury if the attorney seeks to inquire "into the contents of jury deliberations and thought processes of jurors." Id. at 548.

In response to the defendants' motion to require judicial approval for postverdict contact with the jurors, the plaintiffs explained that they sought to contact the jurors in order to ask them "how they felt about [Miller's trial counsel] nearly assaulting Dr. Genecin . . . on the witness stand and if they would have felt differently if the attorney was male and witness was female."[29] These objectives fall far afield of anything resembling a valid reason for approaching jurors and instead appear to be aimed at "inquiry into the contents of jury deliberations and thought processes of jurors and the

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[29] In granting the defendants' motion, the trial judge noted that no assault occurred and that the plaintiffs' suggestion otherwise could distort the jurors' understanding of the advocacy process.

impeachment of jury verdicts based on information that might be gained from such inquiry." See Moore, 474 Mass. at 548. For these reasons, the trial judge's concerns that the plaintiffs would pry into the jurors' deliberations were warranted and the prohibition on postverdict contact with the jury was appropriate.

d. Additional claims. Finally, the plaintiffs make a litany of arguments that cite few or no legal authorities, contain cursory or no argumentation, or are unsubstantiated in the record or reference no portions of the record at all.[30]

[30] The plaintiffs contend, for example, that if the trial judge had admitted every publication they offered in evidence, then "a different result on the informed consent questions would have been likely." For this conclusion, the plaintiffs cite once to Pfeiffer v. Salas, 360 Mass. 93, 99 (1971), but provide no discussion of it. We further discern no abuse of discretion in the trial judge's limitations on the use and reference to certain drugs containing progesterone that were not demonstrated to be the same as or sufficiently similar to the topical progesterone cream used by Doull. Next, the plaintiffs make at least nine different versions of the argument that the judge systematically abused her discretion and deprived them of a fair and balanced trial. For each iteration of this claim, the plaintiffs fail to explain how the judge abused her discretion or how it prejudiced them, resorting instead to vague declarations that they were denied a fair trial. The plaintiffs then turn to the judge's denial of their motion for judgment notwithstanding the verdict on the defendants' affirmative defenses. For this claim, the plaintiffs make no argument on appeal at all, instead directing our attention to arguments they made below. Finally, the plaintiffs argue that the judge abused her discretion in various ways during the pretrial and discovery processes. Again, these claims are made with scant argument. More is required from appellate advocates.

These claims do not rise to the level of appellate argument.[31] See Mass. R. A. P. 16 (a) (9), as amended, 428 Mass. 1603 (1999). We therefore do not consider them.[32]

3. Conclusion. For the foregoing reasons, we affirm the judgment and the order denying the plaintiffs' motion for a new trial.

So ordered.

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[31] Because the plaintiffs' appeal raised nonfrivolous issues, we reject the defendants' call to award appellate attorney's fees and double costs. See Masterpiece Kitchen & Bath, Inc. v. Gordon, 425 Mass. 325, 330 n.11 (1997) ("The determination whether an appeal is frivolous is left to the sound discretion of the appellate court . . ."). See also Avery v. Steele, 414 Mass. 450, 455 (1993), quoting Allen v. Batchelder, 17 Mass. App. Ct. 453, 458 (1984) ("An appeal is frivolous '[w]hen the law is well settled, when there can be no reasonable expectation of a reversal'").

[32] We cannot, however, pass over in silence the many references made in the plaintiffs' brief to the trial judge's supposed biases. At various points, the plaintiffs' counsel insinuates or outright alleges that the trial judge was biased toward the defendants. Indeed, the plaintiffs' brief concludes by noting of the causation issue: "The simple truth is the Trial Court gave the wrong instruction of law in order to guarantee a defense verdict." We have reviewed the transcript, and the judge exhibited patience, rectitude, and fairness throughout the trial. The record supports none of the accusations found in the plaintiffs' briefs.

LOWY, J. (concurring, with whom Gaziano, J., joins). Today the court abandons decades of precedent in an attempt to clarify confusion that does not exist. Abandoning the substantial contributing factor instruction in circumstances where there is more than one legal cause of an injury will, in my view, inure to the detriment of plaintiffs with legitimate causes of action while not clarifying the existing law of causation. To be clear, I agree that regardless of the test, the outcome in this case is the same. Here, the jury found only one breach on which to consider causation; this is the paradigmatic situation for but-for causation.[1] Yet for the following reasons, I would maintain the current practice of applying the substantial contributing factor test to multiple cause cases.

1. Current law. We have long applied the substantial contributing factor test. See, e.g., Bernier v. Boston Edison Co., 380 Mass. 372, 386 (1980); Tritsch v. Boston Edison Co.,

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[1] At trial, plaintiffs argued three theories of negligence: (1) that Anna C. Foster and Richard J. Miller failed to acquire informed consent from Laura Doull, (2) that Foster failed to diagnose Doull properly during her spring 2011 visits, and (3) that Miller was negligent in his supervision of Foster. The jury eliminated informed consent as a possible theory, thus leaving only the failure to diagnose and the negligent supervision claims. These two theories of negligence shared only one cause, because finding liability on the negligent supervision claim hinged on the failure to diagnose claim. Thus, although the judge should have initially instructed on the substantial contributing factor test, failure to do so was harmless.

363 Mass. 179, 182 (1973); Falvey v. Hamelburg, 347 Mass. 430, 435 (1964); Quinby v. Boston & Me. R.R., 318 Mass. 438, 444-445 (1945); Vigneault v. Dr. Hewson Dental Co., 300 Mass. 223, 229 (1938). References in our cases to causes being "substantial contributing" factors even predate the test's modern formulation in the Restatement of Torts (1939) and Restatement (Second) of Torts (1965). See Wheeler v. Worcester, 10 Allen 591, 594, 597 (1865). In recent years, we have refined how the test is applied to cause-in-fact problems. See Matsuyama v. Birnbaum, 452 Mass. 1, 30-31 (2008) (limiting substantial contributing factor test to cases with multiple causes). Examination of the test reveals why it has so long endured.

To begin, note how the substantial contributing factor test mirrors the analysis of but-for causation. Save for the rare instances where two or more causes are each alone sufficient to produce a result, we have made clear that a substantial contributing factor must actually make a difference as to whether an event occurs in order to be considered a cause of it. In O'Connor v. Raymark Indus., Inc., 401 Mass. 586, 592 (1988), for example, we held that a jury must "distinguish between a 'substantial factor,' tending along with other factors to produce the plaintiff's [harm], and a negligible factor, so slight or so tangential to the harm caused that, even when combined with other factors, it could not reasonably be said to

have contributed to the result." If the plaintiff cannot demonstrate that the defendant's negligence substantially contributed to the alleged harm, then the defendant cannot be held liable. See id. at 587. Just as but-for causation does, the substantial contributing factor test embodies a core principle of tort law: only those who meaningfully contributed to a person's harm should be liable for it.[2] See Wainwright v. Jackson, 291 Mass. 100, 102 (1935).

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[2] Semantics further proves the point. A substantial contributing factor must first and foremost be a genuine factor. It would be difficult to contemplate how conduct could "substantially" contribute to an outcome and yet the outcome would have happened without the conduct. See Black's Law Dictionary 1728 (11th ed. 2019) (defining "substantial" as "1. Of, relating to, or involving substance; material . . . . 2. Real and not imaginary; having actual, not fictitious, existence . . . . 3. Important, essential, and material; of real worth and importance").

Other courts have echoed this sentiment. See, e.g., June v. Union Carbide Corp., 577 F.3d 1234, 1239 (10th Cir. 2009) ("the ultimate legal standards in the two Restatements," one of which advocates substantial contributing factor and other of which advocates but-for cause, "are essentially identical"); Mitchell v. Gonzales, 54 Cal. 3d 1041, 1052 (1991) ("the 'substantial factor' test subsumes the 'but for' test"); Burnette v. Eubanks, 308 Kan. 838, 850-851 (2018) ("An act of negligence which contributes to an accident must, of necessity, have at least a part in causing the accident" [citation omitted]). Hence, even critics of the substantial contributing factor test concede that it works fine when clearly delineated: the test implicitly subsumes within it the same requirements of but-for cause. See Robertson, The Common Sense of Cause in Fact, 75 Tex. L. Rev. 1765, 1781 (1997) ("As long as courts are careful to explain that they are not adding a sixth requirement -- but instead are either using the 'substantial factor' test for cause in fact in lieu of the but-for approach or are using

Where the two tests part ways is in where they focus jurors' attention. The substantial contributing factor test is positive in outlook: it frames causation to have a juror start by considering what actually happened, and whether the defendant's actions played a part in producing the result. See Restatement (Second) of Torts § 431(a). But-for causation, on the other hand, begins not with what was, but with what might have been: in order to determine whether what occurred was the product of the defendant's action, the jury must determine how the sequence of events would have played out in the absence of this conduct. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 comment e (2010) (Restatement [Third] of Torts).

Although this counterfactual framing may be straightforward when the jury are considering only one theory of causation, I fear that in cases with multiple causes it invites the jury to get caught up in speculative combinations of "what if" and "if only." See, e.g., Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543, 556 (1962) ("Tests of this character have the same vice as any 'if,' or any analogy. They take the eye off the ball"). See also Spellman & Kincannon, The Relation Between Counterfactual ("But For") and Causal

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the 'substantial factor' vocabulary to describe a general approach to the legal cause issue -- no clear harm is done").

Reasoning: Experimental Findings and Implications for Jurors' Decisions, 64 Law & Contemp. Probs. 241, 243-247 (2001) (detailing how moral and other nonfactual factors enter into jurors' considerations when engaged in counterfactual reasoning). The substantial contributing factor test better replicates how many people understand causation and thus avoids this issue.

These considerations reveal not only why we recently said that the substantial contributing cause test was "useful" in cases with multiple causes, but also how the test promotes fairness. Matsuyama, 452 Mass. at 30. As with the other elements of a negligence claim, plaintiffs bear the burden of proving causation. See Glidden v. Maglio, 430 Mass. 694, 696 (2000). In the sorts of byzantine fact patterns that often arise in medical malpractice, toxic tort, and other tort cases with multiple causes, an instruction on but-for causation provides defendants with tools unavailable to plaintiffs. For example, civil defendants in cases with multiple causes sometimes "employ an 'empty chair' defense -- blaming the party not on trial." Lind v. Domino's Pizza LLC, 87 Mass. App. Ct. 650, 665 (2015). This strategy is but one example of how but-for causation encourages jurors to speculate about alternative realities. An instruction on the substantial contributing factor test, however, focuses the jurors attention directly on

what ought to determine legal responsibility: the conduct of the parties.

2. The court's approach. The court abandons what has been our steady and successful practice of applying the substantial contributing factor test in torts cases involving all sorts of fact patterns, not just in "twin fire" and toxic tort cases. See, e.g., Renzi v. Paredes, 452 Mass. 38, 44 n.10 (2008) (substantial contributing factor test proper in loss of chance case where liability was premised on failure to diagnose); Morea v. Cosco, Inc., 422 Mass. 601, 603 n.2 (1996) (jury found defective product design not "substantial cause" of child's death); Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 14 (1983) (jury could find liquor store's sale of alcohol to minor was "substantial legal factor" causing cyclist's death); Mullins v. Pine Manor College, 389 Mass. 47, 58, 62 (1983) (jury could find that injury to rape victim was substantially caused by college's negligent security).

Why the sudden about-face? Precedent does not dictate the new direction, as recent affirmations of the substantial contributing factor test attest. See, e.g., Renzi, 452 Mass. at 44 n.10. Practices, too, remain unaltered. See, e.g., Parsons v. Ameri, 97 Mass. App. Ct. 96, 102 (2020) (jury instructed on substantial contributing factor test in medical malpractice case). Indeed, even the current Massachusetts Continuing Legal

Education Civil Practice Jury Instructions recognize our use of the substantial contributing factor test in cases with multiple causes. See Massachusetts Superior Court Civil Practice Jury Instructions § 4.3.4(a) practice note (3d ed. 2014) (but-for test is "suitable for use in the ordinary tort case without the complexity of multiple causes or tortfeasors").

Only one thing has changed: the Restatements. Whereas earlier Restatements embraced the substantial contributing factor test, the Restatement (Third) of Torts has rejected it. Compare Restatement of Torts § 431(a) and Restatement (Second) of Torts § 431(a), with Restatement (Third) of Torts § 26. Specifically, the Restatement (Third) calls the substantial contributing factor test "confusing," concluding that, aside from multiple sufficient cause cases, the test "provides nothing of use in determining whether factual cause exists." Restatement (Third) of Torts § 26 comment j. This position is now the court's. What we very recently called "useful" is now supposedly no longer so. See Matsuyama, 452 Mass. at 30.

Of course, we are not bound to follow old law when new facts reveal that application is unworkable in our jurisdiction. See Franklin v. Albert, 381 Mass. 611, 617 (1980). Yet such facts are absent here. Notably, when the court discusses the confusion that the substantial contributing factor test has

allegedly generated, citations to our cases drop off.[3] Instead, the court replicates an abstract and academic discussion of the problems that the Restatement (Third) of Torts found with the standard.[4] See ante at - . We should be "disinclined to fix something that is not broken, even if [we] would have constructed it differently in the first place."[5] Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 589 (Sosman, J., concurring), cert. denied sub nom. Wilfert Bros. Realty Co. v. Massachusetts Comm'n Against Discrimination, 543 U.S. 979 (2004).

Furthermore, how much of the apparent confusion the court's solution would dispel is unclear. Although the court criticizes the substantial contributing factor test for requiring judges to

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[3] One of the court's citations to our cases is also inaccurate. Matsuyama, 452 Mass. at 30, is a loss of chance medical malpractice case; it is neither a toxic tort nor an asbestos case, although the court lumps it in with those cases.

[4] By way of explanation, the Restatement (Third) of Torts catalogues various uses of the test across different jurisdictions. The test appears to be more confusing when comparing cases across jurisdictions -- which unsurprisingly evince the sort of pluralism characteristic of the common law's development -- than when comparing cases within a jurisdiction. Regardless, absent from these comparisons is Massachusetts. See Restatement (Third) of Torts § 26 comment j.

[5] Other States have also successfully continued to apply the substantial contributing factor test in recent years despite the alternative presented by the Restatement (Third) of Torts. See, e.g., O'Grady v. State, 140 Haw. 36, 46 (2017) (reaffirming use of test in negligence cases).

determine how many causes are alleged in a case, the court provides not one standard of factual causation but many. First, there is basic but-for: as is currently the practice, in cases where there is one alleged cause, jurors should be instructed on but-for causation. See ante at - . Second, there is but-for plus: in cases where there are more than one alleged cause, it is "appropriate" to also inform the jurors that there can be more than one but-for cause of a harm.[6] See id. at note 12. Third, there is the new instruction on the twin fires example: in cases where there are multiple sufficient causes, jurors are to be given a hypothetical scenario detailing a camping trip gone wrong, told that "[a] defendant whose tortious act was fully capable of causing the plaintiff's harm should not escape liability merely because of the happenstance of another sufficient cause, like the second fire, operating at the same time" along with a follow-up explanation of this instruction, and then sent to deliberate. See id. at . Fourth, and finally, the substantial contributing factor test remains: for all its purported confusion, the standard continues to work well in toxic tort cases -- except for the fact that the court also

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[6] Even but-for plus presents an option within an option, as the court implies by noting that it is merely "appropriate," not necessary, for the trial judge to so instruct the jury in cases where there are multiple alleged causes.

invites in a footnote overturning what it otherwise praises.[7] See id. at note 21.

The Restatements are owed respect. Our cases, however, deserve more. See Mabardy v. McHugh, 202 Mass. 148, 152 (1909) ("Parties should not be encouraged to seek re-examination of determined principles and speculate on a fluctuation of the law with every change in the expounders of it"). The number of tests the court provides is a tacit recognition of what our cases have long understood: the but-for standard is useful, but limited in its usefulness. Given that our cases have had decades to refine this point, following them is the prudent course.

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[7] Additionally, adopting a new approach to cause-in-fact issues in torts will encourage litigants to press for its application in other areas of the law beyond negligence, such as commercial disparagement, defamation, and false representation. See, e.g., HipSaver, Inc. v. Kiel, 464 Mass. 517, 537 (2013), quoting Restatement (Second) of Torts § 633 comment g ("[w]hen the loss of a specific sale is relied on to establish pecuniary loss, it must be proved that the publication was a substantial factor influencing the specific, identified purchaser in his decision not to buy"); Murphy v. Boston Herald, Inc., 449 Mass. 42, 67 (2007) ("The judge properly instructed the jury: 'The pain and suffering for which [the plaintiff] is entitled to recover in this action is the pain and suffering which the defamatory statement was, or were, a substantial factor in producing'" [alteration in original]); Reisman v. KPMG Peat Marwick LLP, 57 Mass. App. Ct. 100, 112 (2003) ("It has long been the law in Massachusetts that, where reliance on a fraudulent misstatement is a substantial factor in the decision to purchase and/or retain stock, the maker of a false representation is liable for a subsequent loss in the value of stock suffered in reliance on the false representation").

3. Conclusion. With so many pages of the Massachusetts Reports already filled with the successful application of the substantial contributing factor test, the court's conclusion that the test is now unworkable defies experience and unravels precedent. I fear that it does so at the price of fairness.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2018-P-1622

SETH DOULL, as Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and TROY DOULL p.p.a. SETH DOULL,
APPELLANTS / Plaintiffs,

V.

ANNA C. FOSTER, N.P.; and ROBERT J. MILLER, M.D.
APPELLEES / Defendants.

ON APPEAL FROM A JUDGMENT
OF THE FRANKLIN SUPERIOR COURT

APPELLANT'S BRIEF

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Date: June 27, 2019

TABLE OF CONTENTS

Volume II

Volume III

Volume IV

Volume V

Trial Exhibits:

Volume VII

Volume VIII

Volume IX

remainder of Exhibit 2 is filed as volumes XXV-XXIX

Volume XIII (Impounded)

Volume XIV (Impounded)

Volume XV (Impounded)

Volume XVI (Impounded)

Volume XVII (Impounded)

Volume XVIII (Impounded)

Volume XIX (Impounded)

Volume XX (Impounded)

Volume XXI (Impounded)

Remainder of Exhibits 3 (Volume XIII), 4 (Volume XIV), and 16 (Volume XVII) is not being filed at this time, as it is not referenced in the appellant brief but is available to supplement the Record Appendix to have the entire record from the trial available

TABLE OF CASES, STATUTES, & AUTHORITIES

CASES

MASSACHUSETTS GENERAL LAWS

MASSACHUSETTS REGULATIONS

MASSACHUSETTS RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

Whether the plaintiffs' substantial rights were violated because trial court instructed the jury on the wrong causation standard, in violation of the current and controlling laws of the Commonwealth, the facts of the case, and even the lower court's own rulings and proclamations.

Whether the plaintiffs' substantial rights were violated because trial court instructed the jury on the wrong negligence standard.

Whether the plaintiffs' substantial rights were violated resulting in verdict against the weight of evidence on the informed consent claims because the lower court improperly instructed the jury on the wrong legal standards, placed improper over-emphasis on expert evidence, improperly excluded relevant evidence and even made improper comments about relevant evidence on this issue.

Whether the plaintiffs' substantial rights were violated because the lower court systematically deprived the plaintiffs of a fair and balanced trial by abusing its discretion and: unreasonably restricted jury selection; unreasonably restricted cross-examination of the defendants' experts; unreasonably restricted cross-examination of the defendants; evidentiary rulings depriving plaintiffs of important evidence necessary to establish negligence and damages; systematic and improper admonishments of plaintiffs' counsel in front of jury for non-existent alleged violations while ignoring proven serious ethical violations of the defendants' counsel; systematic and persistent blocking by the lower court of the use of the phrase "patient safety" in medical malpractice claim despite it being relevant and admitted evidence; systematic allowing defendants to violate applicable court orders and laws of the Commonwealth in order to advance the defendants' theory of the case; and lower courts improper comments on evidence and trial process in front of the jury.

Whether the plaintiffs' substantial rights were violated by the lower court's refusal to present the defendants' active affirmative defenses to the jury and then ignoring/denying the motion for judgment notwithstanding the non-existent verdict.

Whether the plaintiffs' substantial rights were violated by the lower court's denial of plaintiffs' motion to amend the complaint to bring in a potentially responsible party when it was discovered and after said party admitted that its drug was or could have been systematically inconsistent and un-pure.

Whether the plaintiffs' substantial rights were violated because the lower court systematically deprived the plaintiffs of a fair and balanced discovery and litigation process by abusing its discretion and: ignoring plaintiffs' motion for speedy trial depriving plaintiff Laura Doull her day in court before she died; unreasonably denying plaintiffs' discovery of the defendants; unreasonably denying plaintiffs' discovery of the potentially co-defendant drug manufacturer; unreasonably denying plaintiffs' post-trial contact with the jurors; and unreasonably 'sanctioning' plaintiffs' counsel without grounds or due-process.

STATEMENT OF THE CASE

Plaintiffs, SETH DOULL, as Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and SETH DOULL as next friend of TROY DOULL, (hereinafter the "Plaintiffs") appeal from the jury verdict for the Defendants ANNA C. FOSTER, N.P. and ROBERT J. MILLER, M.D. (hereinafter the "Defendants") after finding both Defendants separately and individually negligent, but not the sole "but-for" cause of the Plaintiffs' harms, associated pre-, in-, and post- trial rulings, and selected discovery and litigation rulings, systematically depriving the plaintiffs of a fair and balanced access to justice.

In brief, Plaintiffs allege that Defendants for years negligently treated Laura[1] by, without informed consent, putting Laura on unproven, non-FDA-approved, hormone-replacement-drugs, causing her to develop venous-thromboembolism ("VTE") and multiple Pulmonary-Emboli ("PEs"), and then for months, if not years, ignored the signs and symptoms of PEs, causing her to develop chronic-thromboembolic-pulmonary-hypertension (CTEPH), leading to premature and painful death at age 43.

Relevant Procedural History

Plaintiffs commenced this suit by filing a complaint against Defendants on claims of negligence, failure to obtain informed consent, and loss of consortium. (RAI/20, 64-74).[2] Defendants answered, via same counsel. (RAI/20, 75-100). Thereafter offer of proof was filed, medical malpractice tribunal was held, and found for Plaintiffs against both Defendants. (RAI/20).

After initial discovery was served on Defendants and partially responded-to, Plaintiffs served on Defendants requests for admissions. Defendants asked for, and were granted, two extensions, but when Defendants asked for third extension, Plaintiffs' counsel (per HoeyLaw firm's policy) would agree if Defendants would

[1] Because all the Plaintiffs share the same last name, they will be referred to by their first names only.

[2] References to the record are as follows: to the Appellant's Record Appendix as (RAx/y)wherein x is the volume of the appendix and y is the page within said volume, and to the Transcript Appendix as (TR/y) wherein y is the page within said volume.

agree to one of their requests. Defendants would not, and filed emergency motion for protective order, that was heard by the Court ex-parte, even before Defendants served the motion on Plaintiffs. The Court, ex-parte, essentially allowed the motion, even extending beyond the relief sought by Defendants, but to make it appear "fair" offered Plaintiffs opportunity to file opposition. Thereafter, the Court issued its written order allowing the Defendants' request and stating that Plaintiffs' counsel should be sanctioned. Multiple oppositions and correspondence followed resulting in a hearing with outside attorney for HoeyLaw arguing for the Plaintiffs, resulting in subsequent order wherein the Court vacated the prior "sanctions" order on the condition that Plaintiffs pay Defendants' counsels' costs. The requests that Plaintiffs made (in the discussion, cross-motions, and Rule 9A motions) was for leave to audio-visually record depositions, appointment of discovery master, and for speedy trial, all of which were opposed by Defendants and either denied or ignored by lower court. (RAI/21-23, 101-222).

On October 23, 2015 Laura died and after her Estate was probated, Plaintiffs' moved to amend the complaint to substitute parties and add wrongful death counts (RAI/223-252). Defendants answered, this time by separate counsel[3], and again asserted numerous affirmative defenses. (RAI/252-279).

[3] Defendants' original joint-counsel remained as counsel-of-record for Foster; during the trial, the Court improperly allowed Miller to be "cross-examined" by his own former-counsel (TR/1833-34).

Discovery continued and once the source of the drug that Defendants ordered for Laura was revealed as a Wisconsin compounding pharmacy ("WIC"), Defendants moved – without opposition – for letters rogatory for *documents only* deposition. (RAI/26-27, 280-286).

As the discovery deadline[4] approached, Defendants noticed live, Rule 30(b)(6) out-of-state deposition of WIC, forcing Plaintiffs to move for a protective order, which the Court mostly denied. (RAI/33-37, 287-405).

After the WIC deposition was started (and suspended) Plaintiffs moved to compel further discovery and for leave to amend to bring WIC in as a co-defendant, but the Court denied said motion. Court's ruling on other discovery motions likewise were mostly for the Defendants. (RAI/35-37; RAII/4-223).

Parties Joint Pre-Trail Memorandum was filed and corresponding trial orders were issued. (RAII/224-325).

Multiple pre-trial motions were served, filed, and opposed, by both sides, and the first pre-trial conference was held on September 6, 2017, followed by additional filings and second conference on September 15. (RAII/326-425; RAIII/3-465; RAIV/3-521; RAV/3-98; TR/3-140).

Jury trial commenced on September 18 and concluded on October 10 after over 20 hours of deliberations. Jury found for both Defendants on the informed

[4] Extended on Defendants' motions (RAI/26-32).

consent claims, found both Defendants separately negligent, but did not find that the Defendants' negligence was the sole/but-for cause of Laura's harms. Over Plaintiffs' objections, Court did not include causation questions on claims of the other three Plaintiffs (Seth, Megan, and Troy). (RAV/237-244).

Post-trial motions followed, including multiple "emergency" motions by Defendants to preclude post-trial juror contact, all motions being ruled by the Trial Court in Defendants' favor. (RAVI/3-203).

On April 23, 2018 Trial Court issued its order denying Plaintiffs' motion for new fair trial and this appeal followed, with only subsequent motion being Plaintiffs' motion to impound all medical records, which was allowed. (RAVI/187-213).

STATEMENT OF THE FACTS

Viewed in the light most favorable to the plaintiff, *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 8 n. 1 (1983), a reasonable and properly instructed jury could have found the following facts:[5]

Laura has been a patient of the Defendant Miller's primary care practice since she was twelve years old. (RAXI/183). Around 2000 Defendant Foster joined the Miller practice and took over majority of Laura's care. (TR/1018). [Defendants were romantically involved with each other, never disclosed this arrangement or

[5] Facts that were not before the jury – due to trial court's rulings – but have been proffered are presented in [brackets].

other conflicts to their patient(s), and Defendant Miller lied under oath about this relations in prior malpractice claim.] (TR/59-60).

Throughout her care with Defendants, Laura had multiple labs drawn, and several times her platelets counts were high or elevated, but this fact was never communicated to her and no plan of care concerning this was documented in the records. (TR/1322-25, 1334-36).

Around August 4, 2008 Defendant Foster, in agreement with Defendant Miller, order prescription progesterone for Laura on "trial" basis as hormone-replacement-therapy ("HRT"). No information about this HRT-drug was provided to Laura and only documented information in record is: "progesterone creme 100mg hs day 14-28" "trial." (RAXI/47-49). Defendant Miller conceded that he knew nothing about his drug other than what was in his Physicians'-Desk-Reference ("PDR") book. (TR/1653-56). The next reference to any type of HRT related medical care is August 24, 2009 notation to "check progesterone," September 8, 2019 lab notation "prog 1.0" and October 22, 2009 notation "stay with Biest creme." (RAXI/43). Biest stands for BIoidentical ESTrogent. (TR/1171). Defendant Foster claims that she is an expert in HRT, having done her master's thesis on the subject, and discussed the various HRT treatments with Laura for years. But no evidence of her publications or thesis was ever produced; no documentation concerning any of this consultation is in Laura's records; and

Defendant Foster concedes to allegedly mistaken estrogen for progesterone, multiple times. (TR/1429-31).

Defendant Foster testified that following August 2008 HRT-drug order she checked in and discussed the progress of this HRT-therapy with Laura on nearly every visit, but just failed to document it. (TR/1418-20, 1423-29). However, records from WIC established that these were lies[6] as Defendant Foster failed to submit a refill/follow up prescription to the pharmacy for over a year, and thus NO such drugs could have been delivered to Laura.[7] (RAXVI/431).

Laura remained on this HRT-drug-"trial" until May 2011 when she had an emergent medical event and subsequently left the Miller-Foster practice on 7/11/11 (RAXI/3).

There is NO record that Defendants ever discussed with Laura the purpose, benefits, risks, or duration of this HRT-drug-therapy, or any alternatives to it. (TR/1428). Based on available scientific data for 2008-2011, including Defendants' own PDR, progesterone carries an increased risk of blood clothing disorders, and natural or bioidentical progesterone carries the same risks as those that are synthetic/manufactured/FDA-approved. (RAVII/337-351, 373-375, 381).

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[6] [Defendant Miller has admitted during his deposition to lying under oath to the Commonwealth concerning his credentials] thus both defendants have an established practice of not telling the truth, or the whole truth.

[7] Both Defendants and WIC conceded that this HRT-drug could only be obtained by prescription. (TR/1313, 2077).

In Spring 2011, after Laura was on HRT ordered by Defendant Foster for either two-to-three years, either on progesterone alone, or progesterone and estrogen (two references to estrogen in Defendants' contemporaneous medical records), she came into the Miller-Foster practice on several occasions complaining of shortness of breath. (RAXI/10-12). At no point during this timeframe Defendants consider/document that PEs were a potential cause of this shortness of breath. (TR/1808). Based on the subsequently obtained imaging studies, Laura was having PEs during this timeframe. (TR/2386).

On May 21, 2011 Laura had an acute episode of seizure-like activity and was rushed to ER at Baystate Franklin where CT was ordered that revealed multiple PEs, whereafter she was transferred to the Baystate Springfield hospital. (RAXII/226-31). During trial, Defendants' expert conceded that the 5/21/11 CT demonstrated that although some of the PEs were acute/fresh, several were older, and would have been present at least several weeks prior. (TR/2386).

After this 5/21/11 episode Laura's pulmonary care was managed by Dr. Landis from Baystate Springfield who immediately put Laura on anticoagulation drugs, noting that this "acute" episode was likely sub-acute as Laura has been experiencing PE symptoms since March. (RAXV/84-166).

For next few months Dr. Landis continued to follow Laura's pulmonary care, noting that the likely cause of the PEs were the "progestational agents" but she has stopped them now. (RAXV/158-9).

In August 2011 Laura returned to the ER and a repeat CT showed "Some small pulmonary emboli are present, predominantly in the lower lobes much lesser in size and number than on the prior CT." (RAXXVI/225) During the follow up visit with Dr. Landis noting the development of chronic pulmonary emboli syndrome, Laura's care was transferred to Brigham & Women's Hospital in Boston. (RAXV/117-41). There, she was diagnosed with Chronic-Thrombo-Embolic-Pulmonary-Hypertension (CTEPH). (RAXVII/213-5). Defendants' expert conceded that the anticoagulation drugs helped with some of the PEs, but because several were already too old when first discovered, no drug treatment was likely going to be successful on those. (TR/2478)

In winter 2011 Laura underwent surgery in Boston to help with CTEPH, however, surgery was only partially successful, and due to complication, nearly killed Laura, leaving her with severe brain injury. (RAXVII). Next four years are marked by Laura's continued rehabilitation, repeated trips to hospitals, in Greenfield, Springfield, and Boston, and ultimately, in October 2015 death due to "respiratory failure" caused by years of "pulmonary hypertension" and "pulmonary embolus". (RAXXVIII/186).

SUMMARY OF ARGUMENT

After weeks of trial and evidence and days of deliberation, the jury found both Defendants, separately and individually, negligent, but concluded that said negligence was not the "sole/but-for" cause of the harm because of the wrong instruction of law by the Trial Court (rubber-stamping the Defendants' requests). That result was prejudicial to the Plaintiffs, but not surprising, since the evidence demonstrated that multiple and different instances of Defendants' negligence were significant contributing factors of the harm, but not the "sole/but-for" cause, as with the multiple wrong-doers, and multiple contributing causes, not one thing, or person, could be the "sole" cause. Even the Trial Court conceded that there were multiple, and separate, defendants, and multiple causes (at minimum, Court conceded that the Defendants' request for the "natural course" instruction undermined the "sole" cause request), but doing the Defendants' bidding, the Trial Court gave the wrong jury instruction to ensure a defense verdict.

Although Defendants have made repeated arguments why the applicable law should change, at the time of trial the controlling law of our Commonwealth was (and still is) that in cases where there are (or can be) multiple causes **or** tortfeasers the appropriate formulation of legal cause is the "substantial contributing factor" and thus the Trial Court's instruction was erroneous, extremely prejudicial to the Plaintiffs, and new, fair, trial is warranted.

Because, based on the current state of the law, and the evidence in this case, a new trial should be ordered, Plaintiffs also appeal the myriad of other errors of the Trial Court, from the trial itself, as well as from the pre- and post- trial rulings. For example, because the Defendants allegedly hired eight different experts to support their story[8], the Court repeatedly overemphasized the need for expert testimony. The Trial Court improperly instructed the jury on the negligence standard, omitting relevant the sources of duty or standards of care and how breach can be established and placed improper over-emphasis on experts. These errors applied to both the instruction regarding the negligence and lack of informed consent, thus were prejudicial, given the split verdict.

In addition to the multiple prejudicial improper instructions of law the Trial Court violated plaintiffs' substantial rights by systematically depriving the plaintiffs of a fair and balanced trial by: unreasonably restricted jury selection; unreasonably restricted cross-examination of defendants' experts; unreasonably restricted cross-examination of defendants; evidentiary rulings depriving plaintiffs of important evidence necessary to establish negligence and damages; systematic and improper admonishments of plaintiffs' counsel in front of jury for non-existent alleged-violations while ignoring proven serious ethical violations of the defendants' counsel; systematic and persistent blocking by the Trial Court of the

[8] "Fact" highlighted by Defendants in their opening, and then *sue sponte* highlighted by the Court again as an instruction.

use of the phrase "patient safety" in medical malpractice claim despite it being relevant and admitted evidence; systematic allowing defendants to violate applicable court orders and laws in order to advance the defendants' theory of the case; and repeated trail court's improper comments on evidence and trial process in front of the jury.

The Trial Court's systematic working for the Defendants' continued post trial, when the court deprived plaintiffs' ability for post-verdict juror contact and by the Trial Court's ignoring/denying the motion for judgment notwithstanding the non-existent verdict after refusal to even present the defendants' active affirmative defenses to the jury.

Similarly, the Trial Court's pro-Defendants bias percolated the pre-trial era with the Trial Court's denial of plaintiffs' motion to amend the complaint to bring in a potentially responsible party when it was discovered and after said party admitted that its drug delivered to Laura was or could have been systematically inconsistent and un-pure. And systematically deprived the plaintiffs of a fair and balanced discovery and litigation process by: ignoring plaintiffs' motion for speedy trial depriving plaintiff Laura Doull her day in court before she died; unreasonably denying plaintiffs' discovery of the defendants; unreasonably denying plaintiffs' discovery of the potentially co-defendant drug manufacturer; and unreasonably 'sanctioning' plaintiffs' counsel without grounds or due-process.

Although many, if not most, of these errors, on their own, would not justify a new trial, given the vast discretion and deference given to trial judges, cumulatively they demonstrate the unfair process Plaintiffs faced from the beginning, and given the gravity of the Trial Court's errors with the improper instructions of law – and thus the necessity of a new trial anyway – Plaintiffs pray that the Appellate Court address these issues, so the future trial is fairer to all parties, and thus the public's faith in our legal system could be restored.

ARGUMENT

Because the Trial Court's myriad of errors violated Plaintiffs' "substantial rights," a new trial is required. *G.L. c. 231, § 119; Mass.R.Civ.P. 61*.

I. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED AS THE TRIAL COURT INSTRUCTED THE JURY ON THE WRONG CAUSATION STANDARD.

There can be no dispute that when the Court improperly instructs the jury on the law, and that error is prejudicial, a new trial is required. *Blackstone v. Cashman*, 448 Mass. 255, 270 (2007); *Comeau v. Currier*, 35 Mass. App. Ct. 109, 111–112 (1993). Jury instructions are required to be full, correct and clear as to the principles of law governing all the essential issues presented, so that the jury may understand its duty. *Kunkel v. Alger*, 10 Mass. App. Ct. 76, 83 (1980). When the Court fails "to present full, fair, **correct**, and clear instructions on the principles of

law to the jury," as it did in this case, new trial is warranted. *Fein v. Kahan*, 36 Mass. App. Ct. 967, 967-968 (1994).

A. THE SUBSTANTIAL CONTRIBUTING FACTOR INSTRUCTION IS THE LAW WHEN THERE ARE MULTIPLE POSSIBLE CAUSES OR TORTFEASORS.

It is undisputed that the current, controlling, law of our Commonwealth is that in cases where there are (*or can be*) multiple causes **or** tortfeasers the appropriate formulation of legal cause is the "substantial contributing factor." The Appeals Court recently addressed this issue in *Hannon v. Calleva*, 87 Mass. App. Ct. 1135 (2015) "because there was evidence that the plaintiff's injuries *may have been the result of more than one cause*." Specifically, the Court stated:

> The **substantial contributing factor instruction is normally given when there are multiple causes or tortfeasors**. In *Matsuyama v. Birnbaum*, 452 Mass. 1, 30, 890 N.E.2d 819 (2008), the Supreme Judicial Court stated that "[t]he 'substantial contributing factor' test is useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any individual defendant's conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm." In the present case, **the "substantial contributing factor" instruction was appropriate and helpful to the jury because there was evidence from which the jury could find that an event or events prior to the motor vehicle accident may have been the cause of Hannon's neck injury**. … See *O'Connor v. Raymark Indus., Inc.*, 401 Mass. 586, 592, 518 N.E.2d 510 (1988).

Hannon v. Calleva, 87 Mass. App. Ct. 1135, *5-*6 (2015); see also *Neurontin Mktg. & Sales Practices & Prods. Liab. Litig. v. Pfizer, Inc.*, 2010 U.S.

Dist. LEXIS 82021 ("Under Massachusetts law, **a plaintiff seeking to establish causation in a case where an injury may be attributable to multiple causes must show that the defendant's conduct was a "substantial contributing factor" to the plaintiff's injury**. See *Matsuyama v. Birnbaum*, 452 Mass. 1, 30-31, 890 N.E.2d 819 (2008) (approving the use of the "substantial contributing factor" test for causation "in cases in which damage has multiple causes")")

Defendants cannot dispute that this is the controlling law, but argue that it should not apply here because in this case they claim that there was only one cause, a position that was then parroted by the Trial Court in its denial of the motion for new trial.[9] Thus, it is (or should be) undisputed that when there are multiple causes **or** tortfeasers the appropriate causation instruction is the "substantial contributing factor."

B. THE TRIAL COURT GAVE THE WRONG INSTRUCTION BECAUSE THERE ARE MULTIPLE POSSIBLE CAUSES AND/OR TORTFEASORS IN THIS CASE.

In this case the evidence is overwhelming that the plaintiff's[10] injuries *may have been* the result of more than one cause and/or more than one tortfeaser. In

[9] Court went to great length to try to justify/ignore all the facts that point to multiple causes and tortfeasors. (RAVI/187-203).

[10] For the purpose of this section, the Plaintiff refers only to Laura and the all the causes, people, and entities that contributed to her harms, as the harms

fact, during the charge conference, after Court announced that it will use the Defendants' requested "but-for/sole" cause instruction, Court noted that the next instruction the Defendants asked for – concerning the "natural progression of plaintiff's disease" – was in fact **another possible cause of the injuries**. (TR/2784). The Court decided not to give that instruction to justify its use of the "but-for/sole", however, it still remained – and was the major element of the Defendants' case, from opening, through experts, and in closing – that the harm to Laura could have been caused, in part, by progression of medical condition, not the Defendants' negligence, thus multiple possible causes existed. Given that there were multiple possible causes of the harm, the but-for/sole cause instruction was incorrect and the "substantial contributing factor" instruction should have been used. *Hannon v. Calleva*, 87 Mass. App. Ct. 1135, *5-*6 (2015).

First, it is undisputed that there are/were multiple tortfeasors, as two separate individuals are named as defendants, and a third, separate potential-defendant was subject of a motion to amend. (RAII/74-180). Defendants argued, and the Court parroted in its order denying a new trial, that the two defendants were one and the same and that the claims against Dr. Miller were *only as employer/supervisor* of Nurse Foster, but the evidence and the Court's rulings were the opposite: Pre-trial the Court denied the Defendant's motion to dismiss the direct negligence claims

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suffered by her family have separate causes (similar in some aspects and different in others).

against Defendant Miller. (TR/72). During trial, evidence showed that Defendant Miller had direct duty to Laura (TR/1625) and he breached said duty (TR/1147-49). Moreover, when during the trial the Court improperly allowed the Defendants' counsel to use a 2015 article to cross-examine Defendant Miller, using the excuse that it relates to "causation" only, the Court justified its ruling by stating that jury could find one and not the other negligent. (TR/1834). And post-trial, the Court conceded that the claims against the defendants are two separate claims (TR/2825), and instructed that the two defendants are to be looked at and evaluated separately (TR/3037, 3056). Thus even if the Court was to ignore WIC as a potential, and separate, tortfeasor, the two before the jury were separately responsible to the Plaintiff, and separately negligent in their care, thus amounting to multiple tortfeasors.

Second, because there were multiple harms, there were multiple causes for them. The ultimate and final harm was Laura's death, and the Death Certificate alone (RAXXVIII/186) identifies **multiple contributing causes**: although the immediate cause was "respiratory failure" that took minutes, due to hemoptysis (coughing up of blood) that took hours, that was "due to" "PULMONARY HYPERTENSION" and "PULMONARY EMBOLUS" (both took years) and also identifying "ANTI-COAGULATION" and "CONGESTIVE HEART FAILURE" as "**other significant conditions contributing to death**." These causes were

certified by Dr. Gorman and part of the medical records in evidence pursuant to Mass.G.L. c. 233, sec. 79G.

Third, the immediate prior harm, Laura's development of CTEPH likewise had multiple potential causes (as one definitive cause was never diagnosed). One likely cause was the patient's blood clot condition which resulted in the PEs, subsequently causing the CTEPH (TR/1145). Another potential cause, as concluded by some of the treaters at B&WH, was unknown, reported in medical records as "no clear etiology," (RAXVII/213) or as "idiopathic" by Defendants' expert (TR/2151, 2296). Another potential cause, based on Defendants' expert's opinions, was the "natural" progression of Laura's disease, (TR/2381), whether said "disease" started while Laura Doull was still under Defendants' care, or after. And yet another likely cause, was the Defendant Foster's (and Miller's) negligent treatment of Laura over the spring 2011 period (March–May) failing to recognize signs and symptoms of PEs and starting treatment (or referring out) thus delaying the administration of the life saving anticoagulation drugs. (TR/1145, 1149).

And fourth, the PEs that preceded the CTEPH likewise had multiple potential causes (as one definitive cause was never diagnosed). The most likely cause, as concluded by the treating pulmonologist, and Plaintiff's expert, was the progesterone HRT ordered by Defendants. (TR/1255). Defendants' own expert likewise conceded that HRT is a likely cause of the PEs that was never ruled out.

(TR/2237) However, multiple other potential causes were also present, and many of them have not been ruled out.[11] Laura's hypercoagulability/thrombophilia was another likely cause proffered by the Defendants' expert (TR/2451, 2453) and one that could have been addressed by the Defendants while Laura was under their care. The estrogen HRT ordered by Defendant Foster could be another likely cause[12], since everyone agreed that estrogen increases chances of blood cloths. (TR/2451). Another potential cause, based on Defendants' expert's opinions, was the "natural" progression of Laura's disease. (TR/2381). Yet another potential cause that should have been before the jury was WIC's non-FDA-approved progesterone cream, with all the impurities, or lack of consistency, in it. (RAVII/92-93). And then the final four another potential causes of PEs were Defendant Foster's (and Miller's) negligent treatment of Laura over the time period of 2008-2011 prescribing HRT-"trial" without proper monitoring or adjustments, while ignoring signs and symptoms of PEs; and Defendant Foster's (and Miller's) failure to disclose material medical information to Laura with

[11] Several likely potential causes have been ruled out by the various subsequent medical providers, such as cancer, genetics, blood disorders, or pregnancy. (TR2237); (RAIX/41, 93)

[12] The jury could have accepted that Defendant Foster simply made a mistake in her records and never ordered estrogen for Laura (an evidentiary view improperly adopted by the Trial Court), or the jury could have accepted that Defendant Foster was the "expert" in HRT she claimed to be, having done her master's thesis on the subject, and thus when she said estrogen, she meant estrogen.

respect to use of the prescribed HRT, resulting in Laura's taking this dangerous HRT in the first place.

Thus, with all these different potential causes of Laura's harms (her development of pulmonary emboli, her development of CTEPH, and eventually her death) not one single factor could ever be the "sole/but-for" cause. Court's adoption of the Defendants' requested jury instruction was in error and wasted sixteen days of trial because it was impossible for the jury to ever return a true verdict. This significant error was extremely prejudicial to the Plaintiffs and warrants a reversal and a new fair trial.[13]

C. THE TRIAL COURT'S ERROR WAS PREJUDICIAL AS THE JURY RETURNED A NO-CAUSATION VERDICT BASED ON THE WRONG INSTRUCTION.

There can be no dispute that the error had an effect on the jury since even though the jury found two separate defendants negligent, the jury could not find that neither one was the "sole/but-for" factor causing the harm (as that would be impossible, since multiple tortfeasors cannot each be the "sole" cause). Given the wide range of evidence supporting multiple causes, and the long time jury deliberated, had the jury been properly instructed that the individual defendant's

[13] Court has previously ruled that if a new trail is necessary, the party responsible for the new trial may have to bear all the costs. Same ruling should apply when it is the Court's errors based on Defendants requests that require the new trial.

negligence had to be a-substantial-contributing-factor (as testified to by both side's experts) and not the-sole-but-for-factor, a different verdict would result.

II. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE TRIAL INSTRUCTED THE JURY ON THE WRONG NEGLIGENCE STANDARD, INCLUDING THE SOURCES OF DUTY OR STANDARDS OF CARE AND HOW BREACH CAN BE ESTABLISHED

According to the Trial Court's instruction, the *ONLY* way a standard of care could be established in this case was through expert testimony. (TR/3021-22). However, the applicable standard of appropriate care can come from sources other than just expert testimony. For example, Section 414 of the Massachusetts Guide to Evidence (2017 Edition)[14] states that: "Safety rules, governmental regulations or ordinances, and industry standards may be offered by either party in civil cases as evidence of the appropriate care under the circumstances." In this case, certain patient safety rules were admitted to and adopted by defendants and witnesses they proffered; certain governmental regulations were offered and admitted into evidence and admitted by defendants that these regulations must be followed; policies and procedures, created both by defendants (RAVII/3 identifying the book) and industry (RAVII/357 – the *Clinical Guidelines in Family Practice*) were discussed at trial, and offered into evidence by Plaintiffs (RAVII/61-RAIX/115);

[14] Remains unchanged in 2019 Edition, derived from *Lev v. Beverly Enters. Mass., Inc.*, 457 Mass. 234, 245 (2010); *Commonwealth v. Angelo Todesca Corp.*, 446 Mass. 128, 137–138 (2006); *Torre v. Harris-Seybold Co.*, 9 Mass. App. Ct. 660, 671 (1980).

therefore, applicable standard of appropriate care came from sources other than just expert testimony. *Torre v. Harris-Seybold Co.*, 9 Mass. App. Ct. 660, 671 (1980). The Court's instruction placed "undue emphasis on the expert testimony," was unbalanced and unfairly prejudicial to the Plaintiffs, and requires a new trial. *Collins v. Baron*, 392 Mass. 565, 569-71 (1984).

Although this is a medical malpractice case, this case involves a nurse (RN/APN) and practice of nursing is strictly regulated by the legislature and corresponding regulations. See *Mass.G.L. c. 13, § 14; c. 112, §§ 61, 74, 74A, 79, 80, 80A, 80B and 80F*; 244 CMR 3.00 & 9.00. Recently, in *Campbell v. Cape & Islands Healthcare Servs.*, 81 Mass. App. Ct. 252 (2012) the Appeals Court held that the trial judge had a duty to inform the jury as to the legal significance of the regulation and his refusal to instruct on this evidence was an error resulting in the plaintiff's substantial right being prejudiced and reversal was required. In Massachusetts, "it is entirely proper to offer in evidence . . . [an official regulation] **to show the relevant standard of care**." *Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 793, 667 N.E.2d 907 (1996)*. (emphasis added). "Where "[s]ubstantial evidence was presented at trial[15] to warrant instructions concerning [proper consideration of the regulations]. . . the judge should not have left the jury

[15] As was in this case, since the applicable regulation was entered as Exhibit 26. (RAVII/11). Court refused to admit the other regulations because Defendants claimed – without any substantiation – that the dates of the regulations were wrong. (RAVII/40-59).

uninformed as to the law concerning the duty owed to a [plaintiff]." **Since the judge had a duty to inform the jury as to the legal significance of the regulation, his refusal to instruct on this evidence was error**. *Campbell v. Cape & Islands Healthcare Servs.*, 81 Mass. App. Ct. 252, 258 (2012) (emphasis added, internal citation omitted). The Appeals Court then added that since the jury found no negligence, the denial of this instruction was not a harmless error and the Court was "unable to say with substantial confidence that an instruction from the judge on the relevance of such a violation would not have made a material difference to its determination of negligence; **the substantial rights of the plaintiff were prejudiced. Reversal is required**." *Id*. at 259.

For example, 244 CMR 9.00 defines "Practice of Nursing" and "Standards of Nursing Practice" both relevant to the applicable standard of care. With respect to Plaintiffs' informed consent claims, the regulation, which establishes the applicable standard of care, *Campbell*, 81 Mass. App. Ct. at 255, states that: "When proposing any diagnostic or therapeutic intervention which is beyond the scope of generic nursing practice, an APN **shall fully disclose to the patient or to the patient's representative the risks and benefits of, and alternatives to, such intervention and shall document such disclosure in the patient's record**." (RAVII/11-18).

Not only did the Court refuse to instruct the jury on the importance of this regulation, the Court actually instructed the jury that the violation[16] of this regulation is NOT evidence of negligence. (TR/3036). Although the jury, despite the Court's erroneous instruction, still found both defendants negligent, jury answered all the questions on the informed consent negligence claims in the negative, and given how this regulation played a significant role in that portion of the case, the Court's error cannot be considered harmless, and new trial is warranted.

Court's erroneous instruction also spread to the breach portion of the case, again with overemphasis on experts. It is undisputed that admissions of fault, whether direct or circumstantial, are enough to establish negligence. *Collins v. Baron*, 392 Mass. 565, 568 (Mass. 1984) ("admissions by a malpractice defendant may suffice to sustain a jury's finding of negligence"). The Court's instructions in this case, as to each and every defendant, focused solely on "expert medical testimony" and violated the controlling law of our Commonwealth. *Collins v. Baron*, 392 Mass. 565, 569 (1984)[17]. Because the Court's instruction of law

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[16] Violation Defendant Foster conceded committing at least six times (TR/1361).

[17] "[breach and causation] **must be established <u>either</u> through expert testimony <u>or</u> through an admission** from which the jury can infer the elements of negligence and causation. Where the evidence at trial includes both expert testimony and testimony regarding an evidentiary admission, which, if believed, is independently sufficient to justify a finding of negligence, the judge, if he or she

improperly placed undue emphasis on expert testimony, jury was left with erroneous impression that only what the experts testified to could be used to determine whether any of the defendants were negligence, and thus their negative finding in the informed consent claims was tainted by improper instructions of the law, as Defendant Foster conceded to breaching her standard (relating to informed consent) at least six times (TR/1352-61).

III. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED RESULTING IN VERDICT AGAINST THE WEIGHT OF EVIDENCE ON THE INFORMED CONSENT CLAIMS BECAUSE THE LOWER COURT IMPROPERLY INSTRUCTED THE JURY ON THE WRONG LEGAL STANDARDS, PLACED IMPROPER OVER-EMPHASIS ON EXPERT EVIDENCE, IMPROPERLY EXCLUDED RELEVANT EVIDENCE AND EVEN MADE IMPROPER COMMENTS ABOUT RELEVANT EVIDENCE ON THIS ISSUE

The first question posed to the jury was "Did the defendant, Anna C. Foster, N.P., fail to disclose material medical information to Laura Doull with respect to use of the prescribed progesterone cream?" Given that Defendant Foster admitted that she did not inform Laura of the increased risks of blood cloths that come with HRT she ordered, the only way the jury could have answered that question in the

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chooses to instruct the jury as to the importance of expert testimony, **must instruct that the admission,** if the jurors believe it was made, is sufficient to support a verdict for the plaintiff. **A failure to do so places undue emphasis on the expert testimony and may leave the jury with the erroneous impression that, even if they credit the defendant's admission of fault, other credible expert testimony of the defendant's negligence is indispensable to a verdict for the plaintiff.**

negative (as they did) was by ignoring all the facts. That is understandable, since the scientific evidence regarding the risks of progesterone were kept out by the Court – adopting Defendants argument that it was not "relevant" to this case because those publications did not talk about the exactly-specific cream that was prescribed to Laura – and not available to the jury during their deliberations. Had all these publications been admitted and able to be seen by the jury during deliberation, a different result on the informed consent questions would have been likely.

During the trial, the Defendants conceded that progesterone carries a known risk of blood cloths (TR/1653-1655); (RAVII/373-375, 381; RAVIII/17-20), but their argument was that the "natural"/"bioidentical" progesterone that was prescribed for Laura was "different." The PDR – which addresses this key issue in this case – was properly noticed by the Plaintiffs (RAIX/20-23), confirmed as authoritative (TR/1381, 1436, 1655) but was not admitted into evidence. Court, again wholesale adopting Defendants' arguments, kept this evidence out, because the three progesterone formulations in 2008 PDR[18] were arguably not same as the one ordered for Laura, despite the defendant (Miller, TR/1653) and defendants'

[18] This PDR (exhibit X), along with the Clinical Guidelines book (exhibit Q) were the only two books/publications that the Defendants identified they had in their possession during the relevant timeframe, yet the Court still kept both of them out.

witness (WIC, TR/2086) having admitted that chemically progesterone is progesterone, regardless of brand name or how it is applied.

Court's prejudicial error of keeping this evidence out – based on the Defendants' *argument* that bioidentical and FDA-approved-commercially-produced drugs (from the PDR) are different – was amplified by the Court's refusal to admit the publications Plaintiffs offered specifically addressing the differences between bioidentical and FDA-approved-HRT drugs. Again, these publications (RAVII/339, 341, 344 and RAIX/24) were properly noticed and authenticated, but where kept out because the Court, adopting Defendants' arguments, claimed they were not "relevant." For example, the ACOG opinion on "Compounded Bioidentical Hormones" (RAVII/339) states, in part, that: "**Compounded hormone products have the same safety issues as those associated with hormone therapy agents that are approved by the U.S. Food and Drug Administration** and may have additional risks intrinsic to compounding. **There is no scientific evidence to support claims of increased efficacy or safety for individualized estrogen or progesterone regiments**."

FDA, likewise, in its publication "Bio-Identicals: Sorting Myths from Facts" (RAVII/341) stated that:

> Myth: "Bio-identical" hormones are safer and more effective than FDA-approved MHT drugs.[19]
> Fact: **FDA is not aware of any credible scientific evidence to support claims made regarding the safety and effectiveness of compounded "BHRT" drugs.[20] "They are not safer just because they are 'natural,'"** says Kathleen Uhl, M.D., Director of FDA's Office of Women's Health.
> Drugs that are approved by FDA must undergo the agency's rigorous evaluation process, which scrutinizes everything about the drug to ensure its safety and effectiveness—from early testing, to the design and results of large clinical trials, to the severity of side effects, to the conditions under which the drug is manufactured. FDA-approved MHT drugs have undergone this process and met all federal standards for approval. No compounded "BHRT" drug has met these standards.

Although these statements were agreed to by both defendants and their experts, at the time of deliberation jury was deprived of having these published studies in paper form – to be able to be reviewed and considered. The overwhelming evidence (as it properly should have been admitted) in this case shows that bio-identical/natural-HRT **carries the same risks** as their FDA-approved counterparts (exhibits K, L, M, VV, PPP, and QQQ) and **progesterone carries a risk of blood cloths** (exhibits X, V, and FF).

The Court's errors of exclusion were amplified when the Judge made multiple improper comments about evidence on this issue, depriving the jury of their function. For example, following Plaintiffs' opening, the Court instructed the

[19] This "myth" position is the Defendants' position, both in practice, during their care of Laura in the 2008-2011 timeframe, and during the trial, as expressed by the Defendants, and all of their paid experts.

[20] This is the published authoritative evidence directly contradicting Defendants' position, yet the Court determined that it is not "relevant" in this case.

jury on issue of fact – that whether or not a drug is FDA-approved, or not, "has nothing to do with whether its safe or not." (TR/952) Such improper statement, was not surprising, since the Trial Court adopted the personal belief that what FDA publishes must be lies. (TR/1734). What is, and isn't, the truth, is for the jury to decide, not for the Court to instruct parroting the Defendants' argument, thus a new trial is necessary. *Pfeiffer v. Salas*, 360 Mass. 93, 99 (1971)

IV. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT SYSTEMATICALLY DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL BY ABUSING ITS DISCRETION AND WORKING FOR THE DEFENDANTS

Citizens of our Commonwealth have a constitutional right to a fair trial. When that right is trampled by the Court's biased rulings, a new, fair, trial is necessary. *Commonwealth v. Sneed*, 376 Mass. 867 (1978) ("We reverse and order a new trial, on the ground that the defendant did not have a fair and impartial trial." "We conclude that the defendant must have a new trial because the judge, in many and diverse ways, deprived the defendant of a fair and impartial jury trial. We discuss below only the most obvious illustrations of this improper intrusion.") In this case, the Court's disdain for the Plaintiffs, their claims, and their counsel, was evident from the beginning and was displayed in the Court's rulings, systematically depriving the Plaintiffs of a fair and impartial trial.

The Trial Court's "discretionary" rulings that were abusive and prejudicial to the Plaintiffs were so numerous that they would require a separate brief on each issue, thus they are addressed here just briefly:

A. UNREASONABLY RESTRICTED JURY SELECTION DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL

Without an unbiased jury there can be no fair trial. The need and importance of meaningful, impartial, and fair jury, was highlighted in the recent case of *U.S. v. Sampson*, 724 F.3d 150 (1st Cir. 2013) ("**Voir dire is a singularly important means of safeguarding the right to an impartial jury**. **A probing voir dire examination is "[t]he best way to ensure that jurors do not harbor biases for or against the parties."***"*) In *Commonwealth v. Vann Long*, 419 Mass. 798, 803-04 (1995), the Supreme Judicial Court quoted from *Davis v. Allen*, 11 Pick. 466, 467-468 (1831): "Where there is abundant latitude for selection of jurors, **none should sit who are not entirely impartial**." Thus, a prospective juror who does not state unequivocally that he or she can be impartial, should be excused for cause. In the instant case, although the Trial Court initially indicated that attorney led panel voir dire would be permitted, because the Defendants' objected and wanted little to no voir dire, Trial Court changed its initial ruling and limited the voir dire to less effective side-bar only questioning, with only six questions permitted per side. Moreover, even with the limited questioning, when multiple

prospective jurors exposed likely bias, or inability to follow the law of the case, the Court systematically denied Plaintiffs' challenges for cause[21], forcing that peremptory strikes be used up. (TR/237, 283, 321, 458-9, 479, 655). Although the Defendants, and the Trial Court, argue that because Plaintiffs did not use up all of their peremptory strikes these errors were not prejudicial, they were the start of the systematic deprivation of a fair trial.

B. UNREASONABLY RESTRICTED CROSS-EXAMINATION OF THE DEFENDANTS' EXPERTS DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL

Cross-examination is the essential tool for trial presentation and bringing the truth to the jury and Plaintiffs have the right of cross-examination "as to all relevant aspects of the case," *Nuger v. Robinson*, 32 Mass. App. Ct. 959, 959 (1992), subject only to reasonable limits which "must not prevent a party from presenting its entire case to the fact finder," *Chandler v. FMC Corp.*, 35 Mass.App.Ct. 332, 338 (1993), *citing Goldman v. Ashkins*, 266 Mass. at 380.

However, the Trail Court deprived Plaintiffs of a fair trial when it unreasonable, and repeatedly, restricted Plaintiffs' cross-examinations. For example, when the Trial Court permitted the Defendants' expert to testify well

[21] In few instances, when the exposed bias was glaring, the Court did allow Plaintiffs' motion to strike.

beyond what was disclosed (in direct violation of pre-trial ruling), Court blocked Plaintiffs' cross-examination concerning the details of said disclosures (TR/2160-61) including the allegedly important distinction between "natural" or "nonnatural" progesterone that was being prescribed to Laura. (TR/2173-74).

Similarly, when Dr. Hill[22] was cross-examined about his bias (and the documents he was required to bring (pursuant to subpoena and court order), Court systematically blocked this line of questioning (TR/2407-13), and similarly again with Dr. Porter (TR/2595-96).

The cross-examination of Dr. Porter – the Defendants' liability expert –was severely restricted by Court, when asking about basic medical knowledge and literature (TR/2591-04, 2597) or simply the use of the words neglect/negligence (TR/2609-11). Given the issue of consent was one of the claims, Court blocked Plaintiffs attempt to cross-examine this expert witness with an informed-consent-form for hormone-therapy that she uses in her practice. (TR/2619-22); (RAIX/112)[23] Similarly, although Defendants were permitted to ask their experts to comment on Plaintiff's expert's testimony, Plaintiffs' were blocked by the Court to do the same during their cross-examination (TR/2644-45).

[22] For unknown reasons the morning portion of Dr. Hill's testimony was not captured by the Court's system and thus not transcribed.

[23] This form was downloaded from Dr. Porter's practice's website.

C. UNREASONABLY RESTRICTED CROSS-EXAMINATION OF THE DEFENDANTS DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL

Similarly to the Trial Courts unreasonable restrictions on cross-examination of the Defendants' experts, the Court placed numerous, and improper, restrictions on the Plaintiffs' cross-examination of the Defendants. *Nuger*, 32 Mass. App. Ct. at 959; *Chandler*, 35 Mass.App.Ct. at 338. A significant portion of the Defendants' expected testimony was known pre-trial, however, the Court ruled-out portions of the Defendants' admissions under Rule 32, because Defendants admitted that "patient safety" is relevant in patient care. Thus, when the nurse Defendant was asked if she must follow rules for patient safety, Trial Court would not permit this cross-examination (TR/984-985). This unreasonable restriction of cross-examination of the Defendant continued. (TR/995-6, 999, 1001-2, 1004, 1006, 1013, 1028, 1031-32).

And while the Trial Court permitted the Defense Counsel to cross-examine Plaintiffs' expert with an out-of-date-range article that he has never seen, the Court, although allowing few limited questions, blocked Plaintiffs from cross-examining the Defendant with an on-point article, that she has seen. (TR/1363-81). When, at sidebar, the Trial Court was confronted with the double standard, the Trial Court created new excuses for blocking Plaintiffs from doing what the Court permitted the Defendants to do. (TR/1376-78). This continued blocking of cross-

examination focused on many key points of the trial, like the difference between FDA-approved drugs and those that are not. (TR/1381).

With regard to cross-examination of Defendant Dr. Miller, even though Defendant agreed that doctors, such as he, can offer testimony as to what is the standard of care[24], (TR/1780-81), Trial Court blocked Plaintiffs' cross-examination of Defendant Miller regarding what is said standard, and when he agrees that it is the patient safety rules that Plaintiffs' expert testified to. (TR/1785-86). Given the importance of cross-examination for trial presentation, the Trial Court's systematic blocking of Plaintiffs examination was an abuse of discretion and prejudicial to Plaintiffs.

D. EVIDENTIARY RULINGS DEPRIVING PLAINTIFFS OF IMPORTANT EVIDENCE NECESSARY TO ESTABLISH NEGLIGENCE AND DAMAGES DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL

Although Trial Court has discretion as to what evidence is "relevant" during trial, when said discretion is abused, as it was in this case, parties are deprived of a fair trial. Aside from the testimonial evidence that the Trial Court blocked with its systematic restrictions on cross-examination, the Court also kept out numerous laws and regulations and relevant learned treatises on the topics in trial.

[24] Which, despite the Trial Court's refusal to accept it, is the correct status of our law, as standard of care testimony does not only come from "paid" experts.

(RAVII/40-351). Court improperly kept out relevant evidence, including certified medical records, concerning Troy's damages (RAXXIII/5-189) and detailed description of Laura's harms (RAVII/361-72).

Trial Court, improperly, kept out evidence of the improper relationship between the two co-defendants, (TR/59-61) even though Defendants themselves offered into evidence the allegedly-great-collaborative-relationship they have how they always communicate about patient care (and hence why it is not in the records).

Although evidence of prior negligence is usually kept out as overly prejudicial, in this case, it should have been permitted, as Defendants, given the woeful state of their records, relied heavily on their "custom and practice," thus making the proven history of bad and negligent customs and practices should have been allowed to be admitted.

And lastly, Court although ruling that some of the WIC pharmacy testimony would be admitted, Court improperly kept out even the limited concessions obtained in that deposition – concession on topic highly relevant to the key issues in this case.

E. SYSTEMATIC AND IMPROPER ADMONISHMENTS OF PLAINTIFFS' COUNSEL IN FRONT OF JURY FOR NON-EXISTENT ALLEGED VIOLATIONS WHILE IGNORING PROVEN SERIOUS ETHICAL VIOLATIONS OF THE DEFENDANTS'

COUNSEL DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL

The Trial Court's disdain towards Plaintiffs' counsel, and overt favoritism towards Defendants' counsel was demonstrated by the treatment of the different sides in front of the jury. Although this behavior permutated throughout the entire trial, two prime examples are how the Court *sue sponte* admonished Plaintiffs' counsel in front of the jury for asking a question about Defendant's Miller's reputation (TR/1808-41), while doing nothing when Defendants' counsel deliberately lied in front of the jury and subpoenaed perjury from her own witness. (TR/2279-89)[25]

F. SYSTEMATIC AND PERSISTENT BLOCKING BY THE LOWER COURT OF THE USE OF THE PHRASE "PATIENT SAFETY" IN MEDICAL MALPRACTICE CLAIM DESPITE IT BEING RELEVANT AND ADMITTED EVIDENCE DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL

Doing the Defendants' bidding, the Trial Court tried to bar the use of the words "patient safety" in a medical malpractice action. In the pre-trial rulings, Court excluded the use of any of the Defendants' testimony where patient safety was even discussed, for no other reason than that the Defendants' insurance-paid

[25] Now that official transcripts are available, it is clear that Defendants' counsel subpoenaed perjury from her own witness (to try to admit inadmissible article) and then misrepresented the law to try to cover it up.

counsel wanted the Court to do so. However, it is undisputed that patient safety, and patient safety rules, were properly part of this case (as they are in most medical care cases). At minimum, taking the Trial Court's position that standard of care comes *only* from expert testimony, Plaintiffs' expert testified that: "**standard of care, which are basically rules for delivering care to patients to keep them safe from harm**." (TR/1094). And while the Court sustained some objections that followed, the fact that standard of care is basically set of rules for keeping patients safe was part of the admitted testimony:

> Q. Please continue, Doctor.
> A. I would say that those are the -- the -- the sources of the standard -- of the standard of care. **Standard of care is the basically rules for -- rules of the road you could think of, as -- for doctors and nurses to keep patients from the effects or harms of illness, or the -- to keep them safe from the harm of medical treatment or intervention. So those are the standard of care.**
> Q. And why do --
> MS. DALPE: Move to strike.
> **THE COURT: Overruled.**
> BY MR. SOBCZAK:
> Q. And why do we have these standards of care or these rules for patient safety?
> MR. DUMAS: Well, objection.
> MS. DALPE: Objection.
> THE COURT: Excuse me; that's not what the witness said.[26] He referred to standard of care, so you can refer – rephrase the question. Specifically I'll just say, Doctor, why -- to rephrase it, why do we have these standards of care.
> A. **In order to ensure that patients receive consistent, effective care that keeps them safe from --**

[26] In fact, as the transcript shows, the expert specifically equated standards of care with rules, but the Trial Court continued with its aversion of the word "rule."

MR. DUMAS: Objection, your Honor.
THE COURT: Well, let him finish the question. Go ahead.
A -- **safe from** --
THE COURT: The answer.
A -- **the harms resulting from illness**.
THE COURT: Over --
A And --
THE COURT: Overruled. Go ahead.
A. **And the -- the harms that can result from in – inadequate or substandard assessment or treatment of the patient's illness**.
(TR/1101-3)

Unfortunately, even though patient safety rules were established as a evidence of the applicable standard of care, the Court blocked the use of said terms throughout the trial. (TR/953, 985, 996, 1013, 1028, 1029, 1031, 1786)

G. SYSTEMATIC ALLOWING DEFENDANTS TO VIOLATE APPLICABLE COURT ORDERS AND LAWS OF THE COMMONWEALTH IN ORDER TO ADVANCE THE DEFENDANTS' THEORY OF THE CASE DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL

When the fight in the Trial Court is unbalanced – individual plaintiffs/patients versus insurance-funded defendants – the rules supposed to keep the system fair. One example of this is the time wasted during trial when the Court entertained the Defendants' late (and in violation of multiple orders) request to offer Plaintiff's deposition testimony under Rule 32. (TR/2097). Although ultimately the Court made the right ruling, not allowing the testimony to be read as

a Rule 32 presentation,[27] the ignoring of the rule upfront wasted valuable (and limited) time and resources during trial. Another, constant, example is how the Court disregarded its own ruling on the subpoenas served on the Defendants' experts and the fact that the Defendants' did not disclose who the actual trial experts will be until well in the middle of trial. (TR/120-37, 2112, 2158-59, 2407-12, 2526).

H. LOWER COURTS IMPROPER COMMENTS ON EVIDENCE AND TRIAL PROCESS IN FRONT OF THE JURY DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL

The Trial Court on numerous occasions made improper comments on the evidence, including weight of the evidence, surpassing the role of the jury, in order to guarantee a verdict for the Defendants. Court made repeated statements concerning role of FDA in reviewing drugs that are available to the patients, despite conflicting testimony being presented, thus leaving the fact decision to the jury. *Pfeiffer v. Salas*, 360 Mass. 93, 99 (1971) (reversal required when the trial judge, in jury trial, improperly charged on matters of fact, not just law).

V. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PRESENT THE DEFENDANTS' ACTIVE AFFIRMATIVE DEFENSES TO THE JURY AND THEN IGNORING /

[27] But allowing the Defendants to back-door it via "cross-examination."

DENYING THE MOTION FOR JUDGMENT NOTWITHSTANDING THE NON-EXISTENT VERDICT

Due to space limitations, Plaintiffs' incorporate by reference their arguments in their motions on the Defendants' affirmative defenses. (RAVI/87-121).

VI. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO BRING IN A POTENTIALLY RESPONSIBLE PARTY WHEN IT WAS DISCOVERED AND AFTER SAID PARTY ADMITTED THAT THE DRUG ORDERED FOR PLAINTIFF WAS OR COULD HAVE BEEN SYSTEMATICALLY INCONSISTENT AND UN-PURE

The Trial Court should have allowed Plaintiffs leave to amend their complaint when it was finally discovered where the prescription progesterone creme came from and when its manufacturer (WI's Women's International Compounding Inc. ("WIC")) conceded that it could have been systematically inconsistent and un-pure. "a party may amend his pleading only by leave of court or by written consent of the adverse party; and **leave shall be freely given when justice so requires**." *Mass. R. Civ. P. 15(a)*, 365 Mass. 761 (1974). "Although leave to amend is within the discretion of the judge, leave should be granted unless there appears some good reason for denying the motion." *Castellucci v. United States Fid. & Guar. Co.*, 372 Mass. 288, 289 (1977). The *Castellucci* court goes on to identify such "good reason[s] for denying" to include:

> undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party…[,] futility of amendment, etc. *Id*. at 290.

The Trial Court's stated reason for denying the motion was proximity to trial (four months away) and incorrect statement alleging that Plaintiff failed to "explain why she did not add and could not have added WIC earlier" is unfortunately yet another example of the Trial Court's bias/favoritism for the Defendants. The Trial Court had no problems delaying the trial when Defendants asked for extensions – to the point that Plaintiff died before she could have her day in court – thus given all the other facts, this should not have been a reason for denial given the recent discovery. See *Saldi v. Brighton Stock Yard Co.*, 344 Mass. 89, 95 (1962) (amendment allowed even during the course of trial); *Tinkham v. Everson*, 219 Mass. 164, (1914); *Pizer v. Hunt*, 253 Mass. 321 (1925) (amendments allowed even after trial). Moreover, Plaintiffs' motion detailed the background why the motion was brought when it was: because of the poor record keeping practices of the Defendants, the identity of the drug maker was not revealed until the November 2016 deposition of the Defendant Foster, and within month of the entity's deposition being taken Plaintiffs' moved to amend (and compel further discovery). Therefore, Plaintiffs' motion to amend the complaint to bring this late discovered responsible party should have been allowed.

VI. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT SYSTEMATICALLY DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED DISCOVERY AND LITIGATION PROCESS

Similar to the Court's "discretionary" rulings that were prejudicial to the Plaintiffs in-trial, the numerous rulings pre- and post-trial, that were unfounded and prejudicial to the Plaintiffs, were likewise so numerous that they would require a separate brief on each, thus they are addressed here just briefly:

A. UNREASONABLY IGNORING PLAINTIFFS' MOTION FOR SPEEDY TRIAL DEPRIVING PLAINTIFF LAURA DOULL HER DAY IN COURT BEFORE SHE DIED

The Superior Court Standing Order No. 1-88 clearly states that there is a global need for speedy and efficient trials because with delays just determination may be jeopardized. Moreover, *Mass.G.L. c. 231 § 59(C)* states: "an action pending before the superior court which alleges malpractice, error or mistake against a physician, surgeon, dentist, optometrist, hospital or sanitarium **shall, at the request of either party, be advanced by the court so that it may be heard and determined with as little delay as possible**."

However, in this case, the Trial Court ignored Plaintiffs' requests for speedy trial – to the point that Laura Doull died and was denied her day in court – because the Defendants wanted more time. It was only when the new, potentially-responsible-party, was discovered late, Court reversed its stand and denied the

motion to amend, citing the upcoming trial, not surprising, because that is what Defendants wanted.

B. UNREASONABLY DENYING PLAINTIFFS' DISCOVERY OF THE DEFENDANTS DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED DISCOVERY AND LITIGATION PROCESS

During their depositions Defendants claimed to have numerous publications available to them relating to the HRT that was ordered for the Plaintiff. However, when Plaintiffs' moved to compel their production, the Court denied the motion, essentially allowing the Defendants to make up "supporting" literature, without having to substantiate it. (RAII/4-73, 181-219, 223). This error was amplified by the Court's in-trial "instructions" that the Defendants don't have to produce anything (while still allowing the testimony about these non-existent publications). (TR/952)

C. UNREASONABLY DENYING PLAINTIFFS' DISCOVERY OF THE POTENTIALLY CO-DEFENDANT DRUG MANUFACTURER DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED DISCOVERY AND LITIGATION PROCESS

Testimony of WIC was relevant to many aspects of the case, but Plaintiffs were denied the right to properly cross-examine this witness, depriving them of fair and balanced process. The deposition – which was improperly noticed as a Rule

30(b)(6) – was noticed by the Defendants, thus Plaintiffs should be allowed to cross-examine the witness on any relevant topics. However, the witness refused to answer majority of the questions posed, either because the designee was not prepared, or selectively instructed not to answer. (RAI/280-405); (RAII/74-180, 220-223); (RAVIII/58-93)

D. UNREASONABLY DENYING PLAINTIFFS' POST-TRIAL CONTACT WITH THE JURORS DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED DISCOVERY AND LITIGATION PROCESS

Since 2016 no judicial approval is necessary for post-trial juror contact. *Commonwealth v. Moore*, 474 Mass. 541, 551 (2016) ("Whether court approval is required prior to contacting jurors. ... We answer the question no.") However, because the Defendants were concerned that such permitted contact may strengthen Plaintiffs' post-trial motions they moved for the Court to deny all such contact. (RAV/232-36). The Trial Court complied and barred all such conduct (although its initial order permitted such contact, consistent with the *Moore* holding). (RAVI/3-22, 24-31, 33-86); (RAX/18-21).This biased restriction was improper, unfounded (based on the Court's biased pro-Defense stance[28]), and should be vacated, so permissible contact is allowed.

[28] Plaintiffs' motions for recusal was denied (TR/1743).

E. UNREASONABLY 'SANCTIONING' PLAINTIFFS' COUNSEL WITHOUT GROUNDS OR DUE-PROCESS DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED DISCOVERY AND LITIGATION PROCESS

Early in the litigation process when the Defendants asked for a third extension for discovery responses, Plaintiffs, pursuant to their counsel HoeyLaw's policy, indicated that they would agree if Defendants could agree to something Plaintiffs were seeking, like audio-visual deposition. Defendants declined the offer and instead rushed with an emergency motion. The Court, in an ex-parte hearing, not only essentially allowed the motion, but also suggested that the Defendants should ask (and get) even more time, but, to make it "fair" would allow Plaintiffs' to respond to the motion. (RAI/146-156). After opposition was filed, Court "officially" allowed the Defendants' motion, granting the longer extension, and stated that Plaintiffs' conduct was sanctionable ordering that Plaintiffs' pay Defendants costs, without any due process. *Beit v. Probate & Family Court Dep't*, 385 Mass. 854, 861 (1982) ("A judge may not use the "inherent power" to avoid the requirements of due process. Like other sanctions costs should not be assessed lightly or without fair notice and an opportunity for a hearing."). After slew of subsequent filings, the Court finally scheduled a hearing on the matter, and after HoeyLaw's outside counsel promised to pay the "costs", the Court vacated the

"sanctions" order. (RAI/101-222).This improper sanctioning (even though vacated) was then subsequently repeatedly used by the Defendants to vilify Plaintiffs' counsel in front of the judges in the session and likely contributed to the Court's attitude towards Plaintiffs and their counsel.

CONCLUSION

There is no dispute that this was a highly contested trial. Unfortunately, due to space limitation, this brief only touches on but few of the errors, and those that are included are addressed in very limited fashion, with the exception of the issue of causation. The simple truth is the Trial Court gave the wrong instruction of law in order to guarantee a defense verdict. That error alone should guarantee Plaintiffs a new trial.

Respectfully submitted,
SETH DOULL, as Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and SETH DOULL as next friend of TROY DOULL
By and through counsel,

/s/ Krzysztof G. Sobczak

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Date: June 27, 2019

CERTIFICATION

I certify that this brief complies with the applicable Massachusetts Rules of Appellate Procedure, including but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). The applicable length limit of Rule 20 was ascertained, by use of "Times New Roman" proportionally spaced font, size 14, and the number of non-excluded words (pages 20-66) total 10,616 words (<11,000) using MS Office Word version 12.0.6785.5000.

/s/ Krzysztof G. Sobczak

Krzysztof G. Sobczak, Esq.

CERTIFICATE OF SERVICE

I, Krzysztof G. Sobczak, do hereby certify that I served a copy of these documents upon Appellees' current counsel of record,

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on this 27th day of June 2019, through the Odyssey File & Serve System will be sent electronically to the registered participants as identified on the Case Service Contacts List; and/or paper copies will be sent by first class mail, postage prepaid to those indicated as non-registered participants.

And that complete copy of the Record Appendix and Transcript Appendix were previously served by U.S. Mail on May 24, 2019.

/s/ Krzysztof G. Sobczak

_____

Krzysztof G. Sobczak, Esq.

ADDENDUM

Table of Contents:

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss. **SUPERIOR COURT**

CIVIL ACTION NO. 2014-00058A

LAURA DOULL, ET AL
PLAINTIFFS
vs.

ANNA M. FOSTER, N.P., ET AL
DEFENDANTS

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' EMERGENCY MOTION TO ENLARGE TIME TO RESPOND TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS.

Introduction

This motion, presented in emergency fashion, is brought by counsel for defendants because counsel for plaintiffs refused to assent to her request for a two-week extension to respond to some 265 requests for admissions. The motion was brought on the day the responses were due.

Defendant acted appropriately in presenting the motion on an emergency basis[1] because under *Mass.R.Civ.P. 36 (a)* "[a] matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission either (1) a written statement signed by the party under the penalties of perjury specifically (i) denying the matter or (ii) setting forth in detail why the answering party cannot truth-

[1] Emergency motions are governed by *Superior Court Rule 9A (e) Exceptions*. The provisions of this rule shall not apply to the following motions: (1) Ex Parte, Emergency, and Other Motions. A party filing an ex parte motion, emergency motion, or motion for appointment of a special process server is excused from compliance with Paragraphs (b)(1) and (b)(2) of this rule. Ex parte motions shall be served within 3 days of a ruling on the motion. Emergency motions shall be served on all parties forthwith upon filing.

fully admit or deny the matter; or (2) a written objection addressed to the matter, signed by the party or his attorney,.."

The need for defense counsel to bring this emergency motion, in my view, presents a rather textbook case of an opposing counsel's willful failure to act cooperatively in conducting discovery, and ultimately, failing in his obligation to secure the just, speedy, and inexpensive determination of the case.

Two days ago, upon my receipt of defendants' emergency motion, I received a letter faxed from plaintiffs' counsel protesting that he had received only the cover letter to the defendants' motion but not the emergency motion itself. This was somewhat puzzling because the same letter made reference to defendants' "draft" motion. Before considering the motion, I granted plaintiffs' counsel the opportunity to file by email a written opposition to the emergency motion, which opposition was received that afternoon. I further ordered that defendants' *Rule 36* responses were not deemed due pending my acting on the emergency motion.

For the reasons set forth below, after due consideration of the defendants' emergency motion and plaintiffs' opposition, the defendants' motion to enlarge time will be **ALLOWED**. Defendants shall have at least 30 days from the date of this order to respond to the plaintiffs' 265 requests for admissions. Plaintiff's so-called "cross-motion" to take audiovisual depositions and his request that I appoint a discovery master will be **DENIED**. Lastly, I will *sua sponte* award defendants their reasonable attorney's and costs in connection with this motion.[2]

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[2] The Massachusetts Superior Court "may act *sua sponte* to sanction lawyers who behave unethically and abuse the legal process, lawyers who appear before it must abide by their ethical duties." *Gray-McNamara v. Fifield*, 2007 Mass. Super. LEXIS 490 (Mass. Super. Ct. Aug. 7, 2007) (Peter W. Agnes, Jr.,

Discussion

At issue in this medical malpractice action are 265 requests for admissions submitted by plaintiffs' counsel. In even the most complex of cases, this is an unusually high number. A good many of the requests are detailed and complex. Several address whether certain conduct is within the standard of care in a medical malpractice case. These requests were served two days before Christmas, on December 23rd during the height of the holiday season. While a party is certainly entitled to submit this many requests, simple common sense dictate that additional time will be needed to adequately respond. The motion before me seeks an additional two-week extension. Defense counsel had previously asked for and obtained from plaintiff's counsel a two-week extension and a three-day extension. Defense counsel had a preplanned family vacation during February 1-6th. Her February 9th meeting with her clients at the place of their medical practice in Shelburne Falls had to be canceled due to inclement weather preventing counsel from traveling from Boston. February 10th was not doable because the Governor had declared a state of emergency due to crippling snowfalls. In recent weeks, all Massachusetts residents—including busy lawyers, their clients and court personnel—have coped with snowfall of historic proportions (in Boston, six feet in two weeks.) In recent weeks, the weather crisis has caused courts to close their doors. Trials and motions had to be continued.

It should have come as no surprise at all to plaintiffs' counsel that such brutal weather has made defense counsel's task even more challenging. Under these pressing

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J.) citing *Van Christo Adver. v. M/A-COM/LCS*, 426 Mass. 410, 416 (1998); *Crystal Constr. Corp: v. Hartigan*, 56 Mass.App.Ct. 324, 333 (2002) (court may sanction attorneys who fail to advance claim supported by fact and law).

circumstances, it is indeed laudable that defense counsel was even striving to respond to this number of requests within such a relatively short a period of time.

I add that during this current court session, due to snow emergencies I entertained a great number of requests for enlargements of time, and for continuances of trials, evidentiary hearings, motions and conferences. Each was presented to me as uncontested motion with opposing counsel treating moving counsel with consideration and respect so as to accommodate professional and family schedules. That is, except for this matter.

Requests for extensions to answer discovery are routine matters which should almost never involve serious disagreement, acrimony or court involvement. Rule 36's language contemplates that additional time beyond 30 days may be needed to respond the requests to admit. The sheer number at issue here alone establishes the degree of opposing counsel's obstinacy in refusing to assent, to say nothing of the effects of the unprecedented snow.

I am dismayed, to say the least, that plaintiffs' counsel was totally unsympathetic and unaccommodating to the plight of his opposing counsel. It will suffice to say that the glib and nonsensical retort in his opposition criticizing opposing counsel because she failed to anticipate the New England weather–"*failure to plan is planning to fail*"–is not well received.

This emergency motion was made necessary only because of opposing counsel's obstreperous behavior, and he should not have advanced his groundless opposition to the motion. Plaintiffs' counsel should have assented over the telephone to this eminently reasonable request for a mere two-week extension to respond to his 265 requests for admission, and should have done so without tactically attaching conditions calculated to give

him advantages to which he was not entitled. Plaintiffs' counsel worsened the already acrimonious atmosphere he created by holding his assent hostage until and unless defense counsel agreed to his request to take depositions by audiovisual means. The matter of audiovisual depositions is, of course, completely unrelated to this legitimate request for a reasonable discovery extension. Defense counsel properly refused to relent in the face of this coercive tactic.

Moreover, it was wrong of counsel to insert within his opposition his so-called "cross-motion" seeking an order for audiovisual depositions of witnesses. By slipping the "cross-motion" into his opposition to the emergency motion, he deliberately circumvented his obligations to follow the opposition motion procedure mandated by both *Superior Court Rule 9A* and *9C*. And there is certainly nothing "emergency" in nature about a motion to conduct an audiovisual deposition which would warrant including it with an opposition to a legitimate emergency motion such as the one now before me. Again, the two discovery matters are unrelated. Except for deposition of treating physicians and expert witnesses for use at trial, parties are not entitled as a matter of right to audiovisual depositions *See Mass.R.Civ.P. 30A* which requires "*leave of court upon motion and an opportunity to be heard in opposition*" absent a stipulation between the parties. Plainly, the rule rejects plaintiffs' position that audiovisual depositions are *always* preferable. Rather, *Rule 30A* contemplates a case-by-case, witness-by-witness approach.

Opposing counsel also improperly inserted in his opposition a request that I appoint a discovery master. First, this too should have been the subject of a separate motion governed by the opposition procedures of Superior Court Rule 9A which counsel ignored. More troubling was his claim that a master was necessary ostensibly because of

defense counsel had engaged in "dirty tactics" (p. 11) which were "likely but a tip of the iceberg that is forthcoming." (p. 12). Such unsupported epithets are, frankly, outrageous. These words constitute "scandalous" matters inserted in a pleading warranting "appropriate disciplinary action" under *Mass.R.Civ.P.*

Sanctions.

It should not be necessary to remind plaintiff's counsel—or any member of the bar—that cooperation and professional courtesy in dealings with opposing counsel are not optional. The failure to so act, obviously, delays litigation and increases the cost to parties and the judiciary.[3]

"It cannot seriously be disputed that compliance with the 'spirit and purposes' of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionally large to what is at stake in the litigation. Counsel cannot 'behave responsively'

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[3] See *Supreme Judicial Court Rule 3:07: Rules of Professional Conduct Rule 3.2: Expediting Litigation*. "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." See also Comment: [1] *Dilatory practices bring the administration of justice into disrepute.* Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having *some substantial purpose other than delay.* Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." (emphasis supplied). See also *Supreme Judicial Court Rule 3:07: Rules of Professional Conduct: Preamble: A Lawyer's Responsibilities.* "8. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, *to the legal system*, and to the *lawyer's own interest in remaining an upright person* while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved *through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.*" (emphasis supplied). See also *Supreme Judicial Court Rule 3:07: Rules of Professional Conduct: Rule 3.4: Fairness to Opposing Party and Counsel*, Comment: [1] "The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against ... *obstructive tactics in discovery procedure*, and the like." (emphasis supplied).

during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation."*Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358; 2008 U.S. Dist. LEXIS 83740.

Rule 11(a), in pertinent part, states: "the signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay." This rule "also applies to motions and other papers by virtue of *Mass.R.Civ.P. 7(b) (2)*." *Van Christo Advertising, Inc. v. M/A-COM/LCS*, 426 Mass. 410, 414 (1998). An attorney may be subject "to appropriate disciplinary action for a wilful violation of this rule." *Mass.R.Civ.P. 11(a)*. Although *Rule 11(a)* "is silent as to the particular disciplinary measures that may be imposed," monetary sanctions are allowed. *Van Christo Advertising Inc.*, 426 Mass. at 412, 414.

A judge, therefore, may impose attorney's fees and costs where an attorney has failed to show a subjective good faith belief that the pleading, motion or other paper was supported in both fact and law. *Id.* at 416 (citations omitted). "Good faith includes, among other things, an absence of design to defraud or to seek an unconscionable advantage." *Id.*, citing *Black's Law Dictionary* 693 (6th ed. 1990); *Hahn v. Planning Bd. of Stoughton*, 403 Mass. 332, 337 (1988). "Although this standard is less demanding than the objective standard embodied in the Federal rule . . . [the Massachusetts] rule does not excuse an attorney's wilful ignorance of facts and law which would have been known had the attorney simply not consciously disregarded them." *Van Christo Advertising, Inc.*, 426 Mass. at 416-17, citing *West's Case*, 313 Mass. 146, 150-51 (1943). A "court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by in-

quiring what was reasonable to believe at the time the pleading, motion or other paper was submitted." *Van Christo Advertising, Inc.*, 426 Mass. at 418-19, quoting *Advisory Committee Notes Fed.R.Civ.P. 11* (1983).

Counsel's regrettable conduct is the type that thwart the "just, speedy and inexpensive determination" of cases. *Mass.R.Civ.P. 1.* I find that the opposition to defendant's motion for this reasonable two-week extension of time was interposed in bad faith both for the purpose of delay and for gaining an unfair tactical advantage by coercing his opposing counsel into submitting to audiovisual deposition of the witnesses, something she was not obliged to do. By improperly including in his opposition the aforementioned "cross-motion" seeking the audiovisual depositions, and the request for the appointment of a master, I find plaintiff's counsel willfully sought to subvert the opposition procedures of *Superior Court Rules 9A* and *9C* governing motion practice. As noted above, counsel's unsupported accusations that defense counsel had engaged in "dirty tactics" which are "likely but a tip of the iceberg that is forthcoming" constitute "scandalous" matters inserted in a pleading subjecting counsel to "appropriate disciplinary action." *Rule 11.*

I, therefore, conclude that *Rule 11* sanctions are appropriate.

ORDER

1. Defendants' emergency motion to enlarge time to respond to plaintiffs' first request for admissions is **ALLOWED**; the time for responding to plaintiff's request for admissions is enlarged by 30 days from this order; for good cause shown, defendants may seek a further enlargement of time to respond;

2. Plaintiffs' so-called "cross-motion" for an order that depositions be conducted by audiovisual means is **DENIED**;
3. Plaintiff's request that a discovery master be appointed is **DENIED**;
4. Plaintiff's request for an award of attorney's fees and costs is **DENIED**;
5. It is further **ORDERED** that defendants shall be awarded their reasonable attorney's fees and costs in having to pursue this emergency motion and in opposing plaintiff's cross-motion;
    a. Counsel for defendant shall file with the court (by email scan if need be) no later than Friday February 20th an affidavit detailing all such attorney's fees and costs incurred;
    b. Counsel for plaintiff may file (by email scan if need be) by Friday, February 27th an opposition challenging the amount claimed; and
    c. Either party may request a hearing prior to the final assessment of attorney's fees and costs. Otherwise, I am content to proceed on the papers submitted.

Edward J. McDonough Jr.
Justice of the Superior Court
Date: 2/13/15

COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss. SUPERIOR COURT
CIVIL ACTION NO. 2014-00058A

LAURA DOULL, ET AL
PLAINTIFFS

vs.

ANNA M. FOSTER, N.P., ET AL
DEFENDANTS

SUPPLEMENTAL MEMORANDUM AND ORDER ON THE IMPOSITION OF RULE 11 SANCTIONS IMPOSED AGAINST PLAINTIFF'S COUNSEL UPON ALLOWANCE OF DEFENDANTS' EMERGENCY MOTION TO ENLARGE TIME TO RESPOND TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS.

Introduction

This supplemental memorandum and order is issued following a hearing held on March 22, 2015 on the matter of sanctions assessed against counsel for plaintiffs pursuant to Mass.R.Civ.P. 11 by virtue of my Memorandum of Decision and Order of February 13, 2105. The amount of any monetary sanctions had yet to be determined and was expected to be a subject of the March 22nd hearing.

Following that hearing, the clerk's office was notified that the parties have resolved the issue of the amount of costs and fees incurred by defendants' counsel as a result of the misconduct I found warranted Rule 11 sanctions, and that the amount had been paid. This was a circumstance the parties and I anticipated was likely to occur at the conclusion of the March 22nd hearing.

At this hearing, although no formal written motion for reconsideration was then before me, plaintiff's counsel, through his recently retained personal lawyer, James S. Bolan, Esq., orally asked that I reconsider my order.[1]

Discussion

Reconsideration of a prior ruling is warranted where there is (a) newly discovered evidence; (b) a change of circumstances; (c) a change of law; or (d) a plain error of fact or law in the original ruling. *Barbosa v. Hopper Feeds, Inc.*, 404 Mass. 610, 622 (1989). Further, in assessing a sanction against a lawyer, I am persuaded that the judge should consider mitigating factors in its calculation of monetary sanctions, including: (1) the impact of the monetary sanctions on the attorney against whom the sanctions are to be assessed, including the attorney's ability to pay; (2) whether the attorney is or will be the subject of any adverse press scrutiny as a result of the sanctions imposed by the court; (3) whether the attorney is or will be the subject of any disciplinary action; and(4) any evidence which would indicate the attorney will be deterred from future conduct in violation of Rule 11. *Brubaker Kitchens, Inc. v. Brown*, 2006 U.S. Dist. LEXIS 89622, 22-23 (E.D. Pa. Dec. 11, 2006) quoting *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195-197 (3d Cir. N.J. 1988).

[1] I invited counsel to request a hearing after my *sua sponte* order imposing sanctions. I do think I erred in imposing an order for Rule 11 sanctions (in a yet to be determined amount) before conducting a hearing. Nor does counsel for plaintiff so contend. A hearing is not always required prior to the imposition of sanctions. While court have often noted "the general desirability and sometime necessity of affording notice and an opportunity to be heard when monetary sanctions are imposed," *Media Duplication Servs., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1238 (1st Cir. 1991), courts have found no abuse of discretion in the imposition of sanctions without a hearing where the sanctions were imposed where "there were few issues, if any, that could have been clarified by the presentation of additional evidence or testimony." *Lamboy-Ortiz v. Ortiz-Velez*, 630 F.3d 228, 246-247 (1st Cir. 2010) citing *Silverman v. Mut. Trust Life Ins. Co.*; *In re Big Rapids Mall Assocs.*, 98 F.3d 926, 929 (6th Cir. 1996) ("21A hearing is not necessarily required [before the imposition of sanctions] where the court has full knowledge of the facts and is familiar with the conduct of the attorneys."); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 606-07 (1st Cir. 1988) (briefing process provided adequate opportunity to present evidence and argument on Rule 11 motion), abrogated on other grounds by *Cooter & Gell*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359.

Based on the above factors, and because I believe I am confronted with changed circumstances in how counsel now views his misconduct, I will agree to reconsider my order of Rule 11 sanctions against him.

First, I view as significant sanctioned counsel's very recent engagement of Mr. Bolan, whose reputation in the area of lawyer professional responsibility precedes him.[2] I say this because in the immediate aftermath of my order imposing Rule 11 sanctions, well after the passage of a sufficient cooling-off period, I was further dismayed by counsel's vexatious and combative response. He served subpoenas on the aggrieved defense counsel seeking documents and depositions of her in connection with her affidavit of fees and expenses incurred, which affidavit I ordered submitted. This was *after* I made clear in my subsequent endorsement order of February 27th that I would *not* take evidence at the hearing. Already beleaguered defense counsel was then forced to *again* file emergency motions to quash the subpoenas, which motions I allowed. This response to my order served only to prompt me to contemplate an expansion of order for sanctions.

Plaintiffs' counsel now expresses deep regret and remorse for his response to my sanctions order acknowledging that it only served to increase the burden on opposing counsel thereby making a bad situation worse. He now concedes his entire course of conduct was wrong, and that he regretted not acting in a manner consistent with a lawyer's

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[2] See James S. Bolan, Esq., former Assistant Bar Counsel, Massachusetts Board of Bar Overseers; author and editor, "*The New Rules of Professional Conduct: The Impact on Ethical Practice in Massachusetts* (MCLE 1998)"; coeditor with Justice Kenneth Lawrence and co-author of *Ethical Lawyering in Massachusetts* (MCLE 1992, 1995, 2000, 2007, 2009); contributing author to the *Massachusetts Attorney Conduct Manual* (Lexis Nexis/Butterworths; Chair of the biannual seminar sponsored jointly by MCLE and the Board of Bar Overseers entitled, "*How to Make Money and Stay Out of Trouble*"; panel member of seminar "*Dealing with the S.O.B. Litigator...*" (1990); former member of the *Boston Bar Association's Professionalism and Bench and Bar Committees* and former member of the *Massachusetts Bar Association's Ethics Committee* (1992-1996); founding member of national *Association of Professional Responsibility Lawyers* (APRL) serving as director, treasurer, secretary, president-elect, and president.
Cite: http://www.legalpro.com/bios/bolan_bio.html

responsibility to work cooperatively with opposing counsel in discovery and in the litigation of cases. He assures me—and his opposing counsel—his misconduct will not reoccur, that he embraces all the representations and assurances put forth by his personal counsel.

Whether a sanctioned party is—or is not—remorseful and contrite is an appropriate inquiry in reconsidering an order for sanctions and in determining the ultimate sanction for lawyer misconduct. *In re Watt*, 429 Mass. 1011 (1999) ("The Supreme Court of Rhode Island noted that the respondent's misconduct was mitigated by ... his sincere remorse for and embarrassment about his misconduct); but see also *In re Ogan*, 424 Mass. 1015, 1016 (1997) ("His remorse and cooperation with the Federal government do not warrant a lesser level of discipline"); *In re Eisenhauer*, 426 Mass. 448, 456 (1998) ("The respondent's candor and trustworthiness both directly affect his capacity to practice law." ... His failure to show remorse and his lack of awareness of wrongdoing were proper for the board to consider in formulating a recommendation for discipline." Citing *Matter of Efron*, 7 *Mass. Att'y Discipline Rep.* 89, 90 (1991) ("respondent's lack of forthrightness and truthfulness before the committee does not bode well for the respondent's ability to perform legal work in a professional manner") and *Matter of Clooney*, 403 Mass. 654, 657-658 (1988) ("Respondent's persistent assertions that he did nothing wrong . . . demonstrated that he continues to be unmindful of certain basic ethical precepts of the legal profession. . . . In cases such as this, disciplinary measures are necessary to deter future misconduct on the part of all members of the bar and to preserve public confidence in the bar"). *See also In re LaBelle*, 79 N.Y.2d 350 (N.Y. 1992) ("In the proceedings before the Commission, petitioner was forthright, cooperative and contrite, and he readily

agreed to change those practices found to be improper. Under these circumstances the sanction of removal is too harsh."); *Brubaker Kitchens, Inc. v. Brown*, 2006 U.S. Dist. LEXIS 89622 (E.D. Pa. Dec. 11, 2006) ("Furthermore, I find Klein lacks any remorse for his actions. During the hearing on the Motion for Reconsideration, Klein stated his actions were justified and, if given the opportunity, he would again pursue the claims against Schibanoff."); *In re Shieh*, 738 A.2d 814, 819 (D.C. 1999) ("[R]espondent used the judicial system to carry on "war" with his perceived enemies by other means ... "greatly harming individuals and the administration of justice" and ultimately neither "expressing . . . remorse" nor exhibiting "any insight into his misconduct."); *Muhammad v. WalMart Stores E., L.P.*, No. 10-CV-6074-CJS, 2012 U.S. Dist. LEXIS 169292 (W.D.N.Y. Nov. 28, 2012) (After judge "directed Ms. Agola to show cause why she should not be sanctioned for misrepresenting that her client's complaint contained a gender discrimination claim, the judge [took] into account the fact that Ms. Agola does not appear to be the slightest bit contrite about her misrepresentations to the Court.");

Of course, a judge must be convinced that the lawyer's turn-about is not induced only by the spectre of the sanction. *See In re Coe*, 903 S.W.2d 916, 921-922 (Mo. 1995) ("Only after this Court rendered its opinion suspending respondent and Judge Benton suggested in his concurrence that he might reconsider the sanction if respondent apologized did she conclude that her actions had been 'unprofessional,' 'unnecessary,' and 'wrong.' Respondent is now eager to have the Court believe that she 'will never engage in conduct of this nature again . . . .' Her sudden about-face is entirely inconsistent with her attitude in the four years between the Dowdy trial and this Court's original judgment. After four years during which she had ample time to reflect on her conduct, only the

specter of suspension induced respondent to proclaim her contrition. Respondent has a history of refusing to apologize unless under duress.")

A lawyer's level of maturity and experience ought to be taken into account in determining whether he should have known better than to act as he did. *See, e.g., Bettis v. Toys "r" Us,* 2009 U.S. Dist. LEXIS 123664 (S.D. Fla. Dec. 30, 2009) ("Mr. Spolter is not some greenhorn out of law school who did not realize what he was doing both in his filings and addressing the Court. In such a case, if the attorney were truly contrite, then there would be a very remedial sanction. But that is not the case here. Mr. Spolter is a seasoned veteran.") Here, as his lawyer points out, counsel is certainly no seasoned veteran having been admitted to the Massachusetts bar in 2011.

Findings and Conclusions

1. This sanctioned lawyer's presentation at the hearing was forthright, cooperative and contrite. He demonstrated sincere remorse. And he readily agreed to change those practices I found to be improper. I believe him.
2. Opposing counsel for defendants, Rachel Moynihan, Esq., of Morrison & Mahoney, has resolved with plaintiffs' counsel the issue of the amount of costs and fees her client incurred as a result of the misconduct I found warranted Rule 11 sanctions, and the amount had been paid and accepted.
3. Ms. Moynihan acted in an entirely professional and laudable manner under these unpleasant circumstances, none of which were of her doing. She chose the path of de-escalation rather the escalation, and she does not oppose the motion for reconsideration. I add that her graciousness was appreciated—and it was critical to and likely dispositive on my decision on reconsideration;

4. In light of these changed circumstances, the imposition of Rule 11 sanctions is no longer necessary. I no longer believe this lawyer should be the subject of monetary sanctions or other disciplinary action. I have no reason to conclude this lawyer needs to be deterred further from future conduct in violation of Rule 11.

ORDER

For all of the reasons stated above. My order of February 13, 2015 imposing sanctions under Mass.R.Civ.P. 11 is hereby ~~VACATED~~.

Edward J. McDonough Jr.
Justice of the Superior Court
Date: 3/3/15

95

COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CIVIL ACTION NO. 1478CV00058

SETH DOULL, as Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and SETH DOULL as next friend of TROY DOULL,
Plaintiffs,

v.

ANNA C. FOSTER, N.P.; and
ROBERT J. MILLER, M.D.
Defendants.

PLAINTIFFS' EMERGENCY MOTION FOR A PROTECTIVE ORDER REGARDING CERTAIN DEPOSITIONS

NOW COME the Plaintiffs, via counsel, and respectfully pray, pursuant to Mass. R. Civ. Pro. Rule 26(c), that this Honorable Court ISSUE a protective order regarding the upcoming out-of-state deposition of Women's International Compounding and issue an order concerning the remaining depositions in this case, including the continued depositions of the defendants.

This is a medical malpractice and wrongful death action wherein a doctor (PCP) and his extender (nurse practitioner), not knowing their own limitations, mismanaged and misdiagnosed their 39-year-old female patient, leading to venous thromboembolism (VTE) with pulmonary embolism (PE) and hypoxic brain injury, and premature death at age 43.

Although discovery has been ongoing in this case for over two years, and two trial dates have already been scheduled, recently, on the Defendants motion, discovery was once again extended until March 21, 2017 and the new trial date of September 18, 2017 was assigned. In November 2016 Defendants expressed interest, and moved, to take an out-of-state, ***documents only***, Keeper of Records (KOR) deposition of Women's International Compounding in WI.

3/8/17 See endorsement on reverse.

86 9←

1478CV58

Plaintiffs' Emergency Motion for a Protective Order Regarding Certain Depositions is **ALLOWED** in part and **DENIED** in part.

There is no automatic right to audio-visual depositions under Mass. R. Civ. P. 30A. Here, plaintiffs have offered no valid basis justifying that all remaining discovery depositions, exclusive of the deposition of Woman's International Compounding, Inc. ("WIC") and including the continued depositions of defendants, be conducted as audio-visual depositions. Accordingly, plaintiffs' request that all remaining discovery depositions be audio-visually recorded, including the continued depositions of defendants and exclusive of the deposition of WIC, is **DENIED**.

The out-of-state 30(b)(6) deposition of WIC is to occur, as scheduled, on March 14, 2017. Defendants are to arrange for plaintiffs' counsel to appear for VTC participation and will bear the cost of counsel's VTC participation. The parties will each bear their own costs of the deposition transcripts.

Leave is granted to any of the parties to conduct the WIC deposition as an audio-visual deposition pursuant to Mass. R. Civ. P. 30, 30A. The party choosing to have the WIC deposition recorded by audio-visual means shall bear the entire cost of the audio-visual recording. Notice of any such audio-visual deposition shall be given to opposing counsel no later than March 13, 2017, 10:00 AM EST. Such party is to provide opposing counsel digital copies of the original recording within ten days after the conclusion of the deposition at no cost to the opposing party(ies).

Counsel for defendants is to ensure the transmittal of documents responsive to the WIC Keeper of the Record deposition notice and subpoena to counsel for plaintiffs no later than March 10, 2017, 5:00 PM EST.

Defendants request for sanctions is **DENIED**.

March 8, 2017

Mark D Mason
Justice of the Superior Court

CLERK'S NOTICE	DOCKET NUMBER 1478CV00058	Trial Court of Massachusetts The Superior Court
CASE NAME: Seth Doull Personal Representative for the Estate of Laura Doull et al vs. Anna C. Foster, N.P. et al		Susan K. Emond, Clerk of Courts
TO: Krzysztof G. Sobczak, Esq. Law Office of Krzysztof G Sobczak 619 Boylston St Newton, MA 02459		COURT NAME & ADDRESS Franklin County Superior Court 43 Hope Street Greenfield, MA 01301

You are hereby notified that on 06/02/2017 the following entry was made on the above referenced docket:

Endorsement on motion for protective order (#105.0): to limit the third consecutive day of her deposition ALLOWED Plaintiff will be permitted additional 2 hours for deposition. Plaintiff's request for audio visiual recording has previously been denied and plaintiff has not demonstrated any change in circumstances. So much of the plaintiff's opposition as requests costs is DENIED.

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
06/09/2017	Hon. Mary-Lou Rup	

Date/Time Printed: 06-09-2017 14:37:11

SCV016_X11 08/2014

CLERK'S NOTICE	DOCKET NUMBER 1478CV00058	Trial Court of Massachusetts The Superior Court

CASE NAME:
Seth Doull Personal Representative for the Estate of Laura Doull et al vs. Anna C. Foster, N.P. et al

Susan K. Emond, Clerk of Courts

TO:
Krzysztof G. Sobczak, Esq.
Law Office of Krzysztof G Sobczak
619 Boylston St
Newton, MA 02459

COURT NAME & ADDRESS
Franklin County Superior Court
43 Hope Street
Greenfield, MA 01301

You are hereby notified that on 06/02/2017 the following entry was made on the above referenced docket:

Endorsement on motion to compel (#115.0): Deposition of Women's International Compounding Inc., and for leave to amend the complaint DENIED

Applies To: Sobczak, Esq., Krzysztof G. (Attorney) on behalf of Doull, Megan, Doull, Seth, Seth Doull Personal Representative for the Estate of Laura Doull, Seth Doull as Next Friend of Troy Doull (Plaintiff)

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
06/09/2017	Hon. Mary-Lou Rup	

Date/Time Printed: 06-09-2017 14:32:48

SCV016_X11 08/2014

115

COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss

SUPERIOR COURT
CIVIL ACTION NO. 1478CV00058

SETH DOULL, as Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and SETH DOULL as next friend of TROY DOULL,
Plaintiffs,

v.

ANNA C. FOSTER, N.P.; and
ROBERT J. MILLER, M.D.
Defendants.

6/2/17
See Endorsement
& Hacked
(M.L. - Rpl

FRANKLIN SUPERIOR COURT FILED
2017 MAY 27 AM 9:55

PLAINTIFFS' MOTION TO COMPEL THE DEPOSITION OF WOMEN'S INTERNATIONAL COMPOUNDING INC., AND FOR LEAVE TO AMEND THE COMPLAINT

This is a medical malpractice and wrongful death action wherein primary care providers, not knowing their own limitations, denied their patient's right to critical information concerning her health, mismanaged and misdiagnosed the patient, leading to venous thromboembolism (VTE) with pulmonary embolism (PE), and premature death at age 43. Women's International Compounding Inc., a Wisconsin compounding pharmacy, on Defendants' orders, created, and shipped to Ms. Doull, the drug at issue in causing Ms. Doull's condition.

NOW COME the Plaintiffs, pursuant to Mass.R.Civ.P. Rules 26 and 37, and hereby moves this Honorable Court to COMPEL Women's International Compounding Inc. to produce for a deposition a FULLY PREPARED witness(es), and ORDER the deponent(s) to answer all proper questions within seven days of the Court Order.[1] Furthermore, in the event the deponent continues to refuse the authority of this Court, Plaintiffs pray for leave to amend their complaint to bring Women's International Compounding Inc. in as a named party.

[1] or other timeframe that the Court deems just and appropriate (and order the deponent to pay all costs associated with the original and continued depositions)

A TRUE COPY ATTEST
Susan K. Emond
Clerk of Courts

115

The plaintiff seeks an order compelling Women's International Compounding, Inc. ("WIC"), a non-party and Wisconsin corporation, to produce a "fully prepared" witness at the M. R. Civ. P. 30 (b) (6) deposition noticed by the defendants and adjourned at the request of the plaintiff. See M. R. Civ. P. 37 (2). The parties have submitted copies of the subpoena duces tecum served upon WIC together with the attached Schedule A (describing topics about which the witness would be expected to testify) and Schedule B (describing documents to be produced).The plaintiff's counsel contends that Michelle Poli ("Poli"), the witness designated by WIC, was not adequately prepared to respond to his questions. The defendants respond that Poli responded to their areas of inquiry. They add that the plaintiff's counsel made no effort, before the deposition, to expand the areas for inquiry beyond their Rule 30(b)(6) notice and Poli declined to respond to questions beyond the scope of the notice. Other than asserting that Poli had not properly or adequately prepared for the deposition, and that she was unable to produce original or contemporaneous documents requested, the plaintiff has failed to demonstrate with particularity that WIC produced a knowledgeable, prepared witness on the areas of inquiry set forth in the defendants' subpoena.

The plaintiff also seeks a ruling that Poli was not entitled to decline to respond to certain questions by asserting privilege pursuant to a decision of the Wisconsin Superior Court, *Alt v. Cline*, 224 Wis.2d 72; 589 N.W.2d 21 (1999). In pertinent part, the *Alt* decision provides that, absent a compelling need shown by the inquiring party, a nonparty witness has a qualified privilege to refuse to answer deposition questions calling for an expert opinion. 224 Wis.2d at 84- 93. Because the deposition was conducted in Wisconsin and Wisconsin has adopted the Uniform Interstate Deposition and Discovery Act, Wisconsin law applies. W.S.A. 887.24 § (5). Other than making bald assertions, the plaintiff's attorney has not demonstrated that Poli improperly declined to respond to his questions by asserting privilege.

The plaintiff moves to amend her complaint to add WIC as a party. The plaintiff seeks to amend her complaint by adding the nonparty WIC in order to seek discovery, see M. R. Civ. P. 34 (c), and also as a named defendant. This matter is scheduled for trial in September and the discovery deadline has passed. Significantly, the plaintiff fails to explain why she did not add and could not have added WIC earlier.

This motion is denied. (Rup, J.)

CLERK'S NOTICE	DOCKET NUMBER 1478CV00058	Trial Court of Massachusetts The Superior Court

CASE NAME:
Seth Doull Personal Representative for the Estate of Laura Doull et al vs. Anna C. Foster, N.P. et al

Susan K. Emond, Clerk of Courts

TO:
Krzysztof G. Sobczak, Esq.
Law Office of Krzysztof G Sobczak
619 Boylston St
Newton, MA 02459

COURT NAME & ADDRESS
Franklin County Superior Court
43 Hope Street
Greenfield, MA 01301

You are hereby notified that on 06/02/2017 the following entry was made on the above referenced docket:

Endorsement on motion to compel Discovery (#123.0): complete responses to Rule 34 Requests by defendant Miller DENIED
The defendant Miller's explanation for his repsonses (that he has no additional documentation to produce) does not require an over compelling discovery of material that apparently does not exist.

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
06/09/2017	Hon. Mary-Lou Rup	

Date/Time Printed: 06-09-2017 14:51:32

SCV016_X11 06/2014

JUDGMENT ON JURY VERDICT

Trial Court of Massachusetts
The Superior Court

Susan K. Emond, Clerk of Courts

DOCKET NUMBER
1478CV00058

CASE NAME
Seth Doull Personal Representative for the Estate of Laura Doull et al
vs.
Anna C. Foster, N.P. et al

COURT NAME & ADDRESS
Franklin County Superior Court
43 Hope Street
Greenfield, MA 01301

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
Foster, N.P., Anna C.
Robert J. Miller, M.D.

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Seth Doull Personal Representative for the Estate of Laura Doull
Doull, Seth
Doull, Megan
Seth Doull as Next Friend of Troy Doull

This action came on for a jury trial before the Court, Hon. Mary-Lou Rup, presiding, the issues having been duly tried and the jury having rendered its verdict,

It is **ORDERED AND ADJUDGED:**

That the above named plaintiff(s) take nothing, that the action be dismissed on the merits, and that the defendant(s) named above will not recover statutory costs.

A TRUE COPY ATTEST
Susan K. Emond
Clerk of Courts

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
10/24/2017	X

Date/Time Printed: 10-24-2017 09:05:26

SCV085: 08/2016

CLERK'S NOTICE	DOCKET NUMBER 1478CV00058	Trial Court of Massachusetts The Superior Court

CASE NAME:
Seth Doull Personal Representative for the Estate of Laura Doull et al vs. Anna C. Foster, N.P. et al

Susan K. Emond, Clerk of Courts

TO:
Krzysztof G Sobczak, Esq.
Law Office of Krzysztof G Sobczak
619 Boylston St
Newton, MA 02459

COURT NAME & ADDRESS
Franklin County Superior Court
43 Hope Street
Greenfield, MA 01301

You are hereby notified that on 11/03/2017 the following entry was made on the above referenced docket:

ORDER: on Defendant's Emergency Motion for Judicial Intervention to Prohibit Inquiry of Jurors

Judge: Rup, Hon. Mary-Lou

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
11/03/2017	Hon. Mary-Lou Rup	

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1478CV00058

SETH DOULL, et al.
vs.
ANNA C. FOSTER, et al.

ORDER ON DEFENDANTS' EMERGENCY MOTION FOR JUDICIAL INTERVENTION TO PROHIBIT INQUIRY OF JURORS

The plaintiffs filed the above action against the defendants alleging, inter alia, negligence and wrongful death. On October 4, 2017, shortly before the jury began deliberations, the defendants filed a motion to require judicial approval for post-verdict contact with jurors.[1] On October 10, 2017, I endorsed the motion as follows: "If any attorney seeks post-verdict contact with jurors, the procedural guidelines set forth in *Commonwealth v. Moore*, 474, Mass. 541, 551-552 (2016), must be followed."

The jury returned verdicts in favor of the defendants on all counts of the plaintiffs' complaint. Thereafter, the defendants' attorneys filed an "Emergency Motion for Judicial Intervention to Prohibit Inquiry of Jurors," supporting the motion with copies of correspondence between them and the plaintiffs' attorney regarding post-verdict contact with jurors. After review of the defendants' motion, attached exhibits, and the plaintiffs' opposition, the motion will be **ALLOWED.**

[1] See pleading 266.1

A TRUE COPY ATTEST
Susan K. Strand
Clerk of Courts

DISCUSSION

In pertinent part, Rule 3.5(c) of the Mass. Rules of Professional Conduct ("Rule 3.5(c)") states that "[a] lawyer shall not . . . communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order." In *Commonwealth* v. *Moore*, 474 Mass. 541, 551-554 (2016), the Supreme Judicial Court provided guidelines for counsel wishing to conduct post-verdict inquiries of jurors pursuant to Rule 3.5(c). The Court indicated that by enacting Rule 3.5 (c), it had overruled its prior prohibition against attorney-initiated contact of and communications with jurors without judicial supervision. *Id.*, at 547. While doing so, the Court expressly reaffirmed its "continuing adherence to the common-law principle barring inquiry into the contents of jury deliberations and thought processes of jurors and the impeachment of jury verdicts based on information that might be gained from such inquiry," as set forth in *Commonwealth* v. *Fidler*, 377 Mass. 192 (1979). *Moore, supra,* at 548. Noting that "[t]he secrecy of jury deliberations has served as a bedrock of our judicial system," the Court made clear that Rule 3.5(c) did not overrule "[t]he common-law principle that 'it is essential to the freedom and independence of [jury] deliberations that their discussions in the room should be kept secret and inviolable.'" *Id.*, quoting *Fidler, supra* at 196, quoting *Woodward v. Leavitt,* 107 Mass. 453, 460 (1871). While Rule 3.5 (c) permits post-verdict contact with jurors, the inquiry remains limited and excludes "communications barred by law, communications with jurors who have made known an unwillingness to communicate, and communications involving 'misrepresentation, coercion, duress or harassment.'" *Moore, supra,* at 548 – 549. The Court restated that "common-law principles . . . limit post-verdict inquiry to matters relating to extraneous influences and prohibit inquiry into the individual or collective thought processes of jurors, the reasons for their decision, or the substance of their

deliberations." *Moore, supra,* at 553, citing *Fidler, supra,* at 196-198. And, while post-verdict juror contact no longer requires that an attorney seek judicial approval and conduct inquiry under judicial supervision and direction, Rule 3.5(c) (1) "expressly contemplates" that a court may further restrict or prohibit a lawyer's post-verdict unsupervised communications with jurors by issuance of a court order. *Moore, supra,* at 549 n.10.

In the present case, on October 10th (the date that the jurors returned their verdicts), the plaintiffs' counsel, Krzysztof Sobczak ("Attorney Sobczak"), sent an email to the defendants' attorneys advising that he intended to contact the trial jurors and attached a draft copy of the letter that he intended to mail to jurors. In part, the juror letter indicated that Attorney Sobczak would like to ask questions of the jurors "for purposes of professional development" so counsel could "better serve [his] clients in the future," and that he would inquire only about the jurors' "in-trial observations" and not "about anything that occurred during jury deliberation."

In a letter dated October 11th, one of the defendants' attorneys, Rebecca Dalpey ("Attorney Dalpey"), responded, indicating that Attorney Sobczak's letter did not provide notice of the "substance of any proposed inquiry to the jurors" as required by the *Moore* decision, *supra,* at 551-552, and requesting a description of the substance of counsel's intended inquiry. On that same date, Attorney Sobczak responded by email, asserting that he had given proper notice and that neither the *Moore* decision nor "any other Court Orders" required that he list the specific questions he intended to ask of jurors. He indicated that his topics of inquiry would be "limited to 'in-trial observations' and [would] not address deliberations." He added, parenthetically, that he did not know the questions "yet, as it will depend on how talkative the jurors want to be." Nonetheless, he gave examples of the areas of inquiry: how a juror felt about the voir dire process; how a juror "felt about the questioning attorneys being up high behind the

bar;"[2] the juror's opinion of the forms in which evidence was presented (in juror notebooks, through projection on video screens or by "blow ups"); the juror's opinion of the different styles of questioning and presentation of evidence by the attorneys – whether he was "too loud at times" and if the juror took offense to that; how the juror felt about the length of the evidence, full or half trial days sessions, and the number and length of breaks; and "Etc etc etc" [sic]. Attorney Sobczak also stated that he intended to ask jurors "how they felt about Attorney Dalpey nearly assaulting Dr. Genecin [the plaintiffs' expert witness] on the witness stand and if they would have felt differently if the attorney was male and witness was female."

After receipt of Attorney Sobczak's response, the defendants' counsel filed the present motion, requesting that the court prohibit him from contacting and conducting any post-verdict inquiry of the jurors. Attorney Sobczak filed an opposition, stating that the defendants' motion was "in contradiction of controlling [Massachusetts] law," and "moot" because the case docket reflects that five jurors had already indicated to the court that they did not wish to be contacted by counsel.[3]

On first consideration, some of the areas of proposed inquiry appear to be appropriate, such as: jurors' impressions of the process of attorney-conducted voir dire; impressions about the form(s) or manners though which attorneys presented evidence (for instance, in juror notebooks or by video display); whether Attorney Sobczak was offensive or spoke too loudly. Other

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[2] Presumably this is based on the location of the attorneys during juror voir dire in the Franklin Superior Court.
[3] After discharge of the jurors, I advised them that court rules permit attorneys to contact jurors after they have reached a verdict, but attorneys cannot inquire about their deliberations, thought processes or discussions. I provided each juror with a written instruction in language similar to that suggested in *Moore, supra,* at 555. I have been advised by the Franklin Superior Court Clerk's Office that four or five of the jurors have indicated verbally or in writing that they do not wish to have any attorney contact them. According to Attorney Sobczak, because the docket reflects that these jurors do not wish to be contacted, the defendants' motion is "moot" and he can contact the other nine jurors

proposed questions draw upon a juror's thought processes and could impermissibly intrude into the jurors' deliberations and discussions.

The proposed question about an alleged "assault" of a witness by Attorney Dalpey is well beyond any proper inquiry. First, Attorney Dalpey did not assault any witness. To permit Attorney Sobczak to pose such an inquiry would suggest otherwise to jurors and could very well distort these jurors' understanding of the advocacy process, lessen their confidence in the judicial system, and affect their ability to serve as unbiased and impartial jurors in any future trials. It is equally significant and troubling that Attorney Sobczak proposes to ask a question that suggests to jurors that their impression of an attorney's questioning of a witness might or ought to be affected by the gender of each – which serves only to insert explicit or implicit gender bias into the thought processes of these jurors.

In most cases, I have confidence that attorneys initiating post-verdict contact with jurors who decided their cases will conduct their inquiry in a professional and ethical manner, in accordance with legal precedent and standards of professional responsibility, and with proper deference and respect for the "bedrock" principle of secrecy of juror deliberations, and that they will avoid any inquiry that approaches the substance of juror deliberations, or the individual or collective thought processes of a juror or the jury as whole. Cf. *Moore, supra* at 552. In this case, however, it is appropriate that I exercise my discretion to preclude Attorney Sobczak from engaging in any post-verdict contact with the jurors.

As set forth above, Attorney Sobczak seeks to query jurors on the trial performance of one of the defendants' attorneys, grossly mischaracterizing her questioning of a witness, inserting gender issues into his inquiry, and inferentially informing jurors that her cross-

examination was of a criminal nature (assault).[4] This proposed scurrilous inquiry would in no way assist Attorney Sobczak in his personal professional development or representation of clients, and would serve only to inject into the minds of jurors distrust or cynicism of the judicial system and/or the role of lawyers. Furthermore, as noted above, some areas about which Attorney Sobczak seeks to inquire approach improper inquiry into individual juror's thought processes and the deliberative process.

Based on Attorney Sobczak's conduct throughout the trial, and notwithstanding his claims to the contrary, I have well-founded and grave concerns that he would not comport himself in accordance with common-law restrictions on post-verdict inquiries of jurors, the rules of professional conduct (including Rule 3.5), the guidelines set forth in *Moore*, or any orders that I might impose in order to restrict his inquiries.[5] Accordingly, an order prohibiting any post-

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[4] There is no apparent basis for this accusation. It bears noting that in a similar manner during trial, Attorney Sobczak objected to a question that Attorney Dalpey posed to a witness regarding whether Attorney Sobczak had shown him a document or asked him a question, and accused her, before the jury, of suborning perjury. The objection had absolutely no basis in fact or law. He has raised this issue again, in opposition to the present motion, asserting that the defendants and their counsel "lied in front of the jury, attempted subordination of perjury, and when caught, misrepresented the applicable law s of our Commonwealth."

[5] I note, in particular, two egregious examples of the manner in which Attorney Sobczak skirted rules and procedures or engaged in conduct which he insisted that no specific rule or court order barred.

On the second day of jury selection, I learned that Attorney Sobczak had been scanning confidential juror questionnaires into his laptop computer. When I inquired if he were doing so and ordered that he stop and delete all questionnaires, he advised me that he knew of no rule that prevented him from doing so.

Also during jury selection, a juror reported that he had concerns about his ability to be impartial because he knew that some in his community referred to one of the defendants as "Killer Miller." The juror was excused without further discussion. Approximately two weeks later, as Attorney Sobczak appeared to be nearing the end of his cross examination of Dr. Miller, he asked a question to this effect: "Would you tell the members of the jury why you are known as Killer Miller?" I forcefully and immediately instructed jurors to disregard the question and that it was improper. During the consequent sidebar discussion, Attorney Sobczak insisted that the question was proper reputation evidence. A recess followed, so defendants' counsel could decide whether or not to move for a mistrial. When the parties returned to the courtroom, Attorney Sobczak objected to my earlier instruction to the jurors and insisted that I apologize to him before the jury and correct what he termed my erroneous exclusion of the evidence, which he again contended was proper reputation evidence. As an "offer of proof," he asserted that a number of persons on his list of prospective witnesses would establish the foundation for this evidence. He also noted an additional basis for him asking the question: despite numerous motions in limine, the defendants' counsel had never moved to preclude questioning or evidence based on the excused juror's remark.

verdict juror by Attorney Sobczak, as well as any of his law partners, associates, paralegals, employees or agents is warranted.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendants' Emergency Motion for Judicial Intervention to Prohibit Inquiry of Juror is **ALLOWED**, and an **ORDER** shall enter prohibiting any post-verdict inquiry of jurors by plaintiffs' trial counsel, his law partners, associates, paralegals, employees or agents

Dated: November 2, 2017

Mary-Lou Rup
Justice of the Superior Court

ENTERED: November 3, 2017

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1478CV00058

SETH DOULL, et al.
vs.
ANNA C. FOSTER, et al.

ORDER ON PLAINTIFFS' EMERGENCY MOTION FOR RECONSIDERATION OF THE COURT'S ORDER ON THE DEFEDANTS' EMERGENCY SECOND MOTION FOR JUDICIAL INTERVENTION TO PROHIBIT INQUIRY OF JURORS

The plaintiffs' counsel has filed a motion seeking reconsideration of the court's order, dated November 2, 2017, prohibiting post-verdict inquiry of jurors by plaintiffs' trial counsel, his law partners, associates, paralegals, employees or agents. The defendants have filed an opposition and seek sanctions. For the reasons set forth below, the plaintiffs' motion is DENIED.

BACKGROUND

On October 4, 2017, before the jury began deliberations in the above action, the defendants filed a motion to require judicial approval for post-verdict contact with jurors ("October 4th motion"). On October 10, 2017, the jury returned verdicts in favor of the defendants on all counts of the plaintiffs' complaint. On that same date, I endorsed the October 4th motion as follows: "If any attorney seeks post-verdict contact with jurors, the procedural guidelines set forth in *Commonwealth v. Moore,* 474, Mass. 541, 551-552 (2016), must be followed."

On the afternoon of Thursday October 12th, the defendants' counsel sent, by email to the Franklin Superior Court Clerk's Office ("Clerk's Office"), an electronic copy of an "Emergency

Motion for Judicial Intervention to Prohibit Inquiry of Jurors." On that same afternoon, the plaintiffs' counsel sent to the Clerk's Office an email indicating that he intended to oppose the defendants' motion "by Monday" if the court permitted. When the Clerk's Office forwarded the parties' email correspondence to me[1], I instructed First Assistant Clerk Benjamin Simanski to advise the plaintiffs' counsel that he could have the time he needed to prepare an opposition. On October 13, 2017, the Clerk's Office received from the defendants' attorneys and docketed the original "Emergency Motion for Judicial Intervention to Prohibit Inquiry of Jurors" ("October 13th motion"), which was supported by copies of correspondence between them and the plaintiffs' attorney regarding post-verdict contact with jurors. When I did not receive an opposition early during the following week, I contacted the Clerk's Office and learned that the plaintiffs' counsel had in fact filed his opposition on Monday October 16th. Other court business required my attention at that time and I issued my decision on November 2nd.

The plaintiffs filed their motion for reconsideration on November 9, 2017. The defendants filed their opposition of November 10th.

DISCUSSION

According to his present motion, plaintiffs' counsel gave notice to defendants' counsel of his intent to contact jurors on October 10, 2017, and thereafter learned from a court docket entry dated October 11, 2017 that five of the discharged jurors did not wish to be contacted by counsel for the parties.[2] He contends that "[a]s of October 17, 2017 (five business days later) there was

[1] Upon conclusion of the trial in the instant case, I moved to the Hampden Superior Court.

[2] As indicated in footnote 3 of my order dated November 2, 2017, when they were discharged, I provided jurors with a written instruction regarding post-verdict contact by attorneys in language similar to that suggested in *Commonwealth v. Moore*, 474 Mass. 541, 555 (2016). Apparently, the Clerk's Office entered onto the docket the numbers of jurors who indicated (verbally or in writing) that they did not want any attorney to contact them.

no Court Orders prohibiting juror contact, and no additional jurors indicated that they do not wish to be contacted," therefore, he began sending letters to the other jurors. He adds that the Clerk's Office did not docket and mail the order (dated October 10th) on the October 4th motion until "a week later." The plaintiffs' counsel states that he began contacting jurors and spoke "briefly" with one juror on November 1st and with another on November 3rd. He claims that both expressed a willingness to communicate with him again in the future "and potentially offer affidavits to assist with the appeal process." After receiving the court's order precluding juror contact, dated November 2, 2017 (which was apparently docketed and mailed on November 3, 2017), he ceased communication with jurors.

The plaintiffs' counsel now moves for reconsideration of the order dated November 2nd, claiming that it is "unclear, factually inaccurate and incomplete, and contains contradictory statements."

In pertinent part, Rule 3.5(c) of the Mass. Rules of Professional Conduct ("Rule 3.5(c)") states that "[a] lawyer shall not . . . communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by . . . court order." The court order which issued was clear; it prohibited "any post-verdict inquiry of jurors by plaintiffs' trial counsel, his law partners, associates, paralegals, employees or agents." Claiming that he was complying with the protocol set forth in *Moore*, *supra* at 551 - 552, until he received the order dated November 2nd, plaintiffs' counsel now argues that prior to receiving that order, he was free to contact those discharged jurors who had not declined attorney contact. What he chooses to ignore is the fact that when he embarked on juror contact, the court had before it a motion to preclude post-verdict contact and his opposition. While it defies logic that any attorney would engage in conduct the prohibition of which counsel *knows* the court has under advisement at that time, Attorney

Sobczak's behavior at several points during trial made this conduct well-nigh predictable. Of greater significance is the fact that, in setting forth the protocol for post-verdict contact by attorneys pursuant to Rule 35 (c), the Supreme Judicial Court noted that the purpose of requiring prior notice to opposing counsel of an intent to initiate juror contact "is to permit opposing counsel . . . to seek relief from the court if the proposed communication appears to be beyond the scope of permissible inquiry or otherwise improper, or if there is a compelling reason, specific to that case, that communication with the jurors would be inappropriate." *Moore*, *supra*, at 552. Attorney Sobczak was well-aware that counsel for the defendants sought such relief by way of motion filed on October 13th - days before he initiated contact with jurors.

Plaintiffs' counsel asserts that the two jurors who expressed their willingness to speak with him again in the future will "potentially offer affidavits to assist with the appeal process." In his correspondence to defendant's counsel and his opposition to the October 13th motion, Attorney Sobczak stated that he would inquire only into "in-trial observations" and not jurors' deliberations.[3] In responding to defendants' counsels' inquiry, he declined to list specific questions – stating he had not yet decided upon them – and added "it will depend on how talkative the jurors want to be." Notwithstanding his claim to the contrary, one can easily infer from the juror affidavits that he hopes to obtain that Attorney Sobczak will slide into juror thought processes and deliberations if the path appears open to him.

The courts have inherent authority to assure that justice is administered in a fair and appropriate manner. Jurors are a critical component of our system of justice. The courts strive to

[3] He gave these examples of his intended topics of inquiry: the positions of the lawyers and jurors during the voir dire portion of jury empanelment; the form and manner of the presentation of evidence; whether he was offensive or too loud; the length of the trial and recesses; and the manner in which defendants' lawyers questioned the plaintiffs' expert witness.

make certain that those individuals asked to serve as jurors have a positive impression of their experience, and that they recognize the enormous importance of their role to the proper functioning of the courts. The courts expect that these same individuals will, in the future, be called upon again to decide other criminal or civil disputes, and to do so in a fair and impartial manner, in accordance with applicable law. Courts also must respect and maintain the independence of jurors' decision-making process, and in that regard "it is essential to the freedom and independence of [jury] deliberations that that their discussions in the jury room should be kept secret and inviolable." *Moore*, *supra* at 548, quoting *Commonwealth* v. *Fidler*, 377 Mass. 192, 196 (1979), quoting *Woodward v. Leavitt,* 107 Mass. 453, 460 (1871). In recognition of that principle, the *Moore* court reaffirmed its "continuing adherence to the common-law principle barring inquiry into the contents of jury deliberations and thought processes of jurors and the impeachment of jury verdicts based on information that might be gained from such inquiry." *Moore, supra,* at 548. Because, in my judgment, compelling reasons (based on plaintiffs' counsel's trial conduct) made juror communication inappropriate in this case, and improper questioning of jurors likely, I issued an order precluding post-verdict inquiry of jurors. The conduct of counsel since the date the defendants moved to preclude juror contact has now reinforced that decision.

The defendants seek sanctions, some of which are in order. In light of Attorney Sobczak's conduct during the period while the October 13th motion remained under consideration, it appears appropriate to require that he file with the court an affidavit specifically listing the juror numbers for those jurors he contacted, the date of his contact, the manner of contact (in person, by telephone or through other electronic means), whether any other person was present or participated in the conversations, and the substance of these conversations. He

shall also file with the court, under seal (and which shall remain under seal), any notes, print copies of any electronic notes, and copies of any audio-recorded conversations with the jurors that he (or any person who accompanied him or acted under his direction) took during or following these conversations. While under ordinary circumstances, I would not order the sanction of attorney fees for preparation of an opposition to a motion for reconsideration, in this instance, an award of a portion of costs may be warranted. The defendants shall file an affidavit of their fees and costs incurred as to so much of their opposition as addressed plaintiffs' counsel's inquiry of jurors while the court had under advisement the defendants' motion seeking to preclude post-verdict inquiry of jurors. The court will schedule a hearing before determining whether to order payment of costs and fees.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiffs' Emergency Motion for Reconsideration of the Court's Order on the Defendant's Second Emergency Motion For Judicial Intervention to Prohibit Inquiry of Juror is **DENIED**.

The following **ORDERS** shall also enter:

No later than three (3) business days from entry of this **ORDER**, the plaintiffs' counsel shall file with the Franklin Superior Court Clerk's Office:

A. An affidavit specifying: (1) the juror numbers for those jurors he contacted and with whom he communicated: (2) the date(s) of his contact or conversation; (3) the manner of contact (in person, by telephone or through other electronic means); (4) whether any other person was present or participated in the conversations, and the substance of these conversations.

B. The following documents, under seal (and which shall remain under seal): any notes, print copies of any electronic notes, and copies of any audio-recorded conversations with the jurors that he (or any person who accompanied him or acted under his direction) took during or following these conversations.

No later than seven (7) business days from entry of this **ORDER,** the defendants' counsel shall file an affidavit setting forth attorney fees and any costs incurred as to so much of their opposition as addressed plaintiffs' counsel's inquiry of jurors while the court had under advisement the defendants' motion seeking to preclude post-verdict inquiry of jurors.

Dated: November 13, 2017

Mary-Lou Rup
Justice of the Superior Court

CLERK'S NOTICE	DOCKET NUMBER 1478CV00058	Trial Court of Massachusetts The Superior Court

CASE NAME:
Seth Doull Personal Representative for the Estate of Laura Doull et al vs. Anna C. Foster, N.P. et al

Susan K. Emond, Clerk of Courts

TO:
Krzysztof G Sobczak, Esq.
Law Office of Krzysztof G Sobczak
619 Boylston St
Newton Center, MA 02459

COURT NAME & ADDRESS
Franklin County Superior Court
43 Hope Street
Greenfield, MA 01301

You are hereby notified that on 11/29/2017 the following entry was made on the above referenced docket:

Endorsement on Motion for judgment notwithstanding the verdict on defendants affirmative defenses (#288.0): DENIED
For the reasons set forth in the defendants' opposition memoranda.

Judge: Rup, Hon. Mary-Lou

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
11/30/2017	Hon. Mary-Lou Rup	

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL DOCKET
NO. 14-00058

SETH DOULL, individually and as personal representative,[1] & others[2]

vs.

ANNA C. FOSTER & another[3]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION TO FOR A NEW FAIR TRIAL

The plaintiffs Seth Doull,[4] Megan Doull, and Troy Doull[5] filed suit against Anna C. Foster, N.P. ("Foster") and Robert J Miller, M.D. ("Miller"), claiming medical malpractice, wrongful death and loss of consortium related to the death of Laura Doull. On October 10, 2017, after a two week trial, a jury found for Foster and Miller on all claims. The plaintiffs now move for a new trial,[6] pursuant to Mass. R. Civ. P. 59 and Mass. Super. Ct. R. 9A and 9E. For the following reasons, the plaintiffs' motion is **DENIED**.

DISCUSSION

The plaintiffs' theory of the case was that Foster and Miller, as Laura Doull's primary care providers, failed to advise her of critical information regarding alleged risks of a topically-applied "natural" or "bioidentical" progesterone cream treatment, and then mismanaged and misdiagnosed her condition, failing to diagnose venous thromboembolism with pulmonary embolism, resulting in her premature death at age forty-three.

[1] Of the estate of Laura Doull
[2] Megan Doull and Troy Doull by next friend Seth Doull
[3] Robert J. Miller, M.D.
[4] Individually and as personal representative of the estate of Laura Doull
[5] By his next friend Seth Doull.
[6] The plaintiffs titled their motion as one for a new "fair" trial.

In their motion for new trial, they contend that the court committed numerous errors of law, the verdict was against the weight of the evidence, and the court abused its discretion. "Rule 59 (a) (1) permits a judge to order a new trial 'in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the Commonwealth.'" *Wojcicki* v. *Caragher*, 447 Mass. 200, 208 (2006), quoting Mass. R. Civ. P. 59 (a) (1).

A. Errors of Law in Jury Instructions

The plaintiffs argue that the court gave erroneous jury instructions, specifically by: (1) instructing that the standard of care can only come from an expert and failing to instruct about the applicability of the Massachusetts Regulations to the standard of care; (2) instructing that the causation standard was "but-for" rather than "substantial contributing" cause; and (3) failing to include on the special verdict questionnaire a separate "causation" question for the loss of consortium claims. "A trial judge has wide latitude in framing the language to be used in jury instructions as long as the instructions adequately explain the applicable law. . . . The judge [is] not bound to instruct in the exact language of the requests; [t]he test of the charge is the impression created by it as a whole." *Kelly* v. *Foxboro Realty Associates, LLC*, 454 Mass. 306, 316 (2009) (citations omitted; internal quotation marks omitted).

1. Standard of Care Instruction

The jury received the appropriate instruction for the standard of care Expert evidence is required for claims of medical negligence in which applicable standard of medical care is beyond the knowledge and experience of ordinary jurors. See generally, *Goldberg* v. *Northeastern Univ.*, 60 Mass. App. Ct. 707, 709 (2004) (expert testimony prerequisite to recover in cases involving medical practice "where the precautions taken (or omitted) were in fact the result of a deliberated

judgment in the particular case on the part of a physician or skilled staff [internal quotations omitted]"). That said, contrary to the plaintiffs' argument, the jury instruction (which followed the Massachusetts Superior Court Civil Practice Jury Instructions) did not limit jurors to considering only expert testimony. The jurors could consider other evidence, including the defendants' testimony and admissions, medical records, any deviation from an applicable code or regulation, and medical publications.[7]

Jurors heard and received evidence on the standard of care requirement that medical providers advise patients of the benefits and risks and alternatives to medical treatments. They heard testimony about and received in evidence 244 Code of Mass. Regs. 9.04(5) which requires that nurses disclose to patients and document the disclosure of the risks and benefits of medical treatment. The jurors could consider the regulation's disclosure requirement as part of the standard of care on the plaintiffs' claim of lack of informed consent. As I instructed the jury, they could consider failure to comply with the documentation requirement in their determination of whether Foster did or did not, in fact, make the required disclosures to Laura Doull, and on Foster's credibility. Violation of the regulation was not relevant to the plaintiffs' claims of negligence (failure to diagnose and failure to refer to a specialist or for further testing).

As to their negligence claim, the plaintiffs' claim of an erroneous standard of care instruction is without merit, as any possible error in the jury instructions on the standard of care was not prejudicial in light of the fact that the jury found the defendants negligent for their failure to earlier diagnose Laura Doull's condition or to refer her to a medical specialist. See *Blackstone* v. *Cashman*, 448 Mass. 255, 270 (2007) ("An error in jury instructions is not grounds

[7] Plaintiffs' counsel was persistent in trying to put before the jury broad, vague concepts of "patient safety" and "safety rules" as the standard of cause.

for setting aside a verdict unless the error was prejudicial—that is, unless the result might have differed absent the error").

2. Causation Instruction

There was no prejudicial error in giving the "but-for" causation instruction, which was appropriate in light of the facts of this case.

The plaintiffs argue that the court should have used the "substantial contributing factor" instruction. That test "is useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any individual defendant's conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm." *Matsuyama* v. *Birnbaum*, 452 Mass. 1, 30 (2008). Here, the plaintiffs' theory of the case was that progesterone cream caused Laura Doull to develop pulmonary emboli which lead to her death. They claimed that: (1) Foster, whose medical care of patients Miller supervised and oversaw, prescribed a course of progesterone cream treatment to Laura Doull without advising her that use of the cream risked development of pulmonary emboli; (2) Laura Doull developed pulmonary emboli; (3) Foster and Miller failed to diagnose the emboli and/or refer Laura Doull for further testing and/or to an appropriate medical specialist; and (4) Laura Doull died as a result. They argue that eighteen "different potential causes" of harm and injury to Laura Doull and multiple tortfeasors (Foster, Miller and possible others) warranted instruction under the "substantial contributing factor" standard. Their argument fails.

The first eight of the alleged potential causes do not amount to distinctive, multiple causes of Laura Doull's injuries and death and are no more than attempts to parse out piecemeal what was the actual theory of their case, that: (1) Foster and Miller (as Foster's supervising

physician) failed to advise Laura Doull that a risk of using the progesterone cream prescribed was development of pulmonary emboli and, therefore, Laura Doll could not give informed consent to the prescribed treatment; (2) Laura Doull developed pulmonary emboli as a result of using the progesterone cream; and (3) Foster and Miller negligently failed to diagnose Laura Doull's condition and refer her to appropriate medical specialists and/or further testing.

The defendants maintain that Foster prescribed a "natural" "bioidentical" topically-applied progesterone cream to Laura Doull. Throughout the trial, the plaintiffs characterized it as a hormone replacement therapy ("HRT"). They presented evidence and argued that HRTs have a long-known risk of causing embolisms. While not disputing that embolisms are a risk of certain HRTs, the defendants testified and presented expert testimony specifically distinguishing the topically-applied progesterone cream prescribed in this case from HRTs and disputed that the progesterone cream prescribed to Laura Doull had any recognized risk of causing pulmonary embolism.

The plaintiffs point to a single reference to HRT in Foster's medical notes as evidence that Foster also prescribed it, thereby presenting another potential cause of Laura Doull's development of pulmonary emboli. Foster (and the other medical witnesses) acknowledged that HRT carries a risk of development of pulmonary emboli. That said, Foster testified that she prescribed only the topically-applied progesterone cream, which she asserted is not HRT. Other witnesses agreed that the progesterone cream prescribed is not HRT. Furthermore, as I recall, Foster explained the entry in her notes as an error in recording. Apart from this one reference, no evidence showed that Foster or Miller ever prescribed or that Laura Doull ever used HRT.

The plaintiffs contend that "impurities and lack of consistency" in the progesterone cream prescribed was another potential cause. However, apart from attempts to examine witnesses about this *possibility*, there was no evidence of any such impurities or inconsistency.[8]

During trial, the plaintiffs made much of the fact that the Food and Drug Administration ("FDA") does not regulate this progesterone cream, thereby suggesting that the cream was an unregulated and dangerous drug. They raise this lack of approval as further evidence that the cream was unregulated, potentially dangerous and a possible cause of harm to Laura Doull. This argument fails as no evidence indicated that lack of FDA regulation of a particular drug or medical treatment means that it is harmful or, as the plaintiffs tried to argue, dangerous. Any such inference would have been based on speculation and not reasonable.

Using isolated terminology and language elicited from witnesses or appearing in parts of the medical records, the plaintiffs claim that the following represent other potential causes: unknown factors, no clear etiology, idiopathic, bad luck, natural progression of disease, drugs, and hypercoagulability. As presented during this trial, these terms did not represent other potential causes of harm or injury to Laura Doull as would have warranted a "substantial contributing factor" causation instruction.

The plaintiffs also contend that because they made claims against two medical providers, "but for" causation was an inappropriate standard. The evidence showed that: (1) even though Miller treated Laura Doull beginning in her teenaged years, Foster exclusively provided direct care to Laura Dull for many years thereafter and prescribed the progesterone cream; (2) Foster and Miller shared office space and patients; and (3) as the medical doctor in their practice, Miller

[8] Laura Doull died in October, 2011. The plaintiffs commenced this lawsuit in 2014. Shortly before trial was set to begin, the plaintiffs sought to amend their complaint to add as a defendant Women's International Compounding (WIC), a compounding pharmaceutical company which furnished the progesterone cream. The motion was denied. WIC was deposed during the pre-trial discovery period.

was responsible for supervising Foster's work. The plaintiffs' multiple tortfeasors argument fails as their claims against Foster and Miller clearly showed Miller's role as supervisor and his liability, if any, to be vicarious.

Finally, according to the plaintiffs, "the gravity of the Court's error [was] amplified" when "the Court did not announce that it [would] use the erroneous 'but-for' instruction until end of trial day 12." Again, the argument fails. The defendants filed a pre-trial motion requesting that the court instruct the jury using the "but for" causation standard. There is nothing erroneous or improper – and, in fact, it is an almost universal practice - for a judge to reserve decision on appropriate final legal instructions until after hearing all of the evidence.

3. Loss of Consortium/Loss of Parental Society

There was no prejudicial error in the wording of the loss of consortium claims on the special verdict form.[9] A spouse can have a claim for loss of consortium which results from personal injury *caused* to the other spouse by the negligence of a third party. *Diaz v. Eli Lilly & Co.*, 364 Mass. 153, 167-168 (1973) (emphasis supplied). See *Sena* v. *Commonwealth*, 417 Mass. 250, 264 (1994) ("As a general rule, a claim for loss of consortium requires proof of a tortious act that caused the claimant's spouse personal injury.") While a claim for loss of consortium is independent of the injured spouse's damage claim, *Feltch v. General Rental Co.*, 383 Mass. 603, 607-608 (1981), the Supreme Judicial Court has "not repudiated the implicit prerequisite that the injured spouse have a viable claim[,]" *Sena, supra* at 264. A minor or dependent child may also recover for loss of parental society suffered as a result of a third

[9] The plaintiffs submitted a proposed special verdict form which did not include any causation questions for their consortium claims. As I recall, when discussing the language for the special verdict form to be answered by the jury, the plaintiffs made no argument and did not request that it include separate causation questions for the loss of consortium claims.

party's tortious act that caused injury to the parent. See *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 510-516 (1980).

Here, jurors received instructions that Laura Doull's spouse and her children could recover for any loss of consortium or loss of parental society caused by the defendants' negligence. The special verdict form directed jurors to address loss of consortium damages if, in answer to earlier questions, they found that the negligent actions or inactions of the defendants were the cause of harm or injury to Laura Doull.[10] The jurors answered in the negative to all causation questions and therefore, did not award the plaintiffs any loss of consortium damages. The lack of a special verdict question asking, in essence, if the defendants' negligent conduct caused Seth Doull to suffer a loss of consortium and Megan and Troy Doull to suffer a loss of parental society would result in no different result. The estate's failure to prove the negligence claims precluded the plaintiffs' recovery on their loss of consortium and parental society claims. See *Sena, supra* at 264.

B. <u>Was the Verdict Against the Weight of the Evidence</u>

The plaintiffs contend that a new trial is warranted because the verdict reached by the jury was against the weight of the evidence.[11]

"The grant or denial of a motion for a new trial on the ground that the verdict is against the weight of the evidence rests in the discretion of the judge. . . . The judge, however, should not

[10] The following language appeared below the heading "Loss of Consortium (prior to Laura Doull's death: May 2011 – October 2015):" "*Instruction to the jury: Provide answers only if you answered "YES" to one or more of the following questions: Q.3, Q.6, Q.10 and/or Q.13.*" Questions 3, 6, 10 and 13 asked the jurors if the conduct (alleged failure to obtain informed consent or alleged negligence) of each of the defendants caused harm or injury to Laura Doull.

[11] The plaintiffs entitle this ground as: "A New Trial Is Necessary Because The Verdict Was Against The Weight Of The Evidence." However, rather than demonstrating how the jury's verdict was against the weight of the evidence, they argue that the jury was unable to properly reach a factually correct verdict because of the court's incorrect evidentiary rulings in excluding "numerous publications" that the plaintiffs sought to introduce, including the Physician's Desk Reference ("PDR"). I reserve these arguments for later discussion. See, *infra* 10- 11.

decide the case as if sitting without a jury; rather, the judge should only set aside the verdict if satisfied that the jury failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law. . . . Moreover, a judge should exercise this discretion only when the verdict is so greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evidence, but that it was the product of bias, misapprehension or prejudice (citations omitted; internal quotation marks omitted)." *Turnpike Motors, Inc.* v. *Newbury Group, Inc.*, 413 Mass. 119, 127 (1992).

Here, the jury's verdict was not against the weight of the evidence. The plaintiffs and the defendants and their experts provided ample testimony and evidence about Laura Doull's care and her medical condition. Testimony included, inter alia, discussion about Foster's treatment of the patient, Miller's supervision of Foster, and the use of the progesterone cream, development and recognition of pulmonary emboli and CTEPH.

The plaintiffs' expert witness testified about progesterone having a risk of causing pulmonary emboli. On cross-examination, he acknowledged that he was not an expert on CTEPH, hematology or pulmonology and acknowledged his inability to offer an opinion as to whether any or earlier surgical treatment of Laura Doull would have been warranted or successful. Disputing the plaintiffs' evidence and expert's opinions, the defendants' experts testified that progesterone applied topically had no connection to an increased risk of blood clots, and that Laura Doull was not at an increased risk of clotting as a result of her use of it. The defendants also offered testimony regarding the difficulty of diagnosing development of pulmonary emboli in a patient with the symptoms reported by Laura Doull, that development of CTEPH could not be predicted not prevented and that an earlier diagnosis would have made no difference in Laura Doull's case. It was well within the province of the jury to give greater credit to the defendants'

and their experts' testimony than to the testimony of the plaintiffs' expert. There was ample evidence from which the jury could reasonably conclude that the plaintiffs had not proven to a preponderance of the evidence that the defendants failed to obtain informed consent from Laura Doull and that any negligence in failing to diagnose her condition and/or to refer her for further testing or to a specialist caused her to suffer harm and or her death.

C. Abuse of Discretion

The plaintiffs' contend that the court deprived them of a fair trial by abusive and prejudicial discretionary rulings, pointing to twenty-three rulings, which I summarize and address below.

1. Exclusion of Evidence

"As a broad, general rule, error in the exclusion of evidence should not be grounds for a new trial unless the error 'has injuriously affected the substantial rights of the parties.' G.L. c. 231, § 119." *Albright* v. *Boston Scientific Corp.*, 90 Mass. App. Ct. 213, 224 (2016). "It is within the judge's discretion to exclude evidence that, while relevant, presents the danger of 'confusion, unfair prejudice, or undue consumption of time in trial of collateral issues' that outweighs the probative value of the evidence " *Read* v. *Mt. Tom Ski Area, Inc.*, 37 Mass. App. Ct. 901, 902 (1994), quoting *Commonwealth v. Sherry*, 386 Mass. 682, 693 (1982).

Here, any evidence that was excluded at trial was either not relevant, would have caused confusion, or was more prejudicial than probative.

a. Learned Treatises

The plaintiffs sought to introduce as learned treatises what they correctly describe as "numerous publications." They appear to have complied with the pre-trial conditions for offering such materials as evidence in their case-in-chief. See G. L. c. 233, § 79C. Witnesses were

permitted to read portions of those publications to which the defendants did not object or that I found authoritative, relevant and material. At trial and in this motion, the plaintiffs argue that they were improperly prevented from admitting into evidence, as learned treatises, full length reference materials, books and articles. [12] As one example, as witnesses read excerpts from the Physicians' Desk Reference ("PDR") related to certain forms of progesterone, the plaintiffs repeatedly sought to introduce as an exhibit the entire PDR volume.

Our rules of evidence make clear that what is permitted is introduction of "*statements of facts or opinions* . . . contained in a published treatise, periodical, book or pamphlet." Mass. G. Evid. 803 (18) (A); G. L. c. 233, §79C (emphasis supplied). Nothing in Mass. G. Evid. 803 (18) (A) states or suggests that the entire treatise, periodical, book or pamphlet is admissible as substantive evidence. When used in cross-examination of expert witnesses, our rules of evidence make clear that *statements* from authoritative materials may be read into evidence but not received as exhibits. Mass. G. Evid. 803 (18) (B). See *Commonwealth v. Sneed*, 413 Mass. 387, 396 (1992) ("Admission in evidence of a *statement* from a treatise ... whose authenticity and reliability are shown ... and which expresses an expert opinion on a subject relevant to the case on trial ...)(emphasis supplied). Furthermore, admission of the volumes and/or articles in their entirety would have been confusing for jurors and could potentially have resulted in jurors referencing irrelevant portions of them. Rather than admitting thousands of pages not shown to be relevant, I allowed witnesses to read relevant statements into evidence.

With regard to other documents that the plaintiffs argue were admissible as learned treatises, I either found that the plaintiffs had not demonstrated to my satisfaction that that the authors of the statements or publications were recognized as experts, that the materials were

[12] The plaintiffs sought to introduce materials in their entirety rather than offering select, relevant portions of them.

either not relevant or material, or that any probative value was outweighed by the risk of confusing jurors. That said, even if erroneous, the statements not admitted would have been cumulative as the plaintiffs were permitted to introduce a significant number of other statements under the learned treatise exception to the hearsay rule.

b. Defendants' Romantic Relationship

The plaintiffs sought to offer evidence that, years before the relevant time period, Foster and Miller had an amorous affair. They argue that the defendants had a duty to disclose this "conflict of interest."[13] Evidence of any improper relationship between the defendants was not relevant and would have been more prejudicial than probative of any relevant issue.

c. Records and Expenses from Troy Doull's Residential Care

The plaintiff Troy Doull has been severely disabled since birth. He lived in the family home where, before her death, Laura Doull provided most of his non-medical care and education. Unable to provide the same level of daily care, Troy's family moved him to a residential care facility following his mother's death. Jurors heard testimony and received other exhibits (including photographs) that well-demonstrated Troy's condition and the extraordinary care and affection that his mother had provided to him. Witnesses testified that Troy is thriving at the facility, but, in the words of his sister Megan, "It's not the same as his mother." It appears that state disability insurance or other state funding covers the full cost of his care.

During trial, the plaintiffs sought to introduce extensive records from the residential facility detailing Troy Doull's condition, including bills for his care and treatment at the facility where he now resides. Excluding those bills was not prejudicial as the costs of specialized medical services, other services and residential expenses well beyond those that his mother did

[13] The plaintiffs argued that jurors could have inferred from this evidence that the defendants were distracted and not giving full attention to their patients.

or could provide to Troy could have confused the jurors on the proper measure of damages on his claim of loss of parental society.[14] Furthermore, because the jury found that the plaintiffs had not proven that the defendant's conduct caused harm, injury and/or the death of Laura Doull, they did not reach or need to consider the amount of Troy Doull's damages.

d. Unrelated Malpractice Charge against Dr. Miller

Arguing that it was evidence of Miller's "custom and practice," the plaintiffs sought to introduce evidence that another patient brought a malpractice claim against him. The prior claim had no relevance to any of the issues in this case. Exclusion was appropriate.

2. Jury Selection

The plaintiffs argue that the court altered the procedure for attorney participation in juror selection from a panel voir dire procedure to individual questioning of jurors at side bar. The parties appeared in court several days before the scheduled trial date to address thirty-four pre-trial motions, including motions in limine to preclude or admit certain evidence.[15] As I recall, on that date I briefly discussed with the parties their requests to participate in jury selection, including the manner of the attorneys' inquiries. Counsel for the plaintiffs later claimed that I indicated that counsel would conduct panel voir dire and that I would allow counsel 80 minutes per panel.[16] The plaintiffs now argue that they were deprived of an unbiased jury because the court allowed only side-bar inquiry of jurors and limited the number of questions to six per juror.

The record shows that the case was aggressively prosecuted and defended. It bears noting that the plaintiffs submitted one hundred and fifteen questions that they sought to pose to jurors;

[14] The plaintiffs sought to introduce the entire record and did not point to any specific portions of the records that may have been relevant and admissible.
[15] The plaintiffs filed twelve motions and the defendants filed twenty-two motions. All parties filed oppositions.
[16] I neither made any such offer nor would I permit such an extraordinarily lengthy panel voir dire. My best recollection is that while discussing with counsel the manner in which attorneys might conduct voir dire, I likely stated that I might permit twenty minutes of panel voir dire questioning per side.

in contrast, the defendants submitted twelve. Upon review, I considered many of the plaintiffs' questions to be improper either in topic or as phrased. The court has discretion to determine the procedure for attorneys' involvement in jury selection. Super. Ct. Rule 6 (1). See *Commonwealth v. Dabney,* 478 Mass. 839, (2018); *Commonwealth* v. *Kennedy,* 478 Mass. 804, 806 (2018). That discretion includes determining the manner of and time allotted to attorney inquiry, and what represents a reasonable number of questions to be posed to prospective jurors. See *Commonwealth* v. *Lao,* 443 Mass. 770 (2005) ("The scope of voir dire rests in the sound discretion of the trial judge . . .").

The plaintiff also claim that they were "deprived of [an] unbiased jury" because I refused to strike for cause "at least 10 jurors who have expressed possible bias or inability to following the law, forcing [them]" to exercise their peremptory challenges. The plaintiffs provide nothing to support this assertion. Consistent with my regular practice, I carefully observed all prospective jurors and their responses and, before determining if cause existed to excuse them, considered whether they could be fair, focus on the evidence presented and follow the law without regard to any prior experiences or personal opinions. Notably, the plaintiffs did not exercise all of their peremptory challenges and did not request additional challenges.

The plaintiffs' claim regarding the jury selection process has no merit.

3. Trial Subpoenas

At what could accurately be described as the "eleventh-hour," plaintiffs' counsel filed extensive trial subpoenas on the defendants and their experts,[17] claiming that he was entitled to do so, wanted to be certain that all discovery had been provided, and wanted original copies of

[17] Expert witnesses had traveled from states other than Massachusetts.

the records before the jury. Defendants moved to quash them, and after hearing arguments and reviewing the subpoenas, I ordered portions quashed.

The plaintiffs argue that by quashing the subpoenas even in part, the court limited their ability to cross-examine these witnesses. They also argue that the witnesses failed to comply with the un-quashed portions of the subpoenas and that the court "did nothing about it and still allowed the witnesses to testify." It bears noting that the defendants argued that all the materials subpoenaed had been produced in discovery. The plaintiffs expressed great skepticism, citing (without any specific support) alleged or possible altered or unproduced materials. They did not demonstrate the relevance of these materials during the trial. In their motion seeking a new trial, the plaintiffs have neither identified any materials or documents supporting their claim of unfair limitation of cross-examination nor shown how they would have been relevant.

4. Exclusion of "Patient Safety" Language

The plaintiffs argue that the court deprived them of a fair trial by "blocking" them from using the terminology "patient safety" and "safety rules" when addressing their claims. As noted above, the plaintiffs argued that the jury could consider that terminology in determining if the defendants were negligent, and that use of the term "patient safety" was proper in defining the standard of care applicable in this case.

Notwithstanding the plaintiffs' claim that the court "blocked" them from utilizing the concept of "patient safety" as relevant on the standard of care, it bears noting that their expert witness did testify using the terminology. The plaintiffs' counsel repeatedly used the terminology as he cross-examined the defendants and their expert witnesses. Through pertinacious persistence, plaintiffs' counsel repeatedly asked witnesses if "patient safety" was important and the standard of care. The fallacy of the plaintiff's argument lies in the fact that no expert witness

– including their own – agreed that in the facts of this case, "patient safety" was the applicable medical standard of care. As relied upon by the plaintiffs, the terminology could inject confusion into jury deliberations and improperly inflame jurors' emotions and fears. Potential confusion and prejudice far outweighed miniscule, if any, probative value.

5. **Other Challenges**

The plaintiffs cite other instances which they contend deprived them of a fair trial. These include not admitting evidence or precluding them from cross-examining witnesses on certain matters. The plaintiffs have failed to identify these specific matters with specificity or to demonstrate how the court's rulings were in error and an abusive of discretion.

The plaintiffs' complaints regarding the conduct of defense counsel differ from what I observed during the trial. Plaintiffs' counsel claims that I improperly "chastised" him during trial but did not chastise the defendants' counsel for their alleged misdeeds. Review of the record will, I expect, demonstrate that sustained objections to plaintiff's counsels' questions, any interruptions of plaintiffs' counsel's questions and arguments, and any admonitions about counsel's behavior were, for the most part, fully warranted.

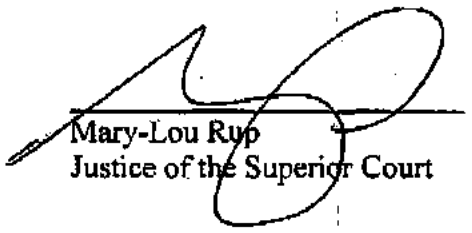
With regard to the numerous other discretionary rulings, my decisions were based on the lack of relevance, unfair prejudice, potential for confusion and waste of judicial resources. See Massachusetts Guide to Evidence §§ 401 et. seq.

Finally, the plaintiffs' claim that there were "many more instances" of abusive and unfair rulings which they did not address due to "space limitations" is not proper argument.

The court did not deprive the plaintiffs of a fair trial.

ORDER

For the foregoing reasons, the Plaintiffs' Motion for a New Fair Trial is **DENIED**.



Mary-Lou Rup
Justice of the Superior Court

DATED: April 23, 2018

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12921

SETH DOULL, As Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and TROY DOULL, ppa SETH DOULL
Plaintiffs-Appellants,

VS.

ANNA C. FOSTER, N.P. and ROBERT J. MILLER, M.D.
Defendants-Appellees

APPEAL FROM JUDGMENT OF THE SUPERIOR COURT OF THE COUNTY OF FRANKLIN

JOINT BRIEF OF DEFENDANT-APPELLEES ANNA C. FOSTER, N.P. AND ROBERT J. MILLER, M.D.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Treatises, Publications

I. STATEMENT OF THE ISSUES

Was there reversible error in using "but for" in the causation instruction where the instruction was consistent with the Third Restatement; directed that there could be more than one cause and that either or both of the defendants could be found negligent; and where there was no showing of material prejudice?

Did the trial court commit reversible error in not instructing that "safety rules," "governmental regulations, and "policies and procedures" can constitute the standard of care where the court's instructions were consistent with established law and where there was no showing of prejudice?

Was the informed consent verdict against the weight of the evidence where there was substantial evidence that the progesterone cream did not pose a known or material risk of pulmonary embolism; where there was no expert testimony as to the materiality of the asserted risk; and where there was no evidence that decedent or a reasonable person would have acted differently?

Have the plaintiffs waived the litany of "fair trial" and "evidentiary" asserted errors on appeal by failing to comply with Mass. R. App. P 16(a)(9) where only cursory argument is provided with little to no citations or authority?

Did the trial court commit reversible error in conducting individual *voir dire* at side bar and denying certain challenges for cause where there is no argument explaining how the court erred as to any challenge for cause and as there was no showing of any injury?

Did the trial court abuse its discretion in denying a motion to amend the complaint to add the manufacturer of the progesterone cream where the motion was made three years after the case was filed, after the close of discovery and only a few months before trial, and where not only was the basis for any claim suspect but plaintiffs' stated purpose for the amendment was to seek further discovery from the manufacturer?

Did the trial court abuse its discretion in denying post-verdict contact with the jury where plaintiffs' counsel sought, *inter alia*, to inquire as to a purported "assault" by defense counsel during trial which did not occur and where there was concern about the ability or willingness of plaintiffs' counsel to abide by Rule 3.5(c) of the Rules of Professional Conduct and otherwise refrain from seeking to evade the deliberative process of the jury?

Was there reversible error in the denial of a motion to compel as to certain deposition questions of a Rule 30(b)(6) non-party witness where the trial court properly applied Wisconsin law as to an applicable qualified privilege; where there was no basis for any finding that the witness improperly refused to answer any question; and where plaintiffs make no showing or argument as to prejudice?

II. STATEMENT OF THE CASE

This medical malpractice action was tried in the Superior Court. Following 14 days of trial and three days of deliberation, the jury returned a verdict for the defendants, Nurse Practitioner Ann Foster ("NP Foster") and internal medicine physician, Richard Miller. M.D. ("Dr. Miller) on October 10, 2017. RAI19;RAV237. Judgment on the verdict entered on October 24, 2017. RAI58. Plaintiffs filed subsequent post-trial motions for judgment notwithstanding the verdict on defendants' affirmative defenses and for a new trial. Id. The post-trial motions were denied by the trial court (Rup, J.) on November 29, 2017 and April 23, 2018 respectively. RAI60. A notice of appeal followed on May 21, 2018. RAI60.

III. STATEMENT OF THE FACTS

Laura Doull ("Doull") passed away on October 28, 2015 at the age 43. At the time of trial, it was claimed that NP Foster and Dr. Miller, Doull's primary care providers, failed to provide informed consent as to the alleged risks of pulmonary emboli ("PE") allegedly associated with topically applied "natural" or "bioidentical" progesterone cream treatment and otherwise failed to properly treat and/or diagnose Doull in three office care visits between March and May 2011 when it is claimed

she had signs or symptoms of PE. TR932-53;2137.[1] NP Foster was the provider and advanced practical nurse who provided the progesterone cream in 2005 and who saw and treated Doull between March and May, 2011 with Dr. Miller her supervisor and the owner of the practice TR984.[2] Doull suffered a stroke on May 21, 2011 eventually passing away in 2014 from "CTEPH" disease[3] and despite extensive treatment. SRAI94-95.

Plaintiffs' expert, Dr. David Genecin, offered opinions as to both standard of care and causation. TR1090-1289. He opined that there was no evidence that natural progesterone is any safer than standard progesterone including as to the risk of blood clots; that there was a failure to document the purpose/duration of the progesterone treatment or of the informed consent discussion; and that NP Foster had failed to further investigate a shortness of breath complaint and to do a differential diagnosis

[1] The progesterone cream is applied to the skin during menstrual cycle. TR2137. It is treatment for menopausal or perimenopausal related symptoms and is derived from plants particularly soy and yams. TR2138;2186-87. Doull preferred holistic treatment and thus preferred the natural progesterone. TR2140-41. Providing natural progesterone cream is one of many different treatments falling generally under "hormone replacement therapy (HRT)." TR2127-28;2133-38;2141;1401;1528.

[2] Dr. Miller did not see or treat Doull at the visits with all care provided by NP Foster.

[3] "CTEPH" is Chronic Thromboembolic Pulmonary Hypertension. SRAI29-33. It is a rare clotting disease where clots accumulate in the lungs where the body's usual and natural ability to dissolve such clots fails. Id.; 108-110; Scar tissue and blockage results causing increased lung and blood pressure. Id. It is life-threatening even with appropriate care. SRAI29;33;108-110. Treatment includes surgery to try to remove the blockage and lower the pressure. SRA35-36;38-40.

at the time Doull presented between March and May 2011. TR1144-45.[4] As to Dr. Miller, Dr. Genecin opined similarly stating that Dr. Miller was the responsible supervisor and owner of the practice; that there was a failure to have written standards for documentation and differential diagnosis; and a failure to ensure that NP Foster provided informed consent including that the progesterone cream provided was not less risky as to blood clots than standard progesterone. TR1146-48.

As to causation, Dr. Genecin testified that, as to both NP Foster and Dr. Miller, it was the "same" and that the progesterone cream was the cause of Doull's blood clot condition which lead to CTEPH and that Doull died from her CTEPH which is a well-known complication of the disease. TR1149-50. He stated that with earlier diagnosis Doull's course would have been "better" and "possibly" would have prevented the CTEPH. TR1266. Dr. Genecin agreed he was not an expert as to the timing or effectiveness or approach to surgery nor an expert in the diagnosis or treatment of CTEPH. TR1162-64. He never opined that earlier intervention with anticoagulation, surgery or otherwise would have prevented the May, 2011 event or subsequent death.

[4] The three care visits in question were on March 22; April 28; and May 10, 2011. TR1548-63. Doull had a prior history of asthma flare-ups in the Spring. TR2546-47;1479SRAI98-101.

The defense presented substantial testimony and expert opinion that there was no lack of informed consent and that natural progesterone cream applied to the skin does not increase the risk for blood clots or have the risk factors of other HRT involving estrogen.[5] Substantial evidence and testimony was presented that Doull did not have any risk factors for PE or CTEPH. TR2143;2149-50;25472;SRAI40-44;47-51;215;221. The evidence likewise included expert testimony that the care provided was appropriate with no delay in diagnosis and that any diagnosis and treatment in March-May would not have altered the outcome. SRAI96-102;261-62. In addition to the testimony of Dr. Miller and NP Foster, an internist (Dr. Potter), a hematologist (Dr. Kenneth Miller), and a pulmonologist (Dr. Hill) testified for the defense as to both liability[6] and causation.[7]

There was expert opinion and explanation that Doull, in the 2-3 office visits between March and May 2011, did not present with any signs and symptoms of either PE or CTEPH or typical risk factors for such a condition and thus no reason, at that time, to suspect such a condition. TR2264;2553-2566;SRAI98-101;160. The initial complaint of some shortness of breath was reasonably believed and treated as

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[5]SRAI222-23;226-27;242;TR1315;1539;1565;1688;1738;1750;2196;2456;2465;1181-82;2134-35;2142;2147-48;2150-52;2171;2174;2196;2217;2237;2272-73;2544-45;2550-53;

[6] TR2550-2573.

[7] See TR2117-2307; SRAI. The complete testimony of Dr. Hill was not included by plaintiff in the Transcript volumes but is included in the court approved Supplemental Appendix ("SRAI).

asthma with Doull reporting that she felt better after being provided medications. SRAI57;163;167;TR1479;1481;2553-2566.

Expert testimony was further presented that, after the event (PE) on May 21, 2011, Doull was diagnosed with CTEPH; that the CTEPH had been present for at least weeks or months (and likely longer); that it did not happen within two months (March-May 2011); and that CTEPH is an "insidious"/"sneaky" disease that almost always goes undiagnosed until a major event with the clots and scar tissue, if small and residing in the distal vessels, being many times asymptomatic.[8] SRAI 50;51-52;79;87;107;109-110;120-21;138;197;199-200. There was evidence and opinion that the natural progesterone cream used by Doull did not cause her CTEPH. TR2152.

The expert testimony, including from an internist, pulmonologist and critical care physician with extensive experience diagnosing and treating CTEPH, informed the jury that the clots and scar tissue in distal vessels, which the body cannot break down resulting in blockage, can be difficult to remove even with surgery. SRAI87; 110. Earlier diagnosis and treatment with anticoagulation or surgery would not have

[8] It was explained that CTEPH is "very rare" and that it is a condition that is highly unusual and not well understood as a pulmonary embolic disease. SRAI 29;48-49 ;54;108-09;211-12; TR2152. The vast majority of Nurse Practitioners or Family Practitioners will never see a case of CTEPH in their entire careers. SRAI56-57.

altered the outcome which was evidenced by the May 22, 2011 lung scan,[9] the progression of the disease, and the failure of surgery and extensive anticoagulation following the event in May, 2011. SRAI 95-99;102;108-112.

The evidence included testimony that CTEPH is not an acute but chronic disease and by the time it presents anti-coagulation therapy is ineffective. SRAI107; 111-12;114;130-31; Surgery, in turn, is sometimes successful and sometimes not. SRAI87-93. In Doull's circumstance, it was explained that the CTEPH had been going on for weeks or months, at least, by the time of the office visits in March-May, 2011 and then when it first presented in the episode on May 21, 2011, Doull had a substantial quantity of small clots that had lodged and scarred distally in the pulmonary vessels and over a period of time. The subsequent anticoagulation and surgery were unsuccessful. As to the surgery, it was not possible to remove the "chronic" and "long-term" clots and scar tissue and, as such, even earlier surgery (and "earlier" anti-coagulation) would not have altered the result. SRAI 68-70;96-97;102;111-12;114;120-23;130-31;168-70;177;199-200;213.

IV. SUMMARY OF ARGUMENT

There was no reversible error in the jury instructions as the trial court acted well within its discretion. The instructions, taken in their entirety and in context,

[9] A lung scan done in May 2011 showed that the CTEPH was chronic, distal, and long-standing. SRAI 72;102;115-16;79;81-82;121-23;130-31;137-38;168-69. It should recanalization which takes weeks, months even years to develop. SRA79.

fairly informed the jury on the element and burden as to both standard of care and causation. There was no abuse of discretion in using "but for" instead of substantial factor. The instruction appropriately directed that there could be more than one cause and that either or both of the defendants could be found negligent and that either or both could be the legal cause of the harm. The instruction was consistent with the Third Restatement with no showing of any material prejudice as there were no independent causes or otherwise any risk of an improper or unjust result in utilizing "but for" under the circumstances particularly given both the deficiency in plaintiff's expert submission and the overwhelming evidence as to the lack of causation. The Court further instructed appropriately on the standard of care including the need for expert testimony with the contention of error otherwise without merit given the jury's finding that both defendants were negligent.

The contention that the informed consent verdict was against the weight of the evidence is cursory and otherwise proceeds to conflate the contention with argument that the court erred in its rulings pertaining to certain publications. The argument does not comply with Mass.R.App. P. 16(a)(9) and otherwise fails as the evidence fully supported the informed consent verdict and as there was no error as to the trial court's rulings pertaining to certain literature plaintiff sought to admit. Plaintiff failed to show that the articles or literature were relevant for purposes of admissibility which literature was otherwise used in cross examination.

The myriad of asserted "fair trial" errors are without merit. The assertions are all perfunctory with no reasoned argument with limited to no citation to the record, and no supportive citations. As such, the contentions have been waived. Further, all of the complained of actions fall within the broad discretion afforded trial courts over trial proceedings particularly as to jury selection; trial and jury management; and the admission or exclusion of evidence. Plaintiffs have failed to articulate or demonstrate any abuse of this broad discretion through any meaningful and understandable argument, palpable error, or any resulting material prejudice.

V. ARGUMENT

A. THERE WAS NO REVERSIBLE ERROR AS TO THE CAUSATION INSTRUCTION

The trial court did not abuse its discretion in using "but for" instead of "substantial contributing factor" in the instruction. The assertion that whenever there are multiple defendants or causes "substantial contributing factor" must be used in lieu of "but for" is not correct. The trial court's instruction, taken in its entirety, properly and fairly informed the jury on the element and burden as to causation and was consistent with the Third Restatement with there no showing of material prejudice.

1. The Instruction

"The trial judge has wide discretion[10] in framing the language of the jury instructions." Kiely v. Teradyne, 85 Mass.App.Ct. 431, 441 (2014). This includes both as to phraseology and the degree of elaboration. Commonwealth v. Newell, 55 Mass.App.Ct. 119, 131 (2002); Bouley v. Riesman, 38 Mass.App.Ct. 118, 121 (1995). The trial court is "not obligated to instruct the jury in the precise words recommended by the plaintiff even if they are a correct statement of the law." Dailey v. Burt, 94 Mass.App.Ct. 1114 (2019) *citing* Hopkins v. Medieros, 48 Mass.App.Ct. 600, 614 (2000). Upon challenge on appeal, the instruction is examined in terms of this discretion as "a whole and in context" including "looking for what meaning a reasonable juror could put to the words of the trial judge.' " Newell, 55 Mass.App.Ct. at 131 *quoting* Commonwealth v. Waite, 422 Mass. 792, 804 (1996).

The Court provided both preliminary and final instructions. TR883-992; 2992-3120; Supp. App 54-134. The instructions informed that that plaintiffs bore the burden of establishing causation; there could be more than one cause; that either or both of the defendants could be found negligent; and that either or both could be the legal cause of the harm. TR917-18;922;927;953;2880;2981;3019;3026-27;3036-37;3039;3048-50;3053;3055-56. The court also made clear that the jury was to

[10] An abuse of discretion occurs when a judge makes "a clear error of judgment in weighing' the factors relevant to the decision ..., such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

evaluate the claims as to each defendant individually and separately. TR3056. The court appropriately conveyed the requisite burden and meaning as to causation. TR917-18;922;2879-80;3019;3026-27;3056.[11]

In addition to the instructions, the special verdict slip asked the jury to individually assess each defendant as to both negligence and causation and lack of informed consent. RAV237-244; TR3096 et seq. It was clear that the jury could find either or both negligent and/or either or both causal to the claimed harm.

2. *The Sine Qua Non of Causation In Fact: But For*

"But for" is the long-standing *sine qua non* of causation in fact. Causation in fact is an absolute prerequisite for imposition of legal responsibility requiring an examination of both the particular wrongful conduct and particular harm with the claimant bearing the burden to show that the specific harm or injury would not have occurred but for the negligence of the specific defendant.[12] "But for" does not mean exclusive but means necessary. Any type of cause whether it is the sole cause or one of many causes incorporates by definition "but for" for purposes of causation in fact. To abandon "but for" cause is to abandon causation.

3. Substantial Contributing Cause Was Never Intended to Be A Blanket Substitute for But For

[11] The Court's preliminary and final charge is reproduced in the Supplemental Addendum. Supp. Add. 54-134;TR883-992;2992-3120.

[12] W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS 366, at 265 (5th ed. 1984) ("an act or omission is not regarded a cause of an event if the particular event would have occurred without it").

The term "significant contributing cause" or "factor" was never intended to be a wholesale substitute for "but for" whenever there are multiple defendants or causes. Restatement (Third) Torts: *Liability for Physical and Emotional Harm*, 26, cmt. c (2005)("recognition of multiple causes does not require modifying or abandoning the but for standard")(hereinafter "R3"); Menne v. Celotex Corp., 861 F. 2d 1453, 1460 (10th Cir. 1989)("but for causation still required in concurrent cause cases); Weigand, *The Wrongful Demise of But For Causation*, 41 W. New. Engl. L. Rev. 75 (2019). That there are certain cases where the "but for" test has been deemed difficult to apply does not mean that "but for" is inapplicable whenever there are multiple defendants or causes in any case. Each individual defendant's conduct is assessed independently to determine whether it was a cause of the claimed harm; i.e., would the harm have occurred absent the particular defendant's conduct. Further, to the extent "substantial factor" is used or viewed as a screening out function as to some "but for" causes on essentially evaluative grounds (differentiating between negligible/trivial v. substantial) it creates ambiguity between factual and proximate cause.

The perceived difficulty with "but for" is the concern that literal application would allow a defendant or defendants to escape liability on the grounds that the injury or harm would have happened anyway due to the other culpable defendant or defendants or cause(s). Yet, the substitution of "substantial contributing cause" for

"but for" does nothing to alleviate any "misconception that a single cause must be found for an outcome" or clarify that a defendant may still be liable even if there are other causes of the harm. R3, §26 cmt. j. The resolution lies not in the abandonment of "but for" and the substitution of "substantial factor" but in the principle that there can be more than one cause and that each of the multiple defendants is to be assessed separately and without regard to whether any other defendant or action is or is not also a cause.[13] But for or necessity is not abandoned. *See* Callahan v. Cardinal Hosp., 863 S.E. 2d 852, 863 (Mo. 1993)("nothing inconsistent or different in applying but for to a circumstance involving multiple causes"); Menne, *supra* (same); June v. Union Carbide Corp., 577 F.3d 1234 (10th Cir. 2009)(substantial factor and but for are not alternative).

4. The Instruction Was Consistent With R3

The trial court was well-within its discretion in providing the instruction without the use or reference to "substantial factor." The causation instruction was, in fact, consistent with R3[14] and the significant authority that has found the use of substantial factor in any context confusing and misleading.[15]

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[13] The jury was so instructed. TR3056;SuppAdd.112.

[14] Defendants submitted a Trial Brief on the issue of causation requesting that the court provide instructions consistent with R3. RAIII394.

[15] R3, 26, cmt, j at 370-71; Ford Motor Co. v. Boomer, 736 S.E. 2d 724, 730 (Va. 2013)(Virginia adopting R3's elimination of use of substantial factor).

Under R3, the use of substantial factor is abandoned altogether including as to its traditional use in the "over-determined" or independent and concurrent cause circumstance. It does so due to the concern that the language confuses the distinction between cause-in-fact and proximate/legal cause (or scope of liability) and can be construed as either lessening or enhancing the burden as to causation. R3, 26 cmt. j (substantial factor test "has not withstood the test of time, as it has proved confusing and been misused"). The fundamental difficulty is the lack of clarity and vagueness as to the term and meaning[16] which, no matter how defined, fails to obviate the problem of meaningful protection against dilution of the more probable than not standard. R3, 26 Reporter's Note cmt j. It has been deemed an improper judgmental limitation on causation where cause-in-fact is an all or nothing proposition. Either a cause is a cause in fact or it is not; it is not a matter of degree. Id.

Not only does R3 reassert the primacy of "but for" for causation in fact but makes clear that it applies where there are multiple causes whether "innocent or tortious, known or unknown, influenced by the tortious conduct or independent of it." R3, 26 cmt. c. R3 requires individual assessment of each act in question and whether "each of which under section 26 alone [i.e. but for] would have been a

16 In O'Connor, the jury required re-instruction as to the meaning of substantial. 401 Mass. at 590; *see also* Seward v. Minneapolis St. Ry. Co., 25 N.W. 221, 224 (Minn. 1946)(using substantial factor for factual cause "leaves the jury afloat without a rudder….and to decide the case according to whim rather than law").

factual cause of the [harm] at the same time in the absence of the other act[s]" and, if so, it is deemed a factual cause of the harm.[17] This is an express recognition that a factual cause does not have to be the sole cause of harm and thus obviates any need for substantial factor as a test for causation. R3, 26 Reporters Notes cmt. j. An event may have multiple "but for" causes. It requires a separate assessment of each defendant's conduct and whether that conduct, alone and irrespective of any other possible cause, was a "but for" cause of the harm.[18]

The trial court's instruction was consistent with R3. The jury was informed that it could find either or both of the defendants negligent and/or causal. It maintained the fundamental requirement for causation that the wrongful conduct of the particular defendant must have caused the claimed harm that otherwise would not have occurred and did so in the context and instruction that either or both of the defendants could be found a legal cause and that the jury was to assess each defendant separately. Taken as a whole, it was understood there could be more than

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[17] Section 27 provides: "If multiple acts occur, each of which under [section] 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act[s], each act is regarded as a factual cause of the harm." Id. 27.

[18] The approval or adoption of sections 26 and 27 of R3 would provide much needed clarity and uniformity and avoid the misunderstanding in the use of substantial contributing factor or cause. *See* Boomer, 736 S.E. 2d at 730 (Virginia adopting R3 position to eliminate use of substantial factor).

one cause with no suggestion that neither defendant could be found a cause if the other was a cause.

5. The Instruction Was Not Inconsistent with Massachusetts Law

The instruction was not inconsistent with Massachusetts law. Neither Matsuyama v. Birnbaum, 452 Mass. 1 (2008) nor O'Connor v. Raymark Industries, Inc., 401 Mass. 586 (1988) stand for the proposition that substantial factor must always be used in lieu of "but for" anytime there are multiple causes or defendants. Indeed, it remains fundamental that negligent conduct must satisfy the "but for" test before it can even qualify as a substantial factor.[19]

In O'Connor,[20] the jury was charged using substantial factor which was otherwise defined in terms of "but for" requiring that "the plaintiff must show that the defendant's product must make a difference in the result." The SJC found no reversible error in the trial court's incorporation of the "but for" equivalent into the definition of substantial factor. While the Court reiterated the general rule as to joint and several liability, the rule added nothing to the dispositive analysis as to cause

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[19]The Second Restatement ("R2") makes clear that "substantial factor" is an additional requirement to "but for" for purposes of causation and intended to provide insulation against unlimited liability. R2, §432; Jorgensen v. Mass. Port Auth., 902 F.2d 515, 524 (1st Cir. 1990)(same applying Mass law); Bonoldi v. DJP Hospitality Inc., 90 Mass.App.Ct. 1104, n. 4 (2016); Bentley v, Lynn Water & Sewer Comm'n., 83 Mass.App.Ct. 1129, n.9 (2013).

[20] Mesothelioma claims were brought against 17 defendants, 16 of whom settled prior to trial. 401 Mass. 586.

and effect, as it is not a substitute for or eliminates the burden as to factual causation.[21] To the extent the Court states or suggests that the claimant did not have the burden to prove but for causation or to distinguish the particular effect of the defendant's product from the effect of the other asbestos products, the case centered on the unique circumstances posed in asbestos cases where medical science is unable to determine the threshold asbestos fiber dose or exposure necessary to cause the disease. The causation obligation is thus unique.[22] This unique causative leniency stems from the long latency period and resulting difficulty in identifying defendants whose products plaintiffs were exposed to, as well as difficulty in determining the amount of exposure created by any particular defendant and that exposure's "contribution" to the injury.[23]

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[21] Joint and several liability is fundamentally a rule of procedure. Donnelley v. Larkin, 327 Mass. 287, 295-96 (1951); David W. Robertson, *Causation in the Restatement (Third) of Torts: Three Arguable Mistakes*, 44 Wake Forest L. Rev. 1007, 1114 (2009)("the standard (procedural) joint-and-several-liability doctrine does not do cause-in-fact work").

[22] In asbestos cases, a claimant is required to establish only that: 1) that the defendant's product contained asbestos (product identification); 2) that the victim was exposed to the asbestos in the defendant's product (exposure) and 3) that such exposure was a substantial contributing factor in causing harm to the victim (substantial factor). Morin v. AutoZone Ne., Inc., 79 Mass.App.Ct. 39 (2011).

[23] Even with the uniqueness presented by asbestos cases, it has been noted that "[n]ot only is substantial factor an inadequate finger in the hole in the dike, there is the possibility that the substantial factor rubric will be shuttled off to other contexts… where the concerns involved in asbestos litigation do not exist." Joseph Sanders, *The Insubstantiality of the 'Substantial Factor' Test for Causation*, 73 Mo. L. Rev. 399, 429 (2008).

Matsuyama likewise does not support any absolute rule that "substantial factor" must be used in lieu of "but for" anytime there are multiple defendants or causes. There, the Court reconceptualized harm under the wrongful death statute holding that it was not limited to death but also subsumed the loss of a statistical chance of cure or better outcome. While it recognized loss of chance as a cognizable harm, the SJC declined to employ or adopt any modified test as to causation such as "a diluted substantial factor or other factual causation test." 452 Mass. at 16 n.29. Instead, the Court in Matsuyama expressly reaffirmed the primacy of "but for" where, like here, the decedent had an underlying disease (i.e. cancer) and the causal inquiry was whether the failure to diagnose and intervene caused the death or the loss of opportunity for cure noting that "substantial factor" was "less appropriate."[24]

The instruction here was not inconsistent with Massachusetts law. This was not the unique circumstance in *O'Connor* involving asbestos or where "it may be impossible to say for certain that any individual defendant's conduct was a "but for"

[24]Plaintiffs' reliance on Hannon v. Calleva, 87 Mass.App.Ct. 1125 (2015) is also misplaced. There, while this Court rejected a claim of error in the use of substantial factor in a motor vehicle negligence action where there was a dispute as to whether the neck injury was due to the negligence or prior events, the underlying instruction included "but for." Id. n.2. "Substantial factor" was used to assist in the differentiation between a "but for" and "substantial factor" which could give rise to liability as opposed to a "but for" but "negligible" factor which would not. This evaluative use of substantial factor creates ambiguity between factual and proximate cause. Regardless, here, where there is no "but for" causation, the issue of substantial versus negligible is moot.

cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm." This is not a situation where "but for" causation is not practical or possible. While there may be more than one cause in fact, the dispositive and minimum showing remains "but for" or whether the harm would have occurred absent the specific tortious conduct at issue. Since the instructions in their entirety and context adequately conveyed that there could be more than one cause; that each defendant was to be addressed separately; and that either or both of the defendants could be found negligent and either or both could be found to be the legal cause of harm, there was no error.

6. The Instruction Did Not Create Any Potential Risk of an Improper or Unjust Result

An error in jury instructions is not grounds for setting aside a verdict unless the error was prejudicial; i.e., unless the result might have differed absent the error. *See* Mass. R. Civ. P. 61, 365 Mass. 829 (1974); Ambramian v. President & Fellows of Harvard College, 432 Mass. 107, 118-19 (2000); S. Solomon & Sons Trust v. N.E. Theatres Operating Corp., 326 Mass. 99, 110 (1950).

The use of substantial factor in independent concurrent cause cases where it is impossible to say whether one or the other caused the harm avoids the perceived unjust result in the use of but for. It offends the sense of justice if it is clear that a culpable defendant or defendants were not found to have caused the harm and thus

escaped liability because the other defendant or defendants could have caused the harm. No such circumstance exists here.

First, the asserted wrongful conduct of NP Foster and Dr. Miller were not independent concurrent causes. This was not the same as two separately commenced and independent fires that later merged; the mixing of asbestos fibers; or where it is "impossible to say for certain that any individual's conduct was a "but for" cause of the harm…." Matsuyama, 452 Mass. at 30. Instead, the alleged wrongful conduct was NP Foster's prescribing topical progesterone cream without informed consent or sufficient documentation and her failure to diagnose and refer in March, April and/or May 2011 before the adverse event on May 21, 2011. According to plaintiffs' counsel, the decision to prescribe the progesterone cream was "joint." TR1729. Further, it was undisputed that Dr. Miller never treated Doull during the 2-3 visits at issue and the theory of liability was negligent supervision. Dr. Miller, in fact, was not only NP Foster's supervisor but her employer. As such, Dr. Miller's and NP Foster's conduct were not independent but dependent.[25] The operative causes including, *inter alia*, Foster's alleged failure to diagnose and refer were the same as to Dr. Miller's as supervisor and employer. This circumstance does not call for the

[25] Plaintiffs' counsel presented the theory as to Dr. Miller as being the only physician in the practice and, as such, was responsible for everything that was done or not done and that Dr. Miller conceded he is jointly responsible for all of Foster's decisions. TR 940. Plaintiff's expert, Dr. Genecin, testified that Dr. Miller's liability "is really the same as for Nurse Foster." TR1149.

use of substantial factor even assuming it adds any clarity to the causal question (which it does not). The use of "but for" was not improper.[26]

Second, the use of "but for" instead of or without use or reference to substantial factor could not, in the circumstances, lead to an unjust result. Under no plausible view of the evidence, can it be said that there was a risk that the jury could and did refuse to find either Foster's or Dr. Miller's negligence a cause of the May 2011 event and/or subsequent death years later because they were under the misconception that neither was liable because the other was the cause of the harm. The claim and theory was the failure of Foster to inform and sufficiently document her discussion about the natural progesterone cream as well as to properly diagnose and refer in the three month (2-3 visit) period and Dr. Miller's failure to properly supervise Foster and ensure informed consent, documentation and/or referral. The

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[26] The "concurrent cause" doctrine applicable to insurance coverage is informative as it requires differentiation between two or more causes of a loss. If there is more than one cause of a loss, with one providing for coverage the other not, the issue becomes whether independent or dependent. *See* Nationwide Ins. Co. v. Gomez, 2017 WL 4310627 (E.D. Cal. 2017)(negligence supervision was not an independent concurrent cause); Safeco Ins. Co. v. Thomas, 2013 WL 12123832 (S.D. Cal. 2013)(same); Burlington Ins. Co. v. Alan, 2013 WL 1819996 (N.D. Cal. 2013)(negligent failure to provide security and third party shooting not independent causes); Modisette v. Apple, Inc., 30 Cal. App. 5th 136 (6th Dis. Ct. 2018)(action involving distracted driver using iPhone with lock out feature did not involve independent causes and but for applied); Rosenthal v. Christian, 378 Wis. 2d 2018 (2017)(unpublished opinion)(claim based on negligent restraint and negligent failure to supervise not independent concurrent causes).

instructions posed no barrier or difficulty for the jury to find causation as to either or both of Dr. Miller and Foster. The jury was, in fact, instructed they were to assess each defendant separately and could find either or both negligent and causal to the asserted harm. TR3056. Neither defendant was blaming or pointing to the other as the cause with the causal issue whether such intervention (whether by Foster or Miller as supervisor or both) would have made any difference in the outcome given Doull's CTEPH disease. The competent and overwhelming evidence was that it would not.

Third, that Doull was diagnosed with CTEPH did not require the substitution of "but for" with "substantial factor." Whether viewed as an underlying disease such as the existing cancer in Matsuyama or as a purported harm that occurred because of the alleged negligence of the defendants (i.e., failing to prevent clots), the causal issue remained whether the failure to document the informed consent and/or to diagnose and refer would have prevented the harms (i.e., the May 21, 2011 event, CTEPH and/or Doull's ultimate death in 2015). The "but for" instruction was appropriate with the proper focus on the asserted wrongful conduct and whether intervention via anticoagulation or surgery would have prevented the harm and outcome or whether the stroke and/or death would have occurred regardless.

Fourth, all that is offered by plaintiffs on the issue of prejudice is that the jury found no causation as to each defendant. This is insufficient appellate argument as

it fails to articulate any basis for any finding that the causation instruction affected the outcome. Plaintiffs provide no argument or explanation of how the use of "substantial contributing factor" in lieu of "but for" would have altered the outcome.

There is no evidence suggesting that there was a risk that the jury was or could have been under the misconception that no causation could be found as to either defendant due the other being the cause or because Doull had CTEPH. Even assuming the basis of the negligence finding was that referral should have been made during the 2-3 visits in the Spring of 2011,[27] the issue remained whether that intervention would have altered the outcome under the circumstances. There is no plausible basis to find that the jury was under any misconception. The jury certainly understood that it could find the lack of any sufficient documentation, diagnosis or referral by either or both of the defendants to be a legal cause of either or both of the May 2011 PE and/or subsequent death.

Further, any error in not utilizing substantial factor instead of "but for" was not material as it cannot be said to have affected the outcome. The plaintiff's evidence was insufficient to support any competent finding that the lack of sufficient documentation or the failure to refer and provide earlier anti-coagulation or surgery was sufficient or substantially contributed to cause either the May 21 event or the subsequent death.

[27] It is more likely that the negligence finding was the lack of better documentation.

Plaintiff's expert neither addressed nor competently disputed that Doull suffered from CTEPH at the time of the visits or that anticoagulation treatment would have prevented the PE on May 21 or subsequent death when anticoagulation treatment in late May and for 6 months failed. While he opined that the progesterone was the cause of the blood clot condition and that Doull died of CTEPH, he never opined that anticoagulation in March, April or May, 2011 would have prevented that condition. TR1146,1265-66. He stated that anticoagulation for many patients prevents the development of CTEPH but never opined it would have as to Doull. TR1265-66. He readily admitted he could not say beyond "a possibility" that earlier diagnosis would have prevented the CTEPH. TR1266. He agreed he was not competent to testify as to the timing and effectiveness as to surgery (TR1238) or that he considered himself competent in the diagnosis and treatment of CTEPH. TR1243. His statement that her course was worse or disease more severe was insufficient to provide a competent finding that anticoagulation treatment at the time in question would have prevented the event and death particularly as the subsequent anticoagulation treatment and surgery failed. Despite six months of anticoagulation beginning in May 2011, the clots remained; a tell-tale sign of CTEPH's long-standing, chronic nature.

The evidence was otherwise overwhelming as to the lack of causation. As to the lack of documentation, the jury found no lack of informed consent with it

otherwise conceded any documentation insufficiency did not cause any harm. As to any lack of diagnosis or referral, the evidence included testimony from a pulmonologist/critical care physician (who unlike Dr. Genecin) had extensive experience treating individuals with CTEPH. The unrebutted expert testimony (Dr. Hill) included the rarity of CTEPH and how the human body's normal mechanisms, which usually dissolve clots, fail to do so causing them to remain in the vessels forming scar tissue. He testified that CTEPH is an "invidious"/"sneaky" disease that involves the collection of small clots in the pulmonary vessels; that it is a long-standing chronic not acute condition; and that by the time it clinically presents anti-coagulation therapy is many times ineffective due to clots collecting distally in the vessels and the formation of scar tissue. The evidence included a CT scan in May 2011 which indicated that the clots had been present for "probably months at least" and that most were in the distal vessels. While surgery is sometimes successful it is sometimes unsuccessful as it can be very difficult to remove distal clots. There was expert testimony that diagnosing CTEPH weeks earlier would not make any difference because the clots that are causing the problem were already present and would not respond to treatment and that neither anticoagulation nor surgery in March, April or May would have altered the outcome. Doull was among the small percentage of people with an already rare condition that do not respond to surgery. There was no reversible error.

B. THERE WAS NO ERROR AS TO THE STANDARD OF CARE OR BREACH INSTRUCTION

The assertion that the court failed to instruct "on the importance" of 244 CMR 9.00 et seq.[28] as to the lack of informed consent claim and that the erroneous instruction "spread" to the element of breach fails. The court gave accurate and detailed instructions as to both the lack of informed consent claim including as to the underlying duty to disclose as well as to both standard of care and any breach of the standard of care. TR3018-35.

Plaintiffs never made any request for any instruction specific to 244 CMR 9:00 and the assertion now made on appeal that the Court was obligated to instruct "on the importance" of the regulation as to the informed consent claim. While plaintiffs relied on the 244 CMR 9:03(16) as to the argument that Foster had a duty to disclose risks and alternatives and document the same, there was no dispute over whether there was a duty to inform or disclose as to material risks and alternatives.[29] Rather, the issue in dispute was whether the natural progesterone cream posed a material risk of PE triggering such a duty to inform. TR3035-36.

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[28] 244 CMR 9.00 is a Board of Registration of Nursing regulation entitled "standards of conduct." It was admitted into evidence as Exhibit 36. Plaintiffs' counsel questioned as to the definition of "neglect" under the regulation and as to section 9:04(16) concerning the disclosure and documentation of risks and alternatives to therapy.

[29] Instructing that the regulation could be considered evidence of a duty to disclose would have been cumulative and otherwise unnecessary given the lack of dispute over the duty.

The cursory reference in appellants' brief that there was an "over emphasis" on experts in the instruction which "spread" to the issue of whether there was a violation of the standard of care due to admissions of fault (P's Brief at 44) does not rise to the level of adequate appellate argument. Mass.R.App. P. 16(a)(9). Regardless, the instructions were appropriate. Expert testimony is required as to both elements with the jury informed that they were free to reject in whole or in part any aspect of any expert witnesses' testimony; to otherwise resolve any conflicts between any experts; and consider all the evidence. TR3010-12;3017;3020-28. Further, any "admissions" were as to the lack of sufficient documentation of the risks and alternatives which lack of documentation plaintiffs' conceded did not cause any harm. TR2944;3036. Finally, there is no material prejudice as the jury found a breach of duty.

C. THE INFORMED CONSENT VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE

Appellants' brief contains cursory argument that the informed consent verdict was against the weight of the evidence and proceeds to conflate the contention with argument that the court erred in its rulings pertaining to certain publications. The

argument does not comply with Mass.R.App. P. 16(a)(9)[30] and is otherwise without merit.

Informed Consent: The informed consent verdict was grounded in the evidence and not "the product of bias, misapprehension, or prejudice." Passatempo v. McMenimen, 86 Mass.App.Ct. 742, 746 (2014); Turnpike Motors Inc. v. Newbury Group Inc., 413 Mass. 119, 127 (1992). There was substantial evidence that even assuming Foster may have failed to sufficiently document the discussion as to the treatment involving progesterone cream, such discussion did take place. TR2550-53. There was substantial expert testimony that the natural or compounded topical cream prescribed to Doull did not pose any known or material risk for PE and that Doull had no increased risk of clotting as a result of her use of the cream. TR2196; Despite plaintiffs efforts to equate natural progesterone with estrogen including HRT therapy, there was substantial evidence that natural topical progesterone was not akin or the same as HRT involving estrogen treatment and did not pose the same or similar risk as to blood clots. TR2196;2456.

Further, there was insufficient evidence to support any lack of informed consent verdict. Plaintiffs' expert never provided any opinion or testimony on

[30] DuLaurence v. Liberty Mutual Ins. Co., 74 Mass.App.Ct. 1125 (2009); Kelley v. Doukas, 64 Mass.App. Ct. (2005); Commonwealth v. Tucker, 96 Mass.App.Ct. 1106 (2019).

materiality with no evidence that either Doull or a reasonable person would have acted otherwise if properly informed. Buckley v. Naranjo, 83 Mass.App.Ct. 1102 (2012) *citing* Harnish v. Children's Hosp. Med. Ctr., 387 Mass. 152, 155-56 (1982). Plaintiffs' expert's testimony that there was a lack of studies or scientific evidence establishing that compounded progesterone posed any lesser risk than standard progesterone is not a substitute for the required competent expert opinion as to materiality including probability of the specific risk at issue (blood clots) and as to the specific medication (topical plant based progesterone cream) at issue.

Publications Rulings: The argument on appeal that "had all the publications been admitted a different result on the informed consent questions would have been likely" is inadequate appellate argument. Neither reasoned argument nor supportive citations are provided. DuLaurence, 74 Mass.App.Ct. 1125; Tucker, 96 Mass.App.Ct. 1106. Regardless, there was no error.

There was no error or material error as to the ruling precluding the introduction of the 2008 PDR[31] as plaintiffs sought to have the entire publication admitted. The court appropriately denied the request which reasoning is set out in the decision on the motion for new trial. Add at 120-21. As noted, nothing in Mass. G. Evid. 803(13)(A) suggests that the entire treatise is admissible as evidence with counsel otherwise allowed to, and who did use, the PDR in cross examination of

[31] PDR is Physician Desk Reference.

defense expert (Dr. Hill) and defendant Dr. Miller by reading certain statements. TR1655;1694-95;1720-26;1848-52;2188;2457-59; SRAI223-30. The trial court properly limited the use and reference to the PDR as plaintiffs sought to read and reference entries to certain drugs containing progesterone but which drugs were not shown or testified to be the same or akin to the topical progesterone cream used by Doull.[32] TR1375;1659-61;1664;1667;1701;1708;1750;1842-44;1847;2144-45.[33] There was also no material prejudice as not only did plaintiffs' counsel use and rely upon various statements from the PDR in cross examination but such testimony was otherwise cumulative. TR1720-26;1842-43; SRA223-30; Kace v. Liang, 472 Mass. 630, 637 (2015).

The reference to a 2005 "ACOG" opinion and the publication "Bio-Identicals: Sorting Myths from Facts" also does not rise to the level of proper appellate argument. Mass.R.App. P 16(a)(9). As to the ACOG publication (RAVII337), there was otherwise no abuse of discretion or material prejudice as the ruling precluding its admission as an independent exhibit was proper. The article did not address or discuss the progesterone cream at issue and was not shown to be relevant to the

[32] Commonwealth v. Sneed, 413 Mass. 387, 395-96 (1992)(statements in treatise must be relevant and material).

[33] The contention on appeal that Dr. Miller and Dr. Hill (expert) admitted that "chemically progesterone is progesterone" (p.47 of Brief) and thus rendered the PDR admissible is not supported by the record. There was no admission whatsoever that the natural and topical progesterone cream had the same risk for blood clotting as estrogen or HRT with estrogen.

issues. TR1132-40; Mass. Guide to Evid. 403.[34] There was likewise no prejudice as counsel used certain statements and references from the ACOG publication, including the assertion that "there is no scientific evidence to support claims of increased efficacy or safety for individualized estrogen or progesterone regiments," in examining the defendants and defense experts and even mentioned the publication in closing. TR1363-67;1386;1744-48;1819-21;2186-87;2191;2273;2278;2462-2465;2646;2936.

As to the "Bio-Identicals: Sorting Myths from Facts" publication (RAVIII341), plaintiffs never established how it was independently admissible. It was not a learned treatise or textbook but a patient information bulletin with any relied upon statements needing to be relevant. TR1391-92;1394. The Court noted its concerns both as to relevancy and prejudice in the form of confusing and muddling the issues for the jury. TR1122;1133;1137-39. Counsel was otherwise not precluded from using the article in cross examination so long as the elements under Commonwealth v. Sneed were met. Counsel, in fact, used and referenced the article

[34] Not only did the article not mention or address progesterone topical cream, there was no identified author; it was dated 2005; addressed FDA v. non-FDA approval; discussed general intrinsic risk with compounding; estrogen or estrogen containing compounds; expressly stated that its contents did not dictate any exclusive course of treatment; and stated, *inter alia*, "there is no scientific evidence to support claims of increased efficiency or safety. But no scientific evidence does not mean that it is not safe or efficient." TR1135-36; RAVII237.

in examination of the defendants and experts. TR1398-1404;1732-42;2664-2670. There was no error and no prejudice.

D. PLAINTIFFS' "FAIR TRIAL" CLAIMS ARE WITHOUT MERIT

The gamut of "unfair trial" contentions are cursory, without reasoned argument and citation, and therefore should not be addressed as they have been waived. Each assertion is accompanied only by a sentence or two of argument with no to limited references to the record or explanation of the specific alleged error and with no citation or support whatsoever.

As to the merits, all of the complained of actions fall within the broad discretion afforded trial courts over trial proceedings particularly as to jury selection; trial and jury management; and the admission or exclusion of evidence. Plaintiffs have failed to articulate or demonstrate any abuse of this broad discretion through any palpable error or any resulting material prejudice.

Jury Selection Claim: Plaintiffs complain that *voir dire* was "limited" to side bar questioning with "only" six questions per side and that the court "systematically denied plaintiffs' challenges for cause." No reasoned argument or supporting citation is provided.

Leaving aside the complete absence of any evidence or basis of any "systematic" denial of challenges, no argument of any kind is made as to how the court erred in any of its rulings denying any of plaintiffs' juror challenges based on

cause. The trial court observed, listened to, and followed up on questioning of each juror and made an appropriate judgment as to their ability to sit impartially. Side bar questioning with individual questioning by counsel; imposing limits as to the number of questions; and the rulings as to impartiality all were appropriate and within the court's discretionary purview. G.L. c. 234A, 67D(2); Commonwealth v. Dabney, 478 Mass. 839, 848 (2018); Commonwealth v. Amaral, 482 Mass. 496, 511-121 (2019). There is likewise no proffer or showing of any injury. Commonwealth v. McCoy, 456 Mass. 383, 842 (2010); G.L.c. 234A, 74.

Cross Examination Claim: As to the assertion of "unreasonable restriction of cross examination," plaintiffs provide nothing but cursory argument with no reasoning or supportive citation. Irrespective of waiver, there was no error or prejudice. Both the scope of cross-examination and the adequacy of expert disclosures are within the broad discretion of the trial court. Ellis v. Clarke, 89 Mass.App.Ct. 1125 (2016) *citing* Kace,, 472 Mass. at 637. Plaintiffs fail to identify how or in what way any defense expert impermissibly testified beyond the disclosure. Counsel otherwise cross-examined the expert on the disclosure and has failed to demonstrate any meaningful restriction or material prejudice with the record demonstrating that significant latitude in examining the defendants and experts and as to the pertinent issues relative to the claims was provided.

There was no wrongful "block[ing]" as to the examinations of Dr. Hill and Dr. Potter regarding a subpoena for documents. Plaintiffs' briefing contains a single sentence on the topic (App. Br. at 52). The pre-trial subpoenas were sent at the eleventh hour and, as found in the trial court's post-trial ruling on the motion for new trial, there was no proffer at trial, in the post-trial submission, or now on appeal of any explanation or identification of what records plaintiffs sought to examine; how they related to bias; or how counsel was wrongly restricted in cross-examination.

There is no merit to the assertion that counsel was "severely restricted" in examining defense expert, Dr. Potter, as to "basic medical knowledge and literature, "use of the words neglect/negligence," and an informed consent form. The only cited reference as to "basic medical knowledge" is to an unexplained effort and question about Medicare with no explanation at trial (or now on appeal) how the question was relevant or material. TR2592-93. As to the "words neglect/negligence" assertion, plaintiffs proffer no explanation of what error was committed or how it was prejudicial.

Further, plaintiffs' have not articulated how the ruling precluding questioning as to a transgender hormone therapy consent form was error never mind prejudicial error. TR2619-22. The form was not relevant. The fact that it was a form used by Dr. Potter for her own patients did not make it relevant. It was otherwise undisputed

as to the obligation to provide informed consent with the disputed issue being whether natural topical progesterone cream posed a material risk of PE triggering a duty to inform as to that purported risk. There was no articulation of how the form or the questions sought to be asked were relevant to the issues.

There was no improper restriction of the cross-examination of NP Foster and/or Dr. Miller. The argument is cursory, with no supportive legal citation or any articulation of how any ruling was error or prejudicial. Further, the trial court acted well within its discretion. While counsel could examine witnesses as to a nursing regulation it was misleading and potentially prejudicial to juxtapose or equate the terms "patient safety" or "patient safety rule" with the regulation or the applicable standard of care at issue. TR990-91. As the trial court noted in its post-trial ruling, there was no expert testimony including from plaintiffs' own expert, Dr. Genecin, that "patient safety" was the applicable standard of care.

Plaintiffs were not "blocked" from cross examining NP Foster as to the ACOG publication. The court ruled it was inadmissible but did not preclude counsel from properly using the publication to cross examine and so long as the references and examination was relevant. Plaintiffs' record citations to cross examination reveal that the court did sustain objections as to questioning that sought to suggest that compounded products are unsafe or concerning as to purity, potency and quality. This was irrelevant to the standard of care and informed consent issues as well as

misleading and prejudicial given the likely sought after inference was that the progesterone cream caused PE because it was misassembled by the manufacture which was without any evidentiary basis whatsoever. After examining the article, and consistent with its prior ruling as to admissibility, the Court had concerns about its relevancy and potential for prejudicial effect as the publication did not address the progesterone cream at issue but combination therapy and compounding generally. TR1376;1369. The Court, however, did not preclude use of the ACOG article in examination to the extent it or excerpts could be shown to be relevant.

Medical Records, Relationship, and Pharmacy Testimony Claims: Plaintiffs' complain that the trial court kept out certain medical records on "damages" and "harms" and the "improper relationship" between defendants. The arguments do not rise to the level of adequate appellate argument and are waived. The prior relationship between the defendants had absolutely no relevance to the medical care claims. It was appropriately addressed in pre-trial motions *in limine* with the assertion by plaintiffs' that it was admissible as a "proven history of bad and negligent customs and practices" without any legal support whatsoever. As to the medical records as to "harms" or "damages," there was no error nor prejudice given the lack of liability finding.

Judicial Admonishment and Comment: The assertion that the trial court engaged in "systematic and improper admonishment" of counsel for alleged violations while

ignoring defendants' "ethical violations" is contained in two sentences. (App. Br. at 56). There is no legal argument or case support. As to the reference to the "admonishment" for asking questions about Dr. Miller's reputation, plaintiffs' counsel had the audacity to refer to Dr. Miller as "Killer Miller" in examination which brought a proper, measured rebuke and instruction by the trial court.[35]

"Patient Safety and Rules" Claim: As the trial court noted in its post-trial ruling (Add. 124-25), plaintiffs' counsel was of the view that "patient safety" and/or "patient safety rules" was akin to the applicable standard of care. This was the subject of a defense motion *in limine* and ruling. After plaintiffs' counsel improperly proceeded to reference in his opening "patient safety rules;" that the case was about "patient safety rules;" that patient safety rules protect all of us; and that the jury should make sure this does not happen again,[36] among other statements subject to objection, the judge properly proceeded to cogently instruct the jury consistent with the law, her rulings, and the actual issues or claims to be decided. TRTR945-46; 952-54;944;TR910-28.

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[35] The question: "And the last thing, Doctor, why is your nickname in the community Killer Miller?" TR1808. The trial judge proceeded to give a short instruction about the improper remark. TR1810. The court rejected the assertion that this was properly admissible as "character evidence." TR1839-40. Plaintiffs' briefing is devoid of any argument or support of how this was admissible.

[36] TR938. Plaintiffs' counsel also improperly stated that the jury was the voice of the community as to the determination of damages. TR943.

Despite the rulings, counsel continued to seek to examine and force feed witnesses utilizing the terms "patient safety" or "patient safety rules."[37] The court thoughtfully addressed each objection and instructed the jury that the issue to be decided was not what should or could be "patient safety" but the appropriate standard of care and whether it was breached as to the specific care and circumstances applicable to Doull. TR945-46;952-54;1030-31;1628.

Plaintiffs' expert did not testify that the applicable standard of care was "patient safety" nor would any such reference and testimony provide any relevant assistance. The cited reference is to Dr. Genecin's peer review experience. TR1094. To the extent he testified that standards of care were "rules of the road...for doctors and nurses to keep patients… safe from harm of medical care and treatment" (TR1101-03), the testimony provides no basis for allowing counsel to examine using unfettered references to "patient safety" whenever he wanted or that the Court lacked discretion to ensure the questions were fair, relevant and not misleading. *See* Olson v. Ela, 8 Mass.App.Ct. 165 (1979); Yacino v. Peloquin, 83 Mass. App Ct. 1136 (2013).

The utilization and generic reference to "patient safety" or "patient safety rules" did nothing to elucidate or provide the jury with relevant information as to the

37 TR1014 ("I am going to establish safety belongs in this case by whatever means possible").

medical care at issue. The questions asked, which brought objection, included such questions as "whether patient safety should be the number one concern for medical providers"[38] which seeks irrelevant, unhelpful information. Such questions were, in fact, misleading and prejudicial as they were a concerted effort to have the jury view and find negligence on the abstract notion of "patient safety rules" instead of what care should or should not have been provided under the specific circumstances based on medical consensus. Counsel was otherwise allowed to properly question and examine witnesses as to the actual terms contained in the regulation and did so.

E. THERE WAS NO ERROR IN THE DENIAL OF THE BELATED REQUEST TO ADD COMPOUNDING MANUFACTURE

There was no abuse of discretion in the denial of plaintiffs' belated motion to amend the complaint to add the manufacturer of the progesterone cream. Dzung Duy Nguyen v. Mass. Inst. of Tech., 479 Mass. 436, 461 (2018); Crosby v. Turco, 96 Mass.App.Ct. 1105 n. 9 (2019). The motion was made in April 2017, only a few months before trial and after the close of discovery. The action was filed in 2014 and concerned care dating back to 2008. The Court denied the motion finding that plaintiffs provided no reason or justification as to why the manufacturer was not sought to be added earlier. Add. 91; RAII220-22. The belated timing alone precludes any finding of abuse of discretion. In re Estate of Bennett, 95 Mass.App.Ct. 1110

[38] TR1029;1030.

(2019). There was otherwise a lack of justification for the amendment with no good faith basis that there was any meritorious claim as to the manufacturer with plaintiff, in fact, justifying the request, not on the basis of any valid claim, but to subject the manufacturer to further discovery. RAII220-22;116-126.

F. THERE WAS NO ERROR IN THE TRIAL COURT'S DISCOVERY ORDERS

Plaintiffs' brief contains only cursory argument as to purported errors in certain discovery orders mandating a finding of waiver. There otherwise was no abuse of discretion.

Ruling As To Post-Trial Contact With Jurors. The Court acted well within its discretion in denying counsel's request for post-trial contact with the jurors and set out its sound reasoning in its November 2, 2017 order. Add.95-101. While judicial approval is no longer required for such contact, Rule 3.5(c)(1) of the Mass. Rules of Professional Conduct "expressly contemplates" that a court may restrict or prohibit an attorney's unsupervised post-verdict contact or communications with jurors. *See* Commonwealth v. Moore, 474 Mass. 541, 549, n. 10 (2016).

The trial court had concerns about the proposed areas of inquiry including counsel's stated intent to probe the jurors about the purported "assault" of a witness by a defense attorney and if they would have felt differently if the attorney was male and witness was female. As noted by the court, counsel was "seek[ing] to query jurors on the trial performance of one of the defendant's attorneys, grossly

mischaracterizing her questioning of a witness, inserting gender issues into this inquiry, and inferentially informing jurors that her cross-examination was of a criminal nature (assault)." This inquiry is removed from any possible desire to assist plaintiffs' personal professional development or representation of clients. This was against the back-drop of the Court having observed plaintiffs' counsel through-out the trial and having concerns about his ability to comply with the applicable ethical obligations, noting that counsel had scanned confidential juror questionnaires into his laptop computer and then defied the propriety of such conduct when confronted by the Court and later asking Dr. Miller why he was "known as Killer Miller" with no good faith basis to ask such a question. Add. 100, n.5.[39]

Rulings As To Motions To Compel. There was no abuse of discretion as to the motions to compel. *See* Solimne v. B. Graul & Co. Kg., 399 Mass. 790, 799 (1987); Beaupre v. Cliff Smith & Assocs., 50 Mass.App.Ct. 480, 485 (2000); Demetras v. Compass Bank for Savings, 60 Mass.App.Ct. 1103 (2003).

As to the motion pertaining to the progesterone manufacturer's (WIC) deposition, plaintiffs do not even identify what questions or what discovery was not provided or how the Court's thoughtful order was in anyway in error. RAII222. The Court noted the applicability of Wisconsin law to the deposition; that Wisconsin

[39] Incredibly, counsel demanded that the court apologize to him before the jury. TR1829.

recognizes a qualified privilege in lay witnesses to refuse to answer questions calling for an expert opinion; that plaintiffs never cross designated topics for purposes of the Rule 30(b)(6) deposition; and that other than "bald assertions," there was no basis for any finding that the witness improperly declined to answer any questions. RAII222.[40] Plaintiffs otherwise make no argument of how any error was materially prejudicial.

CONCLUSION

Based on the foregoing, defendant-appellees Anna C. Foster, N.P., and Robert J. Miller, M.D. respectfully requests that the JUDGMENT below be AFFIRMED. As a majority of the claimed errors on appeal are frivolous with no prospect of reversal and otherwise grossly non-conforming to Mass.R.App. P 16(a)(4), appellate attorney's fees and double costs are requested in the discretion of the Court and pursuant to Fabre v. Walton, 441 Mass. 9 (2004); Sobczak v. Law Office of David Hoey P.C., 94 Mass.App.Ct. 115 (2019)(awarding attorney's fees and costs for frivolous appeal).

[40] The two sentence argument as to error as to a motion to compel upon Dr. Miller does not remotely meet the requirements of Rule 16. Plaintiffs' App. Br. at 63. Plaintiffs provide no record citation to the assertion that "defendants claimed to have numerous publications available to them relating to HRT" and present no argument as to how the court erred in denying the motion to compel on the grounds that there were no additional documents to produce in response to the request. RAII223.

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Certificate of Compliance

I, Tory A. Weigand, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16 (a)(13) (addendum); Mass. R. A. P. 16 (e) (references to the record); Mass. R. A. P. 18 (appendix to the briefs); Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and contains (10,709) total non-excluded words as counted using the word count feature of Microsoft Word 2013.

/s/ Tory A. Weigand

_____

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Certificate of Service

Pursuant to Mass.R.A.P. 13(d), I, Tory A. Weigand, attorney for defendants, appellants, hereby certify that this document filed through the Odyssey File & Serve System will be sent electronically to the registered participants as identified on the Case Service Contacts List as listed below this 18th day of March 2020.

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SUPPLEMENTAL ADDENDUM

Table of Contents

Jury instructions (preliminary)

PRELIMINARY GENERAL INSTRUCTION (RA 883-992)

So after I give you the preliminary instructions, then the next thing that will happen is you'll hear from the attorneys with their opening statements.

…….

THE COURT: Thank you very much.

So members of the jury, right now I'm going to ask that our court officer hand out to you -- each of you will be getting these written instructions. These are not instructions on the law. These are just some instructions that I do give to jurors, particularly in trials that are going to go over some number of days, and trials that may involve issues that the jurors may, at some point, feel tempted to see if they could get some more information about system in their deliberations.

I'm not going -- I'm asking that you not read these right now. But does everybody have one? Okay. But if you would please read them a little bit later. I'm going to go over some of these not in great detail. But I think it is just have this in hand, particularly in same instructions, but helpful for jurors to a longer trial, so they will remember some of the things they need to and -- need to do, and some of the things they should not be doing over the course of the trial.

Now, just procedurally, let me talk about what we're going to be doing. Right now I'm going to give you some preliminary instructions. Part of it will be on the things we'll be doing. Part of it will be on the things you -- you as jurors should and should not be doing during trial. Part of this preliminary instruction, as I said earlier, will be on the applicable law for the case.

Then the lawyers will be making what are called opening statements to you. And we'll start with Mr. Sobczak, and then Mr. Dumas, and -- and Ms. Dalpe will all be making opening statements to you.

This is the attorneys' first opportunity to address the sworn jury about the issues and facts that they expect will be presented during the trial. It's like an out -- it's like an outline or a roadmap of what they expect the evidence will be showing over the course of the trial.

These are not summations. They're not meant to be arguments. They're not meant to be telling you what you should be doing in the case. But instead, as I said, it's

like a roadmap of what the attorneys expect will come. And the reason for that is it gives the jurors some context, because different witnesses and different evidence will be introduced, in order to show or not show certain things. And this way at least you'll understand, generally speaking, why certain things that are introduced in evidence may have some significance to you in your ultimate decision.

But it is important that you understand this. You're deciding the evidence -- I'm sorry, you're deciding this case based only on evidence that will be introduced in the courtroom during the trial. The evidence I expect in this case will consist of testimony from witnesses, people who actually come into court and testify before you by answering questions.

There will be a number of exhibits that will be admitted into evidence as well. Physical things. Lots of documents, lots of records. That is the evidence. There may be some other things as well that may be admitted during -- as evidence during the trial. That is sometimes there are things called interrogatories. I will explain to you what those are when that comes up. But they're written answers that are given by a party to written questions that were submitted to them before trial. That can be part of the evidence.

Likewise, before a civil trial, the parties sometimes that is the Plaintiffs and the Defendants, will sometimes conduct what are called depositions of witnesses. And that can include the parties themselves, where they go to another location, the lawyers are present, the witnesses are asked questions, and answers those questions. And the questions and answers are then transcribed in a written form.

And sometimes during a trial, and I expect it will happen during this trial, you may hear read to you portions of those particular depositions; that is the question asked and the answer given by the witness. So that is the evidence. And you're going to be deciding this case based solely on that evidence.

Getting back to the lawyers' opening statement, they're not evidence. They're not a substitute for evidence. The evidence starts after the attorneys make their opening statements.

At the end of the trial, after all the evidence has been submitted, the lawyers will appear before you again to make closing statements. This will be their final opportunity to speak to you about the evidence that's been presented. They will try to show you how it fits or doesn't fit. They will, at that point, be permitted to try to persuade you to their view or their opinion of the evidence.

But those closing statements, like the opening statements, are not evidence, and they're not a substitute for evidence. So if any of these attorneys in any opening statement or closing statement says something that ultimately doesn't agree with what you remember the evidence has been, or doesn't agree with your opinion or view of the evidence, it is your opinion of the evidence, your view of the evidence that controls in this case, not anything either -- any of these attorneys may have said in an opening or closing statement.

By making these comments, I am certainly not suggesting you should ignore the opening statements or closing statements. I am sure that you will find that they are helpful to you, either in understanding the positions taken by the parties, or perhaps the significance of certain parts of the evidence that either will be or has been introduced during the trial.

But again, I stress this. Those opening statements, those closing statements are not evidence, and are not a substitute for evidence.

Now, getting back to the evidence. There's going to be a lot of documents introduced over the course of this trial. And I think it's fair to say that you're not going to see every single one of those documents or hear every single bit of testimony about what's contained in the documents, word for word, over the course of the trial because that would be extremely time consuming. But instead, the attorneys may be highlighting parts of the exhibits that will be introduced.

And exhibits are things numbered one through whatever number it is. Those are actually exhibits. They're physical things. Some of them may be displayed. Parts of those exhibits may be displayed to you here in the courtroom. Sometimes you'll just hear a witness being asked about an exhibit that has been admitted or will be admitted. But please understand that even though you won't be able to, in -- in some instances, get your hands on the exhibit and look at it carefully while you're in the courtroom, every one of these exhibits will be available to you to review carefully at the end of the trial, once you begin your deliberations.

Now, as I said, sometimes the exhibits may be displayed to you. We have technology here in this courtroom. You might see that there are screens in the jury box. So sometimes a particular document or part of a document may be displayed in the courtroom and for you. There is also, I believe, going to be some notebooks handed out by the Defendants' attorneys, which contain just a -- certain selected number of pages from some of the more cumbersome or bigger exhibits.

And -- and likewise, with regard to these notebooks, they are -- they're not exhibits, but they're part of the exhibits. So the mere fact that something is segregated out, either as it's displayed to you or as it's shown to you in a notebook form, please don't consider that as any evidence that these things are any more important than the other evidence, but rather these are just to assist you because of the, as I said, the large number of documents, and being able to sort of focus and concentrate on what a particular witness is being asked about as he or she is testifying. So -- so that -- those are among the things that you'll be getting during a trial.

Very occasionally, during a trial, including a trial such as this one, there may be some document, for instance, or some physical object that will actually not be admitted as an exhibit during the trial, either because the attorneys are not seeking to have it admitted, or because it's not admissible under our rules of evidence. And I'll talk about those in just a second.

So those types of things you will hear me say to the clerk, that is marked for identification as A. So A, B, C, D -- so they're letters. Things that are marked for identification will typically not be in the jury room with the jurors because they're not exhibits. It's only the exhibits that you'll be able to see and go through and carefully examine during your deliberations.

Occasionally something may be marked for identification and is later admitted as an exhibit. And in that instance,

obviously, it would get a number. So I just want to explain that to you so you're not confused by you've seen or heard about something, but it's not in the jury room with you.

With regard to witness testimony, as I told you during jury selection, you're the judges of the evidence that will be presented here in the courtroom over the course of the trial. And among other things you do is to judge the credibility and importance of what each witness who testifies before you says.

So you're actually deciding, do I believe that person or not. Whether I believe the person or not -- well, how much importance do I really give to what the person said, in comparison to all the other evidence that has been or will be admitted over the course of this trial.

Well, you certainly would be making preliminary decisions about the credibility or importance of what a witness says, as he or she is testifying before you. We do ask that you keep an open mind until you've heard and seen all the evidence, because there may be other evidence, whether it's testimony or exhibits, that can add to the

strength or importance of what the witness said, or it may add to or take away from the credibility of what the witness has said. So it is important that you just remember to keep an open mind and not make a final decision until you've heard and seen everything.

In evaluating a witness' credibility and the importance of what he or she says, you may use your general common sense and life experiences. Bear in mind, it's not just what the witness says -- in other words, the exact words that the witness uses -but the way in which the witness testifies, how he or she responds to questions over the course of the trial. That could be considered by you as relevant in deciding whether or not to accept or believe what the witness says.

Witnesses generally will testify based on something they claim to have personally observed, seen, heard, sensed with their own senses. They may be testifying based on some personal knowledge they claim to have. You can certainly take into account how good an opportunity the witness had act -- to actually observe those things or to know the things about which he or she testifies.

You, I'm sure, would expect the witnesses in many instances are testifying based on their memory. You can certainly take into account how good an opportunity, not only the witness had to observe or know the things, but how good is the witness' memory.

You can take into account whether the witness seems to have some bias or prejudice in testifying in the case. In other words, favoring one side or the other, perhaps, might be a factor that you can consider in evaluating the credibility of what the witness has said.

You may consider whether the witness has some interest in the outcome of this case. And that can include some financial interest in one way or the other.

You may be hearing that during trial, that the witness made a statement before trial, that differs in some way from what the witness says here in the courtroom during trial. And that is that the witness may have verbally said something, or may have written something, that differs from what the witness says in the courtroom. And obviously you can take that into account when you evaluate the credibility and weight of the witness' trial testimony under oath.

You may also hear that the witness made a statement, whether it's written or oral, that a prior time that did not include some information about which the witness is testifying before you. You may take that into account as well, as you evaluate the

credibility and importance of some statement that the witness makes here in court about some matter about which the witness had not previously said anything.

But it's up to you with regard to those differences in the testimony, or omissions in prior testimony, to decide whether or not there is, in fact, a difference, or there was, in fact, an omission. And if so, how significant is it. But again, that's why you may be hearing those sorts of thing before -- I'm sorry, in the course of a witness' testimony.

Now, with regard to a witness' testimony. What they say is evidence. But the way they testify is by answering questions asked by the lawyers. The lawyers' questions are not evidence. It's the answer given by the witness in response to the question that is evidence. You need to take into account, obviously, the question, because otherwise the answer would have no context or meaning. But please bear in mind, it's the witness' answer that is evidence. You decide whether or not you accept or believe what the witness has said.

So let's just say, as an example, an attorney may say to the witness, isn't it true that on that Saturday you were wearing a green dress. Well, that's not evidence that the witness was wearing a green dress. It's the witness' answer that is evidence as to whether or not on that Saturday the witness was wearing a green dress. And then you decide, based on what the witness says, if you accept or believe that answer.

Now, occasionally, I expect, because of the length of trial, and because there were certainly contested matters that arise during a trial, a lawyer may ask a question of a witness, and another lawyer may object to the question. Or sometimes a witness may answer a question, and a lawyer may object to part or all of the witness' answer.

Each time that happens, my job is to rule on those objections. I'm usually able to do so immediately. Sometimes I may need some additional information, either on what the witness is expected to say, or the reason why the lawyer is objecting. And in those instances I will ask the attorneys to see me here at the side bench for a moment or two. You're not going to be able to hear that discussion, but you don't need to, because we're really just discussing legal principles.

Ultimately I will rule on the objection in one of two ways, either by sustaining the objection, which means, if the witness has not yet answered the question, the witness will not be permitted to answer. Don't speculate about what the witness' answer would have been, because that's what you're doing, you're guessing, you're speculating, you don't know.

If the witness has already answered the question, and I sustain an objection to part or all of the answer, I will tell you that you are to disregard, either the entire answer, or a part of the answer.

Please, you must follow that instruction. Think of it as if you'd written the answer on a chalkboard, and you will have notes. If you have written down the answer in your notebook, you cross it out. You cross it out of your mind. If you've written it down, cross it out of your notes.

On the other hand, if I overrule an objection, the witness is permitted to answer the question. And if the witness has already answered the question, you are permitted to consider the witness' entire answer.

Now, please don't hold it against an attorney because he or she makes objections or has objections made to questions that he or she asks. These are all very experienced attorneys. I'm confident that none of them will be asking a question, unless he or she believes it's appropriate, and not making an objection unless he or she believes it's appropriate. But as you might imagine, sometimes they don't necessarily agree. So my job is to decide who is correct.

Why are we ruling? Why are they objecting? Well, for the most part it's based on rules of evidence that we learn in law school, and here's just an example. These are things that we don't expect that jurors would necessarily know in their common life because they're technical, legal rules of evidence that can be presented during the course of a trial. So I'm holding up this black book, and this has all of the -- I shouldn't say all, but many of the -- the rules of evidence that apply in a trial. So that's typically why the lawyers are objecting, and why I'm ruling in the way in which I do. So don't -- don't wonder about, well, why is the judge keeping that away from us, or why is the lawyer objecting.

Really we are just doing the legal aspects of the trial. So don't hold it against an attorney because he or she makes objections or has objections made to a question they have asked.

And furthermore, we've spent a lot of time -- the lawyers will agree with me on this -- before the trial, going over some of the issues that might arise that could be objectionable, that the attorneys anticipate. And I already made rulings on those things. So they know that at least with regard to those matters they are or are not permitted to inquire about them.

But sometimes there may even be a disagreement as to exactly what -- how they interpreted that. So there may still be that type of objection, and that's what we're doing at that particular time.

Now, as I said, you're going to be hearing witness testimony and receiving evidence about a lot of exhibits. And all of those will be available to you at the end of the trial, once you begin your deliberations. But again, I remind you, please make sure you keep an open mind until you've heard and seen everything in this trial.

Now, I'm going to give you a little bit information in a moment about the actual legal instructions that I give to you before the start of the trial. But after the lawyers make their closing statements, which will be sometime either the end of next week or into the following week, I will then give you detailed instructions on the law that applies to the case. And it's after that that you begin your deliberations.

So please don't discuss the case in any way until you've been sent out to begin those deliberations because you may be making decisions about the case, and about the facts that are being presented before you've seen and heard everything, and equally significantly or maybe more so, before you've actually received my instructions on the applicable law.

We fully expect that you'll talk among yourselves and become acquainted. That's perfectly fine. Just make sure that among yourselves you don't discuss the case in any way.

Likewise, as I instructed all of you on the days you were selected -- and you'll see it's discussed again in those instructions we just handed out -- please make sure that you don't discuss the case with anybody else, other than to tell them that you've been selected as a juror and will be unavailable on these days and during the times that are listed, because people may know something about the case, have an opinion about the type of case you're hearing, have an opinion about cases in general, just be curious about what you're doing, and try to engage you in conversation, which could, in fact, influence your decision in some way, if even indirectly.

So please, if somebody really presses you, just say, Judge Rup ordered that I cannot talk about the case in any way.

And yes, jurors sometimes ask after the trial is finished, can I talk to people about it after we're done, after we've reached a verdict. Of course you can do it at that point. But during the trial, because it's you and you alone who are deciding the case based only on what you're seeing and hearing in the courtroom during trial, make sure you discuss nothing about the case with anybody at all.

There may -- there may -- I shouldn't say may -- there is unlikely to be any media coverage about this case. But in the unlikely event that there is, please don't read, listen to it, radio, television, newspaper, online services.

What could happen, and I know that there's at least one matter out there that's getting some degree of media coverage right now, is that there may be media coverage about some of the topics that may be covered in the course of this trial. They're not about this case. They're not about this trial, but they may be about some topics about which you may hear some reference or evidence.

Just to be sure that you're in no way influenced by that type of media coverage or other information, I ask that you all use your good judgment, and avoid reading, listening to, or in any way letting yourselves be exposed to those particular things.

And in one -- one example I will give you is that there is going to be some testimony during this trial, not only about a particular drug -- number of drugs, perhaps -- but progesterone cream. So there might be something in the media about that -- I don't know that there will be. There will be some testimony about a compounding pharmacy. I'm aware of the fact that there may be a trial that has nothing to do with this case, nothing to do with the compounding pharmacy in question, but there is a trial going on. Don't read or listen to anything about that trial because it could in some way improperly influence your decision.

And there may just be other topics that come up about the standard of care, certain things that doctors do or do not do, certain things that the Doull family may or may not have done, or that Laura Doull may or may not have done. So I just ask that you all use your good judgment, and -- and keep yourself away from anything of that sort that could in any way influence your decision.

And by that I mean this. We do not sequester jurors. In the -- in the past, many years ago, decades ago, if you were picked for a jury you would be in a hotel for the length of the trial. There would be somebody giving you newspapers with

things cut out of it. They would restrict or prevent you from listening to the radio or television. We don't do that anymore. But that's because judges like me instruct jurors to be careful when they're out of the courtroom, that they don't inadvertently or purposefully expose themselves to something that could influence their decision in some way.

So you're free to go to movies, to watch television shows, to watch movies on TV, documentaries, read books, magazines, go online and do research about regular things, but make sure that you do not read, listen to, research, or in any way expose

yourself to any of the various topics that may arise over the course of the trial. Some of them you're not going to know about until you hear about them. Some of them you will know about because of the -- the lawyers' opening statements that -well, we're going to hear about this kind of thing or that kind of thing. So just please use your good judgment in that regard.

Now, one of the things that sometimes comes up -- and I cannot for the life of me imagine how it would be important to jurors, but that you'll be hearing evidence about, perhaps, some locations here in -- in the county or elsewhere. We're not taking any views of any locations in this case. I can't imagine how they would be -- that would be helpful to jurors.

But occasionally jurors may decide to go out to some location on their own. Please don't do that. That would be improper when a view is taken during the trial, it's taken under the supervision of the Court, which means that the judge, jury, and the lawyers all go out at the same time. We're not doing that in this case. Do not do it on your own.

Now, let me just talk a little bit more about some of the things that will be happening during trial. I may have mentioned it to a few of you but not all of you, but I do permit jurors to take notes during trial. This is going to be a long trial, and even though you're going to have a lot of exhibits, we don't provide transcripts of witness testimony. So if at the end of the trial you're thinking, well, Judge Rup can get those transcripts all typed up for us, we just simply cannot do it. It takes a court reporter, for instance, three, four, five, or six times as long to type up what a witness has said. So a half an hour testimony can be three hours of typing time or more.

Digital transcription -- well, we do that here at the court. The court procedure is that the recordings have to be sent to Boston, which in turn the office there sends it out to other people who transcribe. So it would be days or weeks before you could get a transcript. So that's why it' important that you pay careful attention, and try to remember what you hear and see as the witnesses testify. But that's why I do permit jurors to take notes. I take notes. I take a lot of notes. It helps me focus and remember things. So you'll see me taking a lot of notes, though I'm not trying to write the great American novel up here or do something unrelated to the trial. I can assure you, I'm taking notes on what's being -- happening here in the courtroom. But I do think jurors can benefit as well from taking notes.

The notebooks will be handed out to you after the lawyers make their opening statements, just so that you don't inadvertently take notes, and two weeks from now think, oh, this is part of the evidence what a lawyer says.

You'll be given a pen or pencil. If during the trial you run low on paper, your pen or pencil breaks or wears down, or you run out of ink, just raise your hand if I don't notice it. One of the court officers will, and your note-taking materials will be replayed.

The notebooks are solely for your use. You'll each get the same notebook. So juror in seat 1 should get number 1 notebook, and on through. When you leave the courtroom, please leave your notebooks on your chairs for two reasons. Number one, you may misplace them if you take them out of the courtroom. Number two, you may jot down something when you leave the correct that didn't necessarily happen here. You will be permitted to take your notes with you into the jury room once you begin your deliberations to assist you.

With regard to notetaking, I'd suggest if you try to take down everything, you're probably going to miss something. As I said, it's not just the words used by the witness, but maybe the way in which he or she is responding to questions that can be of assistance to you.

And please don't rely on other jurors to take notes for you. They may hear it differently or view it differently, so if you think something is important, and you want to remember it, jot it down.

And as I said, you will be permitted to use your notes to assist you during your deliberations.

With regard to notetaking, these are solely for your use. Nobody looks at your notes. I don't. The lawyers don't. At the end of the trial, after your reach a verdict, all of your notes will be destroyed, so don't worry about how well you write, how well you spell, what kind of notes you take. These are really just intended to assist jurors in recalling and -and focusing on certain things they may think are significant over the course of a trial, particularly a long trial like this one.

I remind you, this is a public building. When you come to and from the building, try to keep any -- keep some distance between yourself and anybody that you know or suspect has any connection with the case, so you don't inadvertently overhear or see something that could influence your decision.

I remind you, as I told you, as I excused each group over the past three days, that the lawyers -- these lawyers, the parties; that is Dr. Miller, Nurse Foster, the Doull family members are none of them, and all the witnesses, none of them are permitted to communicate with you in any way during the trial. You're not permitted to

communicate with them. So if they don't respond to you, smile at you, say hello, et cetera, please don't hold that against them, because they're just following the rules.

And I remind you, the reason for that rules is so that communication between the parties, lawyers, and witnesses, and jurors could very well influence the jurors' decision. Even if it's nothing that has anything to do with the case, others may see that happening, and may believe that jurors are being unfairly and improperly influenced. So just bear that in mind.

Cellular phones, I'm sure if not all of you, almost all of you have them. Some courthouses do not permit people to bring them into the courtroom with them. They're not even permitted to bring them into the courthouse. We don't have that rule here.

So just to be sure that we don't have any interruptions because somebody's phone is ringing, or there's a ping because you have a text or email coming in, I ask that every one of you make sure that you power it down altogether. If you bring it into the courtroom with you, power it down altogether before you set foot in the courtroom.

We also don't want to see jurors taking a quick look down at their phone to see if someone sent them a message or an email. And certainly we don't want people to be sending messages to other people. 100 percent of your attention needs to be on what's happening in the courtroom while you're in the courtroom.

We take breaks, as I said, every two hours, so I can't imagine anything is so important that it can't wait until there is a break. So please just bear that in mind.

Now, with regard to -- let me just see if there's anything else oh, regard to breaks, we'll take one every couple of hours. Sometimes jurors may need freq -- more frequent or earlier breaks. That's perfectly fine. We do it all the time.

In fact, there may be other people that may ask for a more frequent or earlier break. I want to be sure that you're all fully attentive and focusing on the case.

If you need to take a break for any reason, whether it's you're getting a little groggy, which sometimes can happen, particularly if there's a long stretch of -- of time before there's a break going to happen, or if you need to use the restroom, or there's something else going on that you're feeling a little uncomfortable, personally, physically, your attention is probably being distracted by that.

We would far prefer to take more frequent breaks or earlier breaks if it will assist jurors in making sure that they all stay attentive and focused on the trial. So please don't feel shy about that.

Very occasionally during the course of a trial a juror may not be able to hear something. So if you're having trouble hearing for one reason or another, I can't imagine that that will happen here because we have good acoustics, microphones, and lawyers with good, strong voices, but just let us know if you're having some difficulty hearing. Sometimes witnesses may not be talking as loudly or as close to the microphone as would be of assistance to jurors.

Likewise, very occasionally, something may happen in the courtroom. Maybe somebody comes in and you suddenly realize you know who they are, or something else, please just raise your hand. Don't say it out loud. We'll just take the information from the juror and -- and address it at that time.

In that same regard, sometimes during the course of the trial it may happen when the jurors are out of the courtroom, that a juror may inadvertently realize he or she has some knowledge about the case or has been exposed to something about the case, or maybe something indirectly connected to the case, maybe somebody has in your presence said or done something that you may have -- you may believe has some connection to the case, or you may hear or see another juror doing something we've instructed them not to do, or there maybe something else that comes up and you think, oh, I don't know if this should have happened, or if I should be doing this, or if I should have done that, I ask that you handle it in this way.

Please report it to a court officer as soon as you can. The court officer will report it to me. I will address it with you, and determine if there is, in fact, an issue. Don't talk to other jurors about it because if it's something that could affect your impartiality, speaking to other jurors may affect theirs as well.

Please don't keep it to yourself. That is far more problematic than anything else. You're not going to be causing trouble. You are not going to get yourself in trouble or other people in trouble. You are not going to get people mad at you. That's -- that's really not why we need to hear these things.

Sometimes things can happen during a trial, but they need to be addressed as soon as possible, and it's not just with jurors. It can happen to witnesses, or the lawyers, or even the judge. What's most important is that we learn about it as soon as possible, discuss it among the relevant people, decide whether or not it is problematic, and then address it in -- in the appropriate fashion.

If you do keep it to yourself, especially if it's something that would have been problematic in our view, if it comes to light later in the trial or even after the trial, that's far more problematic. What is much better and -- and preferable, and what we really want to make sure happens is that if anything arises of any sort, that you let us know as soon as possible. We will address it, make any corrective remedies, if necessary, and go on from there. So please just bear that in mind. We really need to hear about things if they do arise. I doubt that they will, but sometimes they do.

Now, let me see if there's anything else that I need to speak about at this point. I don't think so. So let me just get to the specific law that you're going to be -- that's going to be part of this particular case. Give me just a moment because I want to make sure I use the correct language. I brought out some materials in that regard.

So members of the jury, most people, I believe, are familiar with the concept, which is the burden of proof in a criminal trial. When the government accuses a person of committing a crime during a trial of those criminal offenses, the government, the prosecution, has the burden of proving beyond a reasonable doubt that the accused person is guilty.

That burden of proof, that standard of proof, does not apply in a civil trial. That standard of proof in a criminal trial is much, much higher than the standard that applies in a civil trial.

In a civil trial, a party who is making a claim, and that would be in this case members of the Doull family, have the burden of proving their claim or claims to what is called a preponderance of the evidence.

So I'm sure you'll say, well, what exactly does that mean. It means that the party making the claim, the Plaintiffs, must prove each of their claims are more probably true than not -more probably true than not. That means, the facts that are necessary to make out their claims are more probably true than not.

If you were to think of this case as being, at this point, represented by an evenly balanced set of scales -- and so I'm just going to use the example of Dr. Miller first, the claims against him. So the Doull family is on my right side. That's their side of the scales. Dr. Miller is on the left side. If -- so the scales are balanced -- evenly balanced at the beginning of the trial.

If at the end of that trial those scales tip, even just slightly in favor of the Doull family, then they have proven the claim or claims against Dr. Miller to a preponderance of the evidence, that is that they're more probably true than not, more likely true than not.

If at the end of the trial, in your view, those scales remain evenly balanced, or if they tip at all in favor of Dr. Miller, then the Doull family has not proven the claim or claims to a preponderance of the evidence. So every claim has parts or elements to it, and the party making the claim must prove each of the necessary elements to a preponderance of the evidence. In other words, that it's more likely true than not, more probably true than not.

So let me just go through those elements. And I'm going to try to, as I said, be relatively brief. But I think that it's important that you understand generally what the Doull family will have to prove. There may be some additional claims on which I will instruct you at the end of the trial. But these are the ones, in general terms, that will give you some idea of the legal and factual issues you will be expected to understand, and also to decide.

So as you know, this is what's called a medical malpractice case. But it's essentially a claim of negligent provision of medical services. Everybody -- every one of us has what's called a duty to exercise reasonable care in our ordinary affairs. And we're negligent only if we do something that a reasonably careful person wouldn't do or failed to do something that a reasonably careful person would have done under the same or similar circumstances. So that in general terms is what we mean by negligence.

Negligence of a physician who practices medicine, and particularly in a particular field, is the failure to exercise the degree of care and skill of the average qualified medical provider. That is whether it's a doctor, or in this case also a nurse practitioner, practicing within that specialty, taking into account the advances in the profession in the time of the alleg -- alleged negligent act, and the medical resources available to that medical provider at the time.

So again, this is a case in which the allegations are being made against a medical doctor, a physician, and a nurse practitioner. So the elements for a malpractice claim are this. The Plaintiffs must prove each of the following things to a preponderance of the evidence.

First, the standard of medical care that was owed to, in this case, Laura Doull, by on the one hand, Dr. Miller, on the other hand, Nurse Practitioner Foster, in the circumstances of this case.

Second, the Plaintiffs must prove that Dr. Miller on the one hand, Nurse Practitioner Foster on the other hand, breached that standard of care; in other words, was negligent.

The Plaintiffs must prove that Laura Doull suffered some injuries or losses, and also must prove that it was the negligence of the Defendant in question, that is Dr. Miller on the one hand, Nurse Practitioner Foster on the other hand, that caused Laura Doull's injuries.

So there must be proof to a preponderance of the evidence; in other words that it's more likely true than not for each of these elements of the claim.

Now, let me just speak very generally to you about -- this is what we call this duty or standard of care, which must be proven. A duty simply means an obligation to -- to conform to a particular standard of care toward another person, which is recognized and enforced in the law. Doctors and other healthcare professionals have a duty to their patients to act according to what is called, the standard of care.

The Plaintiffs must prove by a preponderance of the evidence -- in other words, that it's more likely true than not -- what the standard of medical care was that was owed to Laura Doull by Dr. Miller and by Nurse Practitioner Foster in the provision of medical services to her during the time period where they were providing those services.

Now, you should understand that that standard of care is not one that we expect ordinary jurors to understand. And so therefore, in a case such as this one, there will be people who will be called to testify who will be testifying about what they consider to be the standard of care that was owed to Laura Doull under the circumstances of this case, on the one hand by the physician, Dr. Miller, on the other hand by the nurse practitioner -- Nurse Practitioner Foster.

And those people -- I want to let you know in advance -are not people who provided medical care to Laura Doull. They are not people who gave her any medical advice. Instead, they are people who are going to be offering some opinions on the medical care that was provided to Laura Doull. And they will be offering their opinion on what the actual standard of care was that was owed to Laura Doull under the circumstances of her case.

But again, I remind you that that's what the Plaintiffs have to prove, what was the actual standard of care owed to Laura Doull. Now, you may be hearing some conflicting testimony in that regard. In other words, there may be at one medical care provider who says, well, this is the standard of care. There may be another one who says, well, this was the standard of care. And as the judges of the evidence that's going to be presented in this case, your job will be to decide, well, which one do I believe. Has the Plaintiff really persuaded me that this was the standard of care?

Now, as I said, the next thing that the Plaintiffs are going to have to prove is that the -- the medical care provider in question, Dr. Miller on the one hand, Nurse Practitioner Foster on the other hand, breached or violated that standard of care.

As I said, with regard to the standard of care, a physician or a nurse practitioner's responsibility is to have and to exercise the degree of care and skill of the average qualified practitioner, taking into account any advances in the profession at the time the medical care is provided to the patient. So we're speaking about the time period within which Laura Doull was under the care of these two doctors.

The physician's responsibility is to exercise the degree of skill and care of the average physician practicing in that particular care provider's area of specialty. In applying this standard it is permissible for the jury to consider any medical resources available to the medical care provider as one circumstance, in determining the skill and care required at the time.

The standard of care that applies is the standard of care that existed at the time of the alleged malpractice. Therefore, a question you must decide is whether the named Defendant in question -- that is Dr. Miller, Nurse Practitioner Foster -- had and exercised the level of knowledge, skill, and care that the average qualified physician or nurse practitioner had, and exercised in that particular time period.

Now, prior -- part of the standard of care is that a medical care provider will use his or her judgment in accordance with accepted medical practices for the medical care provider in -- in that same area of specialty. The fact that in retrospect a medical care provider's judgment was incorrect is not in and of itself to prove medical malpractice or negligence. Doctors and nurse practitioners are allowed a range in the reasonable exercise of professional judgment, and they're not liable for mere errors of judgment, so long as that judgment does not represent a departure from the requirements of accepted medical practice resulting in a failure to do something that accepted medical practice requires, or by doing something that should not have been done under accepted medical practices or standards.

In other words, a medical provider is liable for errors of judgment, only if those errors represent a departure from the standard of care applicable to that particular area of specialty at the time in question.

The degree of skill and care exercised by a medical care provider must be judged in light of the facts that medical care provider knew or reasonably should have known under the circumstances. Hindsight is not a proper basis for the jury's evaluation, except insofar as you may determine that in the exercise of reasonable skill and

diligence the medical care provider should have obtained certain information at the time of the events at issue.

A doctor and a nurse practitioner are not judged by standards of perfection or excellence, or by standards that may apply today in 2017, but -- but the doctor or nurse practitioner is judged by whether the doctor and/or nurse practitioner had and used the knowledge, skill, and care possessed by the average doctor, on the one hand, medical -- I'm sorry, nurse practitioner, on the other hand, in that particular specialty at the time of the alleged malpractice.

Evidence that a doctor who may testify during this trial might or might not -- might have or would have undertaken a different course of treatment with regard to Laura Doull is not evidence itself that the doctor in question -- in other words Dr. Miller or the nurse practitioner in question, Nurse Practitioner Foster, that -- that the treatment rendered by that practitioner was negligent.

Please understand that medical care providers do not guarantee a cure or guarantee a particular outcome. They do not guarantee that the patient's condition will be improved by treatment, or that the patient's condition will not get worse, either by natural causes, or even as a result of the treatment itself. A bad result or unfortunate medical outcome, standing alone, is not evidence of negligence. In order to find the Defendant doctor, and/or the Defendant nurse practitioner in this case negligent, you must determine by the evidence that will be presented to you over the course of the trial, whether that practitioner Defendant's care of Laura Doull did not comply with accepted standards of medical care for the profession in question.

Now, members of the jury, one of the issues that I understand will arise within the context of this case is not just an alleged failure to diagnose or misdiagnosis of Ms. Doull's condition, but also there's an issue that I expect will arise with -- with regard to what we call informed consent. And let me just define to you in just general terms what that means because this is another issue I expect may arise, and -- and therefore you need to understand why you may be hearing some testimony about this issue.

A physician does owe to his or her patient -- and that would apply as well to a nurse practitioner owing to his or her patient -- the duty to disclose in a reasonable manner all significant medical information that the medical provider possesses or reasonably should possess that is material to an intelligent decision by the patient, whether to undergo a proposed procedure, or to, for instance, take a particular medication or to follow a particular recommendation with regard to medical treatment.

The information a medical provider reasonably should possess is that information possessed by the average qualified medical care provider practicing in that particular field. What the average qualified medical care provider should know involves professional expertise, and could ordinarily be proven, again, only through testimony from expert witnesses.

The extent to which a doctor or a nurse practitioner must share that information with the patient depends on what information the physician should reasonably recognize is material to the patient's decision.

Now, members of the jury, you heard me talking about negligence and informed consent, but I want to also describe to you also this particular claim, because as you know, while the allegation is that medical -- that medical care provided to Laura Doull, and this is the claim made by the Plaintiffs, was negligent, Laura Doull is deceased. So she is not going to be here before the Court. And her claim instead is being brought under what's called the wrongful death statute by her family. So her family is standing in her place, with regard to that particular claim.

So the claim is brought by the personal representative of Laura Doull's estate; that would be her husband, Seth Doull, and a wrongful death action is one in which the Plaintiff -- that would be Mr. Doull -- is bringing that -- this action to recover damages for the benefit of himself as the spouse of Laura Doull, as well as their children. And this is -- the wrongful death action is for damages or losses that they've suffered, caused by the death of Laura Doull.

Now, with regard to that particular aspect of the case, what you're going to be doing throughout the course of the case -- and and this will apply to the specific claims brought by the children and spouse for what's called loss of consortium, but also the wrongful death action.

As you know, earlier I told you that among the things the Plaintiffs are going to have to prove is that Laura Doull suffered some injuries, and also that the injuries were caused by negligence of the Defendant or Defendants.

And likewise, with regard to this wrongful death claim, as well as claims of loss of consortium, which are claims that can be brought by people who are not specifically the subject matter of the negligent conduct, in the sense that they didn't receive the medical care, but they -- but they suffered a loss as a result of alleged negligent medical care. They're entitled, if they can prove it, that there was actually negligence that caused injury to Laura Doull. They are entitled to recover for damages to themselves, the loss of the spouse, the loss of the mother, the parent.

And likewise, in a wrongful death action, those are among the -- the losses that can be recovered.

But for a wrongful death action, the things that can be recovered by way of compensation are the following things.

The -- but again, this must be proven by the -- by the Plaintiffs that these damages were actually caused by negligent conduct on the part of either Dr. Miller, Nurse Practitioner Foster, or both of them.

So with regard to this, what we -- we call this damages, but it's actually -- that word damages is the compensation that a jury awards to a Plaintiff if the jury is persuaded that there has been negligence that caused some injury, harm, or loss to one or more of the Plaintiffs.

With regard to this -- this idea of damages, the purpose of the law in awarding damages or compensation is to fairly and reasonably compensate for the losses actually occur -- that were incurred because of another person's negligent conduct.

Recovery for wrongful death -- in a wrongful death lawsuit, such as this one, represents damages to the survivors for the loss of value of the decedent's life.

Now, with regard to that particular issue, as well as damages in -- in general, there may be some things that you will have actual documentation introduced over the course of the trial, medical bills, for instance. For much of what I am about to define for you, there's no special formula. There's going to be no piece of paper put in front of you that says, well, this is what this represents. Instead, your obligation will be to decide, based on all the evidence that's presented to you in this trial, to determine what is fair, adequate, and just, based on the evidence that will be presented.

You will make this determination by using your wisdom and judgment to translate into dollars and sense the amount that will fully, fairly, and reasonably compensate the next of kin for the death of Laura Doull. And I'm speaking of this not because I'm telling you you will do this. You only arrive at and address damages if you find that there was negligence that caused -- caused injury or loss to Laura Doull. But I just want you to explain -- I want to explain to you at this time, in general terms, what these issues are, so that you will understand why you're hearing testimony about certain things.

So among the things that can be the -- the basis for compensation in a case such as this one are medical expenses. That would be medical expenses to Laura Doull for -- that were incurred in caring for her injuries, that you find were caused by the

Defendants' negligence. And those would be reasonable medical expenses. So you make that determination. So in that regard, I expect that there will be medical bills introduced over the course of the trial as exhibits.

With regard to Laura Doull as well, you may consider any evidence, if there is any, of loss of her earning capacity prior to death. The estate -- her estate is entitled to recover the loss of earning capacity from the date that she suffered these injuries until the date of her death.

You will also be -- I expect, perhaps -- presented with evidence of burial and funeral expenses. The Plaintiffs are entitled to comp -- to be compensated for those expenses that were reasonable in amount and which were reasonably necessary for -- to bury or inter or to otherwise have a funeral service for Laura Doull.

As I said, among the other things you may consider in this particular case, are also conscious pain and suffering. That is any conscious pain and suffering of Laura Doull as a result of the Defendants' negligence. And exact -- with regard -- with regard to this particular element of damages, like with everything else, but this one in particular, I just want to be sure you understand that while it is likely that you will hear some evidence of pain and suffering, the estate is only entitled to recover for pain and suffering that was caused by the Defendant in question's negligence.

Now, pain and suffering can be of two different types. It can be actual physical pain and suffering, as well as mental pain and suffering. With physical pain and suffering, obviously you consider the -- any areas of the body which you find – in which you find that the Plaintiff, Laura Doull, was physically injured as a result of -- of any medical negligence on the part of the Defendant or Defendants. And you take into account the pain and suffering from the date of the injury or injuries inflicted by the Defendant in question, up until the date of Laura Doull's death.

Mental pain and suffering can include nervous shock, anxiety, embarrassment, or mental anguish, resulting from a particular physical condition or injury.

And again, with regard to pain and suffering, it's the pain and suffering of Laura Doull in this particular instance, that would be a part of what the jury can consider in -- in arriving at a decision on compensation, if you believe compensation is warranted in this case. But that's why you will be hearing some evidence in that regard.

Again, because this is a -- a lawsuit in which the next of kin are entitled to recover, you are also entitled to -- to determine -- and you'll be hearing some evidence with regard to what might be the fair monetary value of Laura Doull to her children and

to her spouse, including but not limited to compensation for the loss of reasonably expected net income, services, protection, care, assistance, companionship, society, comfort, guidance, counsel, and advice by Laura Doull to her families.

This idea of net income would be this -- and I don't know if there will be any evidence in this regard, but that would be those amounts which Laura Doull would have contributed to her husband, on the one hand, to each of her children, or for their benefit had she not died. And so that would be from the date of her death going forward, but as with everything else, the Plaintiff must actually produce evidence in that regard.

And as I said, the loss of services is among the things that the -- for which there -- there may be compensation, together with the other things I've just outlined for you. And that would be services which Laura Doull performed, even though those services to her family -- this is what I'm speaking of -to her spouse, to her children -- even though those services may have been fortuitous -- in other words, she wasn't getting paid for the services, but she provided them to her family, and so her family members are entitled to compensation for loss of her services.

Again, I stress, the fact that I have all the -- over the -- all these aspects of compensation, by no means is any indication on my part that you are to do that to award compensation in this case. You do that only if you are satisfied that there was negligent conduct by the Defendant or Defendants in question that caused a injury or loss to Laura Doull. If you determine those things, that -- it's at that point that you make a determination on what amount of compensation would fully and fairly compensate each of these Plaintiffs for losses that they suffered, and what amount of compensation would reasonably compensate the estate for the losses.

Now, members of the jury, with regard to everything I have just told you, as I said, it's not a complete instruction on the law that applies to this case. I will give you more detailed instructions at the end. I just think it's helpful to jurors to understand perhaps why they're hearing about certain things over the course of the trial, and the significance that they may have in their ultimate deliberations.

Now, one more thing I just want to speak about is this. You've heard me say that in a case such as this one, because there's a number of issues that arise that we expect are not within the common understanding of ordinary lay jurors such as you. And that would be, number one, the standard of care owed by a doctor, such as Dr. Miller, the standard of care owed by Nurse Practitioner Foster during the time period in question, and in -- in light of the area of specialty that each of them was practicing.

That is an area about -- for which there must be evidence produced through testimony of witnesses as to what these standard of care was that was owed to patients in -- in the particular area of -- of medicine, and given the particular circumstances; in other words, the condition of Laura Doull at the time.

Secondly, because you have to determine whether or not there was a breach of that standard of care -- in other words, that the doctor on the one hand, the nurse practitioner on the other hand was negligent by having violated that standard of care or breached that standard of care, that's another area in which expert testimony and expert opinion must be offered to assist the jurors in making that decision.

Now, as I said, I fully expect -- and -- and likewise, there is -- there is a need for, perhaps, some evidence as to whether or not that negligence caused Laura Doull to suffer some injury and/or loss.

Now, with regard to that issue, these expert witnesses who will be coming in to testify -- and I know there are a number of them -- as I said earlier, they may not necessarily agree. They may give you differing opinions on things. Your job will be to decide whether or not you accept or believe the opinion offered, and how much importance or weight you give to it.

But with regard to these expert witnesses, it's important that you understand this. They're permitted to testify, even though they have no personal knowledge about the case. They will be testifying based on materials that they were given, such as medical records, and other information about the case. And based on that information that they've been provided, they will be offering their opinions.

But merely because they offer opinions, doesn't mean that you need to accept them. You are advised -- and I'm instructing you right now -- that you consider these expert opinions in exactly the same way as you would the opinions of every other witness who is testifying before you over the course of the trial. In other words, you decide whether you accept or believe their testimony, how much weight or evident -- how much weight or importance you give to the testimony, whether you think the testimony is relevant to any issue that you need to decide in this case.

You might decide you believe all of what a witness says, none of what a witness says, only parts of it. And -- but when there's conflicting testimony, your role would be to decide what -- what of the conflicting testimony you accept and believe, and how much importance or weight you give to it.

But again, just because somebody has specialized training or experience in a field, does not put that witness' testimony or evidence on a higher level than any other

witness. And again, that's why you treat the testimony of these so-called witnesses, just as you would the testimony of any other witness.

Now, with regard to the testimony of these witnesses, it is important, of course, that you take into account their training, their experience, the reasons that they give for their opinions. If a witness gives an opinion, and you don't accept the underlying facts about upon which that witness has based his or her opinion, that can certainly be a factor that you can take into account in deciding whether or not you accept that witness' testimony in part or in whole.

So if you determine that the witness' opinion is not based on sufficient education and experience, or even that the witness' testimony was motivated by some bias or interests in the outcome of the case, you may take that into account.

Now, with regard to expert testimony, it's important that jurors understand that experts don't decide cases, jurors do. So in the final analysis, that's why it's important that you keep in mind, and bear in mind, and remember that while you will be permitted to hear and consider this testimony -- and this kind of testimony is, in fact, the sort of testimony that is always introduced in a medical malpractice case, because otherwise jurors would be guessing or speculating about things outside their general knowledge, like standard of care and whether care was or was not negligent -- in the final analysis it is your determination as to whether or not the Plaintiffs will be able to make out the necessary parts of their claim.

So members of the jury, I know this has been a fairly long instruction I have just given you, but hopefully it will help you get some context as to the issues -- the legal and factual issues you'll be deciding in this case.

Thank you all again very much, on behalf of the Court, on behalf of the Plaintiffs, their attorney, on behalf of each of the Defendants and their attorneys, for your willingness to serve. I'm confident that each and every one of you will follow all the instructions I've given you, all those that I will give you during the trial, that you will follow the oath that you just took.

And remember, throughout the trial your job here is to be neutral, impartial, objective judges of the evidence that will be presented. Your role is to be fair -- to remember to be fair, both to the Plaintiffs, and to the Defendants. Your role is not to support either side, to advocate for any side here. Your role is not to advocate for any cause, to support any cause.

Your role is to decide whether or not each of these medical providers treated Laura Doull in a negligent manner, whether that -- whether Laura Doull suffered some

loss or harm, and whether or not that loss or harm was caused by the doctor or the nurse practitioner's negligence. And if so, how much money will fully and fairly compensate these Plaintiffs -- not anybody else, but these Plaintiffs for any losses that they've suffered. So please bear that in mind. Thank you all very much.

(Jury in at 10:58 a.m.)

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FINAL INSTRUCTIONS (RA 2992-3120)

THE COURT: ……Everybody may be seated. Members of the jury, as I told you, I'm permitting jurors to take notes. That includes during my instructions, but I do ask that if any of you took any notes during the attorneys' closing statements, I want to see you all draw a line under that last note, so that nobody mistakenly looks at their notes from my instructions, and perhaps, confuse them either with what the attorneys said or vice versa.

So draw a line under the last note you took. Just so you know from here on down, it's Judge's instructions. My instruction, I expect will be well over an hour. I hope it's not as much as two, but it could potentially because we have a long verdict slip to go through. But I do record my instructions as well and I will send the -- a -- a tape player as well as the recording of my instruction into the jury room with you together with an outline of topics that I'm covering in the order in which I cover those topics. I don't necessarily have every single topic that I talk about on the list. But I give you a list of the topics in order, so in case you want to go back and listen to a portion of my instruction, it will be a little bit easier for you to do so. When I put down the topics for some, but not all, of the topics, I try to keep track of which side of the tape I'm on and roughly at what counter number I start discussing the topic. So you would see that as well on the outline.

And again, the fact that I have counter numbers and sides for some, but not all, in no way suggests that these are any more important. It's just that periodically, I think it's helpful for jurors to see on the outline roughly if they're looking for a topic, roughly where they would find it, so they could either go back or forward on the tape.

And because I am recording it and the -- the tape is 90 minutes long, I expect that part way through I'm going to have to turn it over. I may even have to -- if it seems to go past 90 minutes, go on to another tape. So just bear with me. I'll let you know. You can stand up and stretch. And you may periodically see me writing down

something, and that is likely to be that I'm writing down side and counter number. So there you go. You know what I'm doing.

All right. So I believe we're ready to get underway.

So, members of the jury, as you know, before you begin your deliberations -- let me just make sure I have this going.

Members of the jury, as you know, before you begin your final duty in this case, which is to decide the facts of the case and to reach verdicts, I'm going to be giving you instructions that apply to the different claims that are before you. These are instructions on the law.

You must follow the law, as I'm about to state to you, whether you agree with it or not. Please consider my instructions as a whole. Do not ignore any instruction. Don't give special emphasis to any particular instruction. All of my instructions are equally important.

And again, you must follow the law that I'm about to state to you whether you agree with it or not.

As you know, you are the judges of the facts of this case. You're going to have to decide what evidence you've accepted, how much importance you give to the evidence you have accepted, and what conclusions you will draw from that evidence. You decide the facts from a fair consideration of all of the evidence that has been presented during trial.

You must remain fair and impartial in viewing the evidence and should not allow yourselves to be influenced in any way by prejudice, bias, sympathy. You don't decide this case because you may like one side better than the other.

You don't decide the case, as I've told you a number of times, because you feel that you need to better a system or advocate for any system, advocate for any side. That is not your role here. You are neutral, impartial, objective judges of the evidence that's been presented to you, and your role is to remain fair to both sides, that is to the Plaintiffs and to each of the Defendants.

I stress again that you are the judges of the facts that have been introduced into evidence before you. Therefore, if I've said or done anything during the course of this trial that in any way leads you to believe that I have an opinion about how you should decide the case, I do ask that you please disregard it. I have no opinion about the facts. I have no opinion about what your verdict should be.

Nevertheless, sometimes during a trial a judge may do or say something, use some tone of voice, gesture, expression, whatever, even facial express that, for whatever reason, the jurors take as a hint to them about the judge's opinion.

Let me assure you that if I have done or said anything in that form, it was absolutely not in any way intended to suggest anything to you. And it was totally inadvertent. I have no opinion about the facts. I have no opinion on what -- about what your verdict should be, because deciding the facts and reaching verdicts is solely and exclusively your responsibility.

You're going to be deciding the facts in this case from the evidence that was introduced in the courtroom during the trial. You do not decide this case based on guesswork or suspicion or speculation or upon any unanswered questions that may remain in your mind.

As you know, the evidence in this case has consisted of physical exhibits. They're 36 in number. They're all stacked up here and they're going to be in the jury room with you during your deliberations.

The evidence in this case also included testimony of witnesses, those people who came into the courtroom, took the witness stand, and testified before you over the last several weeks.

The evidence in this case also included portions of depositions from witnesses that were read to you, as well as interrogatory answers of parties. And I remind you, the depositions are the procedures that occur in a civil case before the case goes to trial when certain witnesses may be asked to appear at a particular location at a specific date and time. The witness takes an oath to tell the truth exactly as if he or she were taking the witness stand in a courtroom during trial. The lawyers are present. There is a stenographer who records the questions that the lawyers ask and the answers that the witness gives. So it's as if the witness is testifying in the courtroom. So even though these people may not have actually testified in front of you, if you heard that the witness did answer certain questions, you certainly consider that as part of the evidence.

And interrogatories, I remind you, are those written questions that are sent to parties. Parties being a Plaintiff or a Defendant. It's not ordinary witnesses. And those parties, when they are sent these interrogatories, are required to respond to the interrogatory questions in writing. And they do so under oath. So at the bottom or at some point on the interrogatory, it says "I swear" -- words to the effect of "I

swear that these answers are true". And so those interrogatories are also part of the evidence that's been presented to you.

Now, with regard to the evidence, I want to remind you or if you don't remember from the beginning, two weeks ago, that there are some things that happen during evidence -- during a trial that are not evidence, and it cannot be considered to -by you to be evidence.

The lawyers ask questions of witnesses, and that's how testimony is presented during a trial in the courtroom. The lawyers' questions, I remind you, are not evidence. It's the answer given by the witness in response to the question that is evidence. And it's up to you to decide whether or not you accept or believe the witness's answer.

Now, when I say that, I'm not in any way suggesting that you have to ignore the question because the question itself gives the answer some context or meaning. But the mere fact that a lawyer asks the question is not evidence that what is in that question is true. Instead, you evaluate the credibility of the witness's answer to that question.

A number of times during the trial there have been either some questions asked or a witness has made statements, and in -in response to an objection, I told you that the answer or the question that was asked should not be considered by you. And you have to remember that. So if there was any such answer given that I told you was stricken, that you were to disregard it, obviously, if I told you to disregard a question, you must follow those instructions.

There were a number of things -- quite a number of things you may remember we had letters, starting with A and going through triple -- triple letters at some point because there were quite a number of these various things. Some were documents; some were other things. Those things that have been marked with letters are not actually exhibits, and they're not evidence.

You were permitted to see them in the courtroom, and the attorneys could talk about these things. But I just want to tell you in advance, they are not evidence. They are not going to be in the jury room with you. And furthermore, if you ask me while you're deliberating "could we please see this", my response will be it's not an exhibit, so we can't send it in to you. But again, those are not part of the evidence.

But the fact that there may be something that was discussed during testimony by a witness that's on that particular document or in that document or on a -- there were some things that Mr. Sobczak, for instance, and I believe, Mr. Dumas at one point,

wrote on, you can certainly consider as part of the evidence. Testimony regarding certain things that might have been on those -- those poster boards.

Now, as I told you earlier today, before the attorneys began their closing statements, and I told you at the beginning of the trial before the attorneys made their opening statements, those opening statements and closing statements are also not evidence. This is just the attorneys' opportunity, at the beginning, to outline for you what they expect the evidence will show. At the end of the trial, it's their final opportunity to address the jury, to discuss the evidence that's actually been presented, to try to show the jurors how it fits or doesn't fit, to try to persuade the jurors to their opinion and their view of the evidence.

But I remind you again, those attorneys' opening and closing statements are not evidence; they're not a substitute for evidence. So if any attorney said anything that doesn't agree with your recollection of what the evidence has been, either in their opening or closing statement, if any attorney said anything that doesn't agree with your opinion or view of the evidence, it's your opinion, your view of the evidence that controls.

And again, as I said, I'm not suggesting by making these statements to you that you should ignore the attorneys opening and particularly the closing statements you heard earlier today, because this is the attorneys' final opportunity to try to show you how things may or may not be significant to your decision. But this is not evidence.

So you don't make a decision about this case based on any attorneys' claim of what the evidence has been or view or opinion of what the evidence has been because it's your recollection, your view that controls.

You don't decide this case based on any hope that the attorney has that you reach a particular verdict. It's part of their job to try to persuade you, but that's what it is. It's persuasion and it's -- but it's entirely up to you to decide the facts and reach the verdicts in this case.

Now, members of the jury, there are two different types of evidence that may be used in proving a case. What we call direct evidence and what we call circumstantial evidence and the law does allow both types of evidence to be considered as proof during a trial, in this case, a civil trial.

Direct evidence comes from a witness who can testify directly about something that the witness claims to have personally observed: seen, heard, sensed, felt with his or

her own senses. And in certain instances, there may be a physical exhibit that may provide proof, direct proof of a fact that must be proven.

With circumstantial evidence, no witness can testify and no exhibit can show directly a fact that must be proven, but instead, the jurors are permitted to consider other evidence and determine whether or not, from those -- that other evidence, they are able to draw certain inferences or conclusions.

So even though you might not have direct evidence of a particular fact that must be proven, you may have evidence of other facts, and then you're permitted to, from those other facts, if you believe them, draw certain inferences or conclusions. And those inferences or con -- and conclusions may in fact, in the jury's mind, prove a -- a particular fact that must be proven.

It's important that you understand that if you do draw any such inferences they must be reasonable, natural, and warranted, not based on guesswork or speculation.

So let me give a couple of illustrations of direct evidence and circumstantial evidence. And in my illustration I'll try to illustrate the types of inferences that a jury could draw and those that a jury should not.

And these have nothing to do with this case at all, but just to sort of illustrate to you the -- the -- the thought process that we're speaking of when we speak of direct and circumstantial evidence.

So let's say that this is an entirely different trial. A fact that must be proven is that it snowed on a particular Friday night. And a witness comes into court and testifies before you as follows: On that Friday night before I went out -- to bed, I looked out my bedroom window. I looked up to the sky. It was absolutely clear, not a cloud in the sky. I looked down to the ground -- I'm sorry, let me I'm -- I'm doing the wrong illustration.

Step back. The witness comes into court and says on that Friday night before I went to bed I looked out my bedroom window. I looked up to the sky. It was overcast. There was snow coming from the clouds. I looked down the ground to my front yard, and I saw snowflakes hitting the ground and snow accumulating on the ground.

That's direct evidence. The witness says that's what I saw. It doesn't mean you need to believe it. There may be another witness who testifies before you who says I was in exactly the same place on that same night, looked out that same window as well as other windows, and I can tell you, it wasn't snowing that night.

Or maybe there's evidence that the Friday night in question is the middle of August, and it's 80 degrees on the night in question. That could certainly cause you to not believe the witness's testimony. Or maybe there's just something about the way the witness testified, generally, that causes the jurors to disbelieve the testimony.

But again, that's direct evidence. The witness says this is what I personally observed. The jury still needs to decide whether or not accept or believe that testimony.

Now, let me change the illustration for circumstantial evidence. So again, let's say that it must be proven that it snowed on that Friday night and also that during or after the snowfall a postal employee came to the witness's house to deliver a package. The witness comes into court and testifies before you as follows: On that Friday night, before I went to bed I looked out my bedroom window. I looked up to the sky. It was absolutely clear, not a cloud in the sky, no precipitation. I looked down to the ground; there was no snow on the ground. The next morning when I woke, I looked out that same bedroom window. I looked up to the sky; it was absolutely clear, not a cloud in the sky. There was no precipitation. But when I looked down to the ground, I saw that there were two or three inches of snow on the ground. I also saw footprints that came from my sidewalk. They crossed my yard. They toward my side door. It's to that side door where postal employees typically deliver packages to my house.

That's all the witness says. And during the trial, the jury hears absolutely no other evidence with regard to that issue.

Well, if you, the jurors, believe the witness's testimony, it would be reasonable for you to conclude or infer that it snowed overnight. Even though the witness didn't see it, based on the observations the night before and the following morning, as well as your own common sense and general life experience living here in New England, that would be a reasonable conclusion to draw.

It would not, however, be reasonable for the jury to infer or conclude the identity of the person who made the footprints in the snow or that person's purpose in crossing the yard because based on that limited information that I've just described the juror (sic) giving, you'd be guessing or speculating.

So again, you may use either direct evidence or circumstantial evidence in deciding the facts of the case. But please be aware that if you do use circumstantial evidence that any conclusions or inferences you draw are reasonable, natural, and warranted and not based on guesswork or speculation.

Now, members of the jury, I just want to interrupt for a moment just to say this because I think it's important that I -I say this. A number of times during the course of the trial, and this was a long trial -- and at times you could tell that the lawyers were quite vehemently in disagreement about what should and should not be admitted as evidence or what questions should or should not be asked of certain witnesses. And on occasion, a number of occasions, I did have to reprimand an attorney and ex -- you know, explain that that question's not to be asked or the attorney was to move on to another topic.

Please understand that that's part of what happens during a trial. My role is to try to manage the trial, to rule on objections. Sometimes we're not all in agreement on what is happening. But what is most important that you understand is this: You are to draw absolutely no unfair inference of any sort, no inference of any sort against a client, that is a

party, because I may have reprimanded his or her attorney. It's the duty of the attorneys to offer evidence, to object, to argue to you and to the judge on behalf of their side.

Again, it's my function to try to make decisions that are appropriate. My function is to exclude evidence or arguments that are inadmissible under our rules of evidence, and at times

that requires a judge to, perhaps, adman -- admonish an attorney if it appears necessary. But again, I remind you, please don't draw any sort of inference in anyway against any party or in favor of any party merely because I did that. Your verdicts, as I said, must be based on the facts that are introduced as you find them from the evidence and as the

law -- on the law that I'm about to explain to you and not to be in any way influenced by the fact that I may have had to reprimand someone at some point during trial.

Your focus is to be on the claims that have been made by the parties. And as I said, I'm going to begin describing to you the law that applies to the evidence that's been presented to you.

So as you know, your responsibilities will include deciding any disputed questions about the facts. And in that regard, you're going to have to determine the believability of the witnesses who testified before you, as well as how much importance or weight you've given to each witness's testimony. In doing that, you should consider all the evidence that's been presented and introduced during the course of the trial. You may also, in judging the credibility of witnesses and the

importance of witness testimony, you may also use your common sense and your general life experiences. You may decide that you believed all of what a particular witness said. You may decide that you believed only parts of the witness's testimony.

You may decide that you believed none of it.

If there are any conflicts in the testimony of witnesses, your role is to try to resolve those conflicts in order to decide the facts.

Please understand it's not just what the witness said, in other words, the exact words used by the witness, but the manner in which the witness testified that may assist you in deciding whether or not to accept that witness's testimony as being believable.

You may consider the witness's appearance and demeanor on the witness stand, the witness's frankness or lack of frankness as he or she testified, whether the witness's testimony was reasonable or unreasonable, probable or improbable, whether it made sense or not.

You may take into account how good an opportunity the particular witness had to observe or to know the facts about which he or she testified. You may consider the degree of intelligence shown by the witness, if you think that is relevant. You may consider that witnesses also testify from memory, and you can certainly consider whether or not the memory appeared to be accurate.

Witnesses often testify as well based on something they claim to have observed. You may certainly take into account how good an opportunity the witness had to observe those particular facts.

You may consider, did a particular witness have some motive for testifying? Did the witness display bias or prejudice as he or she testified? Does the witness have any interest, including any financial interest, in this case or in the outcome of this case?

You have heard testimony during the course of the trial about statements that certain of the witnesses may have made prior to trial that may have been inconsistent with what the witness said when on the witness stand before you, here in this courtroom. You may also have heard that certain witnesses may have made statements prior to trial and then gave some information before you, here in the courtroom that wasn't included in that prior -- in that prior statement. When you evaluate both the credibility and the reliability of a witness's testimony, you may take into account

whether that witness made an earlier statement that differs in any significant way from the witness's testimony in the courtroom during trial. It's up to you to decide how -- how significant, if any, any such prior different statement or omission was. And if so, if that earlier statement was not consistent with the witness's trial testimony, you may take that into account when you determine how much belief and importance you give to the witness's testimony here during trial.

So that's another factor you can take into account as you evaluate the credibility and the importance of a witness's testimony in the courtroom during trial.

Now, members of the jury, you heard, as you know in this case, from a number of different witnesses who don't actually have personal knowledge about the case, but they were, what we call, so called expert witnesses. And just to point out to you the witnesses to whom I am referring, they are this: The two doctors who practice internal medicine, Dr. Paul Genecin who's with -- he was the doctor who testified last week or perhaps the end of the week before from Yale Health Center in New Haven, Dr. Jennifer Potter from Beth Israel Deaconess. She testified before you yesterday. From Tufts Medical Center, you heard testimony from a hematologist, Dr. Kenneth Miller, as distinguished from doctor -- the Dr. Miller who's one of the Defendants in this case, and also from Tufts a pulmonologist, Dr. Nicholas Hill. And so those are medical individuals who offered expert opinions and testimony on certain matters that I'm going to cover with you in just a moment.

Additionally, you heard testimony from Nancy McCann. She's the forensic handwriting and document examiner who offered some opinions on parts of the medical records of Laura Doull that had been whited over, what those particular -- what the wording behind that was.

So with regard to these kinds of witnesses, let me just say this, during certain trials, witnesses who have specialized training or experience in a particular field or profession are permitted to testify and offer opinions. Generally, in both criminal and civil cases that are tried in our courts, witnesses may testify only about facts that are within their personal knowledge, that is things they've personally seen, heard, sensed or felt. However, in some cases, such as cases like this one, a medical malpractice case, issues arise that are beyond the experience of ordinary lay jurors. And in these types of cases, the courts do allow persons with specialized training or experience, so called expert witnesses, to testify about facts and also to state an opinion and the reasons for the opinion on issues that are within the witness's area of expertise and relevant and material to the case that's being tried. Just because a witness has specialized training and experience in his or her field, however, does not put that witness on a higher level than any other witness. You are to view so-

called expert witnesses just as you would view any other witness. In other words, it's completely up to you to decide if you accept or believe the testimony of and the opinions offered by an expert witness. It's entirely up to you to decide whether you accepted the facts upon which the witness relied. It's up to you to decide what conclusions, if any, you draw from the witness's testimony.

If an expert based his or her opinion by assuming certain facts that were presented to the witness by an attorney through questioning, you have to obviously decide whether or not those facts have, in fact, been proven.

You are free to reject any part or the whole of the witness's testimony and any ex -- and any opinion offered by the expert, if you determine that that expert's opinions was not based on sufficient education, training, and experience or if you determine that the witness's testimony was motivated by some bias or prejudice or even some financial interest in this case.

But please keep this in mind: You alone decide the facts of the case. Therefore, if you conclude that an expert opinion -- an expert witness's opinion was not based on the facts as you find them, then you may reject any part or all of the testimony and opinions offered by that witness.

Keep this in mind, expert witnesses do not decide cases. Juries do. So in the final analysis, an expert witness is to be considered like any other witness in the sense that you alone make a judgment about how much credibility and weight you give to the witness's testimony and what conclusions, if any, you will draw from that testimony.

Now, I will be addressing several of these witnesses, the medical expert witnesses' testimony later during my instructions because in a case such as this one which involves medical issues including medical opinions on a number of things, it is required that these types of witnesses be presented to the jury. But nonetheless, what's important is that you understand that to the extent that there may be some conflicts between those witnesses, conflicts between their opinions, your role is to decide which of the opinions, which of the testimony you believe, if there is conflict. In other words, you need to, to the best of your ability, resolve those conflicts in order to decide the pertinent facts.

Now, sometimes during a trial a person may testify in front of a jury and that person is a party to the case. The parties, I remind you, are the Plaintiffs. The Plaintiffs in this case are Seth Doull, Megan Doull, Troy Doull; and even though she's deceased,

one of the parties is also Laura Doull. The parties also include the two Defendants, Dr. Miller and Nurse Practitioner Foster.

Now, generally speaking when jurors are presented with evidence of statements made by people it will be because the people come into the courtroom and testify before them during trial. But there may be certain statements that were made outside of the courtroom by a party. And so even though the party may not say that in front of you in the courtroom, you may still consider a party's statement made outside of the courtroom as admissions on that part.

And so the admissions may even be such that they may contradict or discredit something that party says if the witness actually takes the stand. But it's just important that you understand that unlike regular witnesses' out-of-court statements, which may be used to contradict them if they've

testified in the courtroom during trial, and that's the only purpose for which you may consider it, if a party, a Plaintiff or a Defendant has made an out-of-court statement, you may also consider that as an admission on the part of that party.

Now, there was a mention made during the final statements made by the attorneys to you, their closing arguments earlier today, about the fact that Seth Doull, even though he's a party to this lawsuit, did not testify. And so I'm just going to give you a brief instruction on -- to follow up and explain what you can do with the fact that he didn't testify even though he's a party in this case.

When a -- a party to a lawsuit is available and is also shown to be friendly, at least not hostile. Obviously, you're not hostile to yourself if you are a party. And this particular person, if called to testify as a witness would be expected to give noncumulative, in other words, not repetitive testimony about what other people have always said -- already said, noncumulative testimony of distinct importance to either the case or to that par -- party's specific claim, and there's no logical or tactical explanation for the failure for that person to take the stand, the jurors are permitted, if they feel it is reasonable to draw an adverse inference from the fact that that party did not testify. But that's entirely up to you to determine whether or not that is an inference you choose to draw. But I'm just simply instructing you that that is permissible if you believe it is appropriate.

Now, members of the jury, let's get to the specific claims that are being made in this case. And first, I'm going to begin with the burden of proof, which I defined at the beginning of the trial, but it's important that I remind you of it at this time as well.

In a civil case, the burden of proof is on the party or parties making the claim. And in this case, that would be Seth Doull, both on his own personal claim, also on behalf of Lau -Laura Doull's estate, as well as Megan Doull on her claim, and Troy Doull on his claim. And so again, these claims are being made by those parties, and so the burden of proof is on them. They must have proven the validity of their claims by what we call a fair preponderance of the believable evidence. You return a verdict in favor of the Plaintiffs or a particular Plaintiff only if he or she has produced evidence that proved to you that it is more probable than not, more likely than not that the facts necessary to prove that Plaintiffs' claims are true.

Now, stepping back for just a moment, I just gave you an instruction with regard to the fact that Seth Doull did not testify. Troy Doull is a party, but you have heard lots of evidence about the fact that he's really not verbal and would really not be capable of testifying coming into the courtroom and -- and in any way answering questions. So that instruction that I've just given you with regard to Seth Doull would not apply, for obvious reasons, to Troy Doull.

But when I say he has the burden of proving his claim, you look at all the evidence that's presented and determine from all that evidence whether or not Troy Doull, as well as Seth Doull, as well as Megan Doull, as well as the estate of Laura Doull, if that -- the claims made by each and all of them have been proven to a preponderance of the evidence. So you return a verdict in favor of a Plaintiff or the Plaintiffs only if there's been evidence that's been produced that has proven to you that the claim in particular is more probable than not, more likely than not. That is that the facts necessary to prove that claim are more probably -- probable than not or more likely than not.

Now, with regard to that particular issue, you may or may not remember at the beginning of the trial I used the illustration of an evenly balanced set of scales. One side in favor of a Defendant, the other side in favor of the Plaintiff. At the beginning of the trial, that's exactly what it is.

Evenly balanced set of scales. Bearing in mind that the Plaintiff or Plaintiffs have the burden of proof. If those scales tip even just slightly in favor of the Plaintiff on a particular claim or Plaintiffs on a particular claim, the Plaintiff or Plaintiffs have proven that claim to a preponderance of the evidence. If the scales remain evenly balanced, in other words, you can't decide more in favor of one side or the other, or if they tip at all in favor of the Defendant or Defendants, then the Plaintiff or Plaintiffs have not proven that claim to a preponderance of the evidence.

Please understand that a preponderance of the evidence is not measured by whether one party produced more witnesses or a greater volume of evidence than the other side. A fair preponderance of the evidence is determined by the quality of the evidence, rather than by the number of witnesses who may have testified or the number of exhibits that may have introduced by a particular side. You ask yourself, was the evidence more believable, more trustworthy? Was it more accurate? Did it make sense or not?

Now, members of the jury, I'm going to begin by speaking about the medical malpractice claim that's being made in this case. And -- and there's also another claim that's being made, which is called a wrongful death claim.

To some extent the claims, the law that re -- that applies to these claims is similar or identical, and I will let you know that so I don't have to repeat instructions in that regard.

In other ways, there are differences and so I will let you know what the differences are.

But I'm going to start with the medical malpractice claim, and just with regard to this, this is essentially a claim of negligence. Negligence is the failure of a responsible person, either through his or her acts or failures to act, to exercise that degree of care that a person of ordinary caution should exercise under the same circumstances.

Now, when a person engages in negligent conduct and causes harm or injury or loss to another person, the law provides that the party responsible should compensate or pay for the harm, injury, or loss caused. In a lawsuit, the jury decides if the conduct was negligent, if the negligence caused some harm, injury, or loss, and if so, how much compensation the injured person or persons should receive.

Now, medical malpractice is the term used to describe negligence by a healthcare provider such as a nurse practitioner or a doctor. A doctor or a nurse practitioner is negligent if that healthcare provider fails to treat or provide medical care to his or her patient in accordance with good, proper and acceptable medical practices and as a result causes the patient to suffer some harm or loss. Good medical practice takes into account any advances in the profession at the time of the alleged medical treatment as well as the medical resources available to the medical practitioner at the time of treatment of the patient.

A doctor or nurse practitioner with training or skill in a specialized medical field is negligent if that doctor or nurse practitioner fails to exercise the degree of care and skill of the average qualified doctor or nurse practitioner practicing in that field.

In a lawsuit claiming medical malpractice, the Plaintiff does not have to show that the Defendant healthcare provider intended to cause harm to the patient. The fact that a doctor may have had -- or nurse practitioner, for instance, may have had good motives, does not prevent a Plaintiff from recovering for harm caused by the healthcare provider's negligence.

Now, when you -- this case, as you know, the Plaintiffs, I'm going to use that term collectively, have brought the -this lawsuit claiming that Nurse Practitioner Foster, on the one hand, Dr. Miller on the other hand, that each of them was negligent in a number of ways.

Number one, by failing to obtain informed consent from Laura Doull before prescribing to her the progesterone cream. And part of the claim is that the progesterone cre -- cream posed a risk of her -- of her developing blood clots and that it was as a result of that her -- her using the progesterone cream that she did, in fact, develop blood clots. That's one of the claims, what's called informed consent.

Another aspect of the -- of the medical malpractice negligence claim is that the nurse practitioner and -- and/or the doctor failed to properly diagnosis pulmonary embolism at a time earlier before Ms. Doull did in fact collapse in -- in or about May of 2011. So tho -- that's the essence of the claims that are being made here. So what I'm going to do is first go through the general failure to diagnose and failure to refer to a specialist aspect, and then I will define for you the informed consent aspect of the claim of negligence.

So but just in general terms, with a claim of negligence made against a medical care provider, the Plaintiffs must have proven to a preponderance of the evidence, in other words, that it's more likely true than not, first of all, the Plaintiffs must have proven what the actual standard of care was that was owed to Laura Doull under the circumstances. Second, the Plaintiffs must have proven that Nurse Foster, on the one hand, Dr. Miller, on the other hand, breached that standard of care. These first two elements, both of which must have been proven to have been more likely true than not ,are what constitute negligence, that is, the breach or violation of a duty of care owed by a medical provider to the patient.

The next thing that the Plaintiffs must have proven is that Laura Doull suffered some injury, harm, or loss and that the injury, harm, or loss was caused by the

negligence of Nurse Practitioner Foster and/or Dr. Miller. So let me go over each of those elements in greater detail.

The first element that the Plaintiffs must have proven by a preponderance of the evidence is that the Defendant in question and I'm going to refer to them by that word rather than continually repeating, that the Defendant is question owed a duty of care to Laura -- Laura Doull. A duty simply means an obligation to conform to a particular standard of conduct toward another person. Doctors and other healthcare professionals, such as nurse practitioners, have a duty to their patients to act according to the standard of care. The Plaintiff is required to have proven by a preponderance of the evidence the standard of medical care that was owed to Laura Doull at the time of her treatment by, on the one hand, Nurse Practitioner Foster and on the other hand, by Dr. Miller. Now, the standard of care owed by a doctor to a patient is -- actually, I'm going to stop right now because I'm pretty close to the end of this side of the tape. So if you'd like to stand and stretch, you may do so.

(Pause.)

THE COURT: So again, the first element of a medical malpractice claim is the standard of medical care owed by the medical care provider to the patient.

The standard of care owed by a medical care provider to a patient is not static or rigid. It is measured as -- as of the time that the medical care provider provided medical care to the patient and differs depending on many factors which may in -which would include the doctor or nurse care -- nurse practitioner's field or specialty, any responses available to the medical care provider, and the state of any advances in the medical field at the time the care provider provided medical care to the patient. Generally, speaking a medical care provider's responsibility to a patient is to have and to exercise the degree of care and skill of the average qualified medical practitioner taking into account any then current advances in the profession. So you have to look at this particular standard of care as it existed during the time frame in question, that is while Nurse Practitioner Foster and Dr. Miller were treating Laura Doull. And -- and that's essentially around the -- the area of time that we're speaking of, essentially is around 2008 and for perhaps two years before that, before she went on to -- I'm sorry, beginning in 2008 and through 2011, is the time period in question that we're speaking of. Ignore anything before that, 2008 through 2011.

A doctor who practices in the field of family practice as a general internist as well as a nurse practitioner having that type of general practice, general family practice, is held to the standard of care and skill of the average skill healthcare provider

working in that particular field. The standard of care expected is not perfection or excellence, but ordinary skill and care. In determining the -- the standard of care that applied at the time Nurse Practitioner Foster and Dr. Miller treated Laura Doull you must -- you must consider the testimony of the witnesses who offered their expert opinions on the applicable standard of care. That is, Dr. Genecin, Dr. Hill, Dr. Kenneth Miller and Dr. Potter. You do not decide on your own what the standard of care is or should have been, what it ought to have been. You must decide the standard of care based on the testimony of those witnesses. And obviously, as I said earlier, if there's conflict between the -- their opinions as to what the standard of care is, your role is to determine which opinion you credit in that regard.

You may also consider, and should also consider, any medical resources that may have been available to Dr. Miller and to Nurse Practitioner Foster during the time period that they were treating Laura Doull as one aspect of the skill and care required of them at the time.

Again, I remind you that the Plaintiffs have the burden of proving by a preponderance of the evidence the standard of care required of the -- of an average nurse practitioner and doctor practicing internal medicine, as Dr. Miller was at the time that they treated Laura Doull. And that would be the standard of care required of an average medical provider treating a patient such as Laura Doull at that particular time.

You make that determination from all of the evidence introduced during the trial as well as, as I said, you must take into account the -- the testimony of the four medical experts and their testimony with regard to what the standard of care was.

Now, with regard to the next element of a medical malpractice claim that the Plaintiff must have proven, that is that there was a breach of that standard of care, that duty of care owed to Laura Doull by Nurse Practitioner Foster, on the one hand, Dr. Miller, on the other hand.

That is -- that is this. Now, as I just said earlier, the responsibility of a medical care provider is to have and to exercise the degree of care and skill of the average qualified practitioner taking into account any advances in the profession at the time that the medical care is provided.

Part of the standard of care is that the medical care provider will use his or her judgment in accordance with accepted medical practice for a medical care provider in that same particular field. The fact that, in retrospect, the medical care provider's judgment was incorrect is not in and of itself enough to pro -- to prove medical

malpractice or medical negligence. Doctors are allowed a range in the reasonable exercise of per -- professional judgment, and they're not liable for mere errors of judgment, so long as that judgment does not represent a departure from the requirements of accepted medical practice resulting in a failure to do something that accepted medical practice requires. In other words, what would an ordinary doctor or nurse practitioner do under the circumstances or what would a -- what would an ordinary doctor or nurse practitioner not fail to do under the same or similar circumstances?

So, again, a failure to do something that accepted medical practice requires or doing something that should not have been done under accepted medical standards. In other words, a medical care provider is liable for errors of judgment only if those errors represent a departure from the standard of care required at the time of the medical treatment.

The degree of skill and care exercised by a medical provider must be judged in light of the facts that the medical care provider knew or reasonably should have known under the circumstances. Hindsight is not a proper basis for your evaluation except insofar as you may determine that in the exercise of reasonable skill and diligence, the care provider should have obtained certain information at the time of the events in question.

A medical care provider is not judged by standards of perfection of excellence or by standards that might apply today. But -- but the medical care provider is judged by whether that care provider had and used the knowledge, skill, and care possessed by the average qualified doctor on the one hand, nurse practitioner on the other hand at the time of the alleged act or acts of malpractice.

Evidence that a doctor who testified in this case or that any other doctor might or might not have -- have undertaken a different -- I'm sorry. Evidence that a doctor who testified in this case or any other doctor might or would have undertaken a different course of treatment is not in and of itself evidence that either Nurse Practitioner Foster's treatment of Laura Doull or Dr. Miller's treatment of Laura Doull was negligent. Doctors and nurse practitioners do not guarantee a cure or a particular outcome. They do not guarantee that a patient's condition will be improved by treatment or that the patient's condition will not get worse, either by natural causes or even as a result of the treatment itself. A bad result or an unfortunate medical outcome standing alone is not evidence of negligence. In order to find, either Nurse Practitioner Foster negligent or Dr. Miller negligent, you must find that that particular Defendant's care of Laura Doull did not comply with the

accepted standards of medical practice. In other words, that it did not meet the standard of care required of that practitioner at the time.

Now, you, the jury, are going to have to determine whether the conduct of Dr. Miller, on the one hand, Nurse Practitioner Foster, on the other hand, violated the standard of medical care that he, on the one hand, and she, on the other hand, owed to Laura Doull based upon the expert medical testimony presented in this trial. And again, I remind you those expert -- that expert testimony was given by Dr. Genecin, Dr. Hill, Dr. Kenneth Miller, and Dr. Potter.

Now, members of the jury, if you determine that the Defendant in question was negligent, and by that I mean, either that Nurse Practitioner Foster was negligent in her care and treatment of Laura Doull and/or that Dr. Miller was negligent in his care and treatment of Laura Doull -- and what we're focusing on at this point is with regard to the claim that they failed to diagnose the fact that she had developed or was developing pulmonary embolisms. That's the focus of what I'm speaking of right now. If you determine that the nurse practitioner and/or the doctor was negligent, then you have to decide whether that Defendant's negligent conduct caused the harm, injury -- and injury to Laura Doull.

Even if you find that the Defendant in question was negligent, that Defendant is not liable to the Plaintiffs unless his or her negligence caused the harm suffered by Laura Doull. To meet this burden, the Plaintiff need only show that there was a greater likelihood or a greater probability that the harm of which they have complained was due to causes for which the Defendant in question was responsible rather than from any other cause. Causation, like negligence must be proven through medical expert testimony. So again, you have to rely on the -- the testimony of those four medical experts, Dr. Hill, Dr. Kenneth Miller, Dr. Genecin and Dr. Potter.

With regard to this issue of causation, the Defendant in question's conduct was a cause of the Plaintiff's harm, that is Laura Doull's harm, if the harm would not have occurred absent, that is but for the Defendant's negligence. In other words, if the harm would have happened anyway, that Defendant is not liable. So when I'm speaking of cause here, I am using the terminology that is -- that applies in -- in this particular case, the definition of what we mean by cause. I'm going to use the term legal cause here because there can be other causes of things that aren't necessarily within what the law considers to be legal cause. So I'm going to use that term legal cause.

You will see it appear on the verdict questionnaire which will be handed out to you later, but I just want to explain to you when I say legal cause what I mean by that

word legal cause. That is that the Plaintiffs must have proven that the Defendant in question, Nurse Practitioner Foster, on the one hand, Dr. Miller, on the other hand, that that Defendant's conduct was the cause of Laura har -- Laura Doull's harm. That is the harm would not have occurred absent the Defendant in question's negligence. And again, in other words, if the harm would have happened anyway, then the Defendant in question would not be liable.

Now, members of the jury, as I said to you earlier there's two different aspects of this claim of negligence and the Plaintiff must have proven one or the other or both. Plaintiff

-- Plaintiffs need not have proven both, but they are two different manners in which the Plaintiff is saying that the nurse practitioner and the doctor were negligent.

In general terms, what I have just defined for you was the claim that there was a failure to diagnose, to recognize the signs and symptoms, so to speak of, and to diagnose pulmonary embolism at an -- at an earlier point in time and/or to send Laura Doull to a specialist in light of what the Plaintiffs claim were symptoms that should have resulted in referral to a specialist. So that's what I've just spoken of with regard to those claims.

The other claim is with regard to the claim of what is called informed consent. And just to sort of give you a background, what the Plaintiffs are claiming here is that Laura Doull had a prescription of treatment, progesterone cream, a course of treatment that was recommended to her by Nurse Practitioner Foster and/or Dr. Miller. And in the context of that recommendation and the fact that the cream was actually prescribed -- and there is evidence that Laura Doull used that progesterone product. That before Laura Doull undertook that course of treatment herself, the Plaintiffs say she was not given adequate information to be able to make an intelligent decision whether or not to undergo that form of treatment. That is, more specifically, that the Plaintiffs claim there was a risk in the use of progesterone cream and that risk was that one could develop blood clots as a result of using this cream. And the claim is that that was a risk of the use of progesterone cream, number one. So the Plaintiffs must have proven that that in fact is more probably true than not at the time that the cream was first prescribed and the time period during which Laura Doull was using it and under the care and treatment of Nurse Practitioner Foster and Dr. Miller.

And second, not only that the cream was the cause of the clots, but that she was not informed of that risk.

So let me just give you the legal definition of what we mean by informed consent. In a medical malpractice action, when a claim is based on a lack of informed consent, the gist of the claim is that certain inherent risks associated with the treatment or procedure did in fact materialize, and the patient should have been, but was not, warned about them before undertaking this particular form or -- form or course of treatment.

So again, one of the aspects of the Plaintiff's negligence claim is what is called this informed consent or lack of informed consent claim. Specifically, the Plaintiffs allege that Dr. Miller and/or Nurse Practitioner Foster did not obtain Laura Doull's informed consent to undergo progesterone cream as a course of treatment.

Now, with regard to this claim of informed consent, a medical care provider owes to his or her patient the duty to disclose, in a reasonable manner, all significant medical information that the medical care provider possesses or reasonably should possesses that is material to an intelligent decision by the patient whether to undergo a proposed course of treatment. The information that the medical care provider reasonably should possess is that information possessed by the average qualified medical care provider practicing in that same medical field. What the average qualified medical care provider should know involves professional expertise, and can ordinarily be proven only through the testimony of experts. The extent to which a medical care provider must share that information with his or her patient depends upon what information the phy -- the medical care provider should reasonably recognize is material to the patient's decision.

Now, what do we mean by material? Well, materiality is the significance that a reasonable person in what -- in -- in what the medical care provider knows or should know is his or her patient's position. So a reasonable person standing in the same position as Laura Doull at that time.

So that is what the medical care provider knows or should know the -- his -- his or her patient's position would be and that the patient would attach to the disclosed risk or risks in deciding whether or not to submit or not to submit to the course of treatment.

Determination of wha -- of materiality is a two-step process. First, the scientific nature of the risk must be ascertained. That is, the nature of the harm that may result. Second, the probability of its occurrence must be ascertained.

So then you, the jury, must then decide whether the probability of that type of harm, that is development of pulmonary embolisms, is a risk which a reasonable patient would consider in deciding on whether or not to undertake this treatment.

Now, of course, first you must be satisfied from the evidence that's been presented that that was, in fact, a risk. That pulmonary embolisms were, in fact, a risk of treatment by this progesterone cream. And then you determine whether or not the probability of that type of risk -- I'm sorry, the type of harm, pulmonary embolisms, is a risk which a reasonable patient would consider in deciding whether or not to undertake this progesterone cream treatment.

Materiality is in essence the product of a risk and its chance of occurring. A severe consequence ordinarily of interest to the patient would not require a disclosure if the chance of the consequence occurring was so neg -- no -- was so remote as to be negligible. Likewise, no disclosure would be required of a very minor consequence, even though the probability of occurrence was high. Once the severity and probability of the risk are presented, then you may determine materiality without any further aid of expert testimony. Appropriate information that you may consider is the nature of Laura Doull's condition at the time she was prescribed this particular medication and over the course of time while she was taking it and under the treatment of -- of doctors -- Dr. Miller and Nurse Practitioner Foster. You consider the nature and probability of the risk of developing pulmonary embolum -- embolisms by using this progesterone cream as well as the benefits to be reasonably expected by Laura Doull from the use of these creams.

You consider the inability of the physician to predict results. You also consider available alternatives including their risks and benefits.

This obligation on the part of the medical care provider to give adequate information does not require the disclosure of all risks of a proposed treatment or of information the physician or nurse practitioner reasonably believes the patient already has. A medical care provider's failure to divulge in a reasonable manner to a competent adult patient sufficient information to enable the patient to make -- to make an informed judgment whether to give or withhold consent from a particular course of treatment constitutes medical malpractice.

Again, as with the other claim, the burden of proof, rests upon the Plaintiffs in this case to prove that it's more likely true than not, more probably true than not that doc -- that Dr. Miller, on the one hand, Nurse Practitioner Foster, on the other hand, failed to divulge to Laura Doull in a reasonable manner sufficient information to

enable Laura Doull to make an informed judgment whether or not to give or withhold her consent to the progesterone cream treatment involved in this case.

If you're convinced by a preponderance of the evidence, in other words, that it's more likely true than not, that either Nurse Practitioner Foster and/or Dr. Miller failed to inform Laura Doull of a material risk that should have been known by the doctor and disclosed to Laura Doull before she began this course of treatment with progesterone cream, then you have to determine whether the unrevealed risk of blood clots, in fact, occurred as a result of her taking, using this progesterone cream.

The burden of proof on this particular issue rests upon the Plaintiffs to prove by a preponderance of the evidence that blood -- the blood clots in question, the pulmonary embolisms in question, actually occurred as a result of the use of this progesterone cream. That is, but for Laura Doull's undergoing the progesterone cream treatment she would not have developed pulmonary embolisms.

If you find that Nurse Practitioner Foster, on the one hand, Dr. Miller, on the other hand, failed to inform Laura Doull of a material risk that should have been known by the doctor or the nurse practitioner and should have disclosed it to Laura Doull before she undertook this course of treatment and that the undisclosed risk actually occurred as a result of her using the progesterone cream, then the Plaintiffs have -- have the burden of proving by a preponderance of the evidence the next part of this particular claim. That is, that it's more probable than not that had the proper information been provided to Laura Doull neither she nor a reasonable person in similar circumstances to her would have undergone this progesterone cream treatment.

If you're convinced that it's more probable than not that the -- that Dr. Miller, on the one hand, Nurse Practitioner Foster, on the other hand, failed to inform Laura Doull of a material risk, that is of the -- the risk of blood clots if she used the progesterone cream, that should have been known or disclosed to Laura Doull before she undertook or continued this course of treatment, that -- if you're also -- if you're also convinced that it's more probable than not that the undisclosed risk, that is the blood clots actually occurred as a result and that nei -- neither Laura Doull nor a reasonable person in similar circumstances to hers would have undergone or undertaken this course of treatment with progesterone cream had the risk been known, then the Plaintiffs are -- have made out their claim of a lack of -- their claim of negligence based on a lack of informed consent. And as with the other claim, there is -- then you would go on to the issue of what amount of damages, if any, you will award to the Plaintiff or Plaintiffs in this case.

Now, in this particular case, members of the jury, you have heard, particularly with regard to this issue of informed consent, a fair amount of testimony. There's an actual exhibit that's been introduced in this case which is from the Code of Massachusetts Regulations. We have hundreds of these regulations in Massachusetts that apply to many, many different types of things, included some regulations that -- that apply to certain professions.

And the particular regulations about which I am speaking and about which you've heard testimony and received certain evidence, are that there are some regulations that apply to nurses and nurse practitioners. And the Plaintiffs have pointed in particular to a portion of those regulations which apply to documentation of medical records.

So when a nurse practitioner or a nurse is treating a particular patient, there are certain obligations with regard to documentation of what has been done during the course of a particular medical visit or what has been done with regard to that patient, even if it's with regard to something that happened outside of the medical office. And so you've heard a lot of testimony in that regard.

Now, please understand this, with regard to this particular regulation, the regulation applies to nurses and nurse practitioners. It is not a regulation that applies to doctors. So you can't consider this with regard to any claim or claims against Dr. Miller.

And as again, this is specifically a regulation as to documenting in medical records any discussion that a medical care provider has with a patient regarding a recommended course of treatment, a medication, a surgery, things of that sort. And that is documenting in the medical records the discussion of any risks, benefits, and alternatives to the treatment about which the care provider and the patient are speaking. Please understand that any failure on the part of Nurse Practitioner Foster to document these things is not in and of itself to be considered by you as evidence that she was negligent either -- as -- as evidence -- as a substitute for evidence that she was negligent as claimed.

What you may, however, consider with regard to this aspect of the evidence, is this: that you may consider this regulation in determining whether any lack of documentation, which a person under this regulation is expected to do -- whether the lack of documentation by Nurse Practitioner Foster leads you to a reasonable inference that the discussions did not occur if there is a lack of documentation about the discussions. And so that's the sole purpose for which you may consider that particular aspect of the evidence that's been presented.

Now, members of the jury, the next thing that I'm going to discuss is this, if you, members of the jury, find that the Defendant or Defendants -- and I'm going to speak of them collectively, but you do have to look at each of them separately -- was in fact negligent in one or the other of the ways claimed. That is by failing to consider and diagnose pulmonary embolisms or to -- to -- failure to recognize and -- and refer Laura Doull to a specialist or alternatively -- and/or, I should say because it can be one or the other or both, that there was, in fact, a failure to obtain informed consent from Laura Doull before she undertook this course of treatment, the use of progesterone cream. If you're convinced that it's more likely true than not that that happened, that the doctor, on the one hand, the nurse practitioner, on the other hand, was negligent in one or the other or both of those ways and that the negligent conduct was the legal cause, as I've defined it for you, of some injury, harm, or loss to Laura Doull, then you have to determine what amount of what we call damages, if any, that you will award in this case.

And that word damages is the legal terminology which speaks of compensation that can be awarded to a party who is entitled to receive compensation as a result of the wrongful conduct of another party.

The burden of proving damages, of course, is on the party seeking them and in this case, that would be the Plaintiffs. The general rule is that a party is only entitled to recover those damages that the party has proven. Damages must be proven. They cannot be left to speculation.

When I speak of damages in this case, I mean compensatory damages. They're not meant to punish either Dr. Miller or Nurse Practitioner Foster. They're not meant to be a reward or a windfall to any of the Plaintiffs. They are entitled to compensate Laura Doull and her surviving husband and/or children for any harm that Laura Doull suffered as a result of the Defendants' negligent conduct, if any.

So I'm going to define damages for you. You do not award damages, obviously, unless you first find that there was negligence that -- that -- that was a legal cause of any harm, injury, or loss suffered by Laura Doull and to some extent that I will also, in the course of defining damages, any damages suffered, any loss or harm suffered by her husband and her children, her minor children.

In determining damages, you consider the evidence that's been presented and you may apply your common sense and general life experiences.

You must reach a figure that is fair to both sides because, remember, it is to be compensatory. The figure should not be based on sympathy, nor should it be based on bias or prejudice or any other emotion.

It must be fair, reasonable, and based on the facts as you find them. Even though I am explaining how you determine damages, again, remember that you do not consider or award damages unless, first, you are satisfied that negligent conduct by either Nurse Practitioner Foster and/or Dr. Miller was a legal cause of -- of Laura Doull developing pulmonary embolisms and ultimate CTEPH.

If you do determine that negligence by the Defendant or Defendants in question was the legal cause of harm to Laura Doull, then you consider what amount of money will fully and fairly compensate the Plaintiffs for, among other things, the fair and reasonable medical expenses that Laura Doull incurred in the diagnosis and treatment of her medical condition. Please understand that with regard to this issue, there's been some evidence suggesting that perhaps some of these bills may have been paid by insurance. You may infer, I don't mean properly infer, but you might have in your mind, well, these things were paid by insurance. It's important that you understand that even if the evidence may suggest that there may have been some insurance payments, insurers do have the right under law to seek reimbursement for medical bills they have paid. And so therefore, the jury's job is to decide what was the fair and the a full and fair amount of money that should be awarded to the to the Plaintiffs for those medical expenses that were incurred.

Now, among other things that you may consider with regard to damages are any conscious pain and suffering. Oh, and getting back to medical expenses, you have a number of exhibits, including medical bills from which you can make this determination as to what was a fair and reasonable amount of money expended for the care and treatment of Laura Doull for any injury and harm caused by the Defendant or Defendants' negligence.

You may also award compensation for any conscious pain and suffering that Laura Doull may have endured due to her condition during the final years of her life as a result of any negligence on the part of the Defendant or Defendants. Please bear in mind that this form of damages applies only to any pain and suffering that she consciously endured. It does not apply to any sort of pain and suffering that her family may have suffered. It's only Laura Doull's pain and suffering.

There are two types of pain and suffering: physical pain and suffering and mental pain and suffering. For physical pain and suffering, you consider if there has been any evidence of a physical injury, in this case that would have been the pulmonary

embolism, CTEPH, and -- and any physical suffering that may have been connected with that. You may consider whether there was any evidence of physical injury to parts of her body caused by the negligence of the doc -- the den -- I'm sorry, the Defendant or Defendants. And that could entail, among other things, the fact that someone may have to undergo certain medical procedures, or even surgery may result in physical pain and suffering as well.

Mental pain and suffering would encompass any evidence of nervous shock, anxiety, mental anguish, embarrassment, or humiliation resulting from the physical condition that Laura Doull endured. Any award of compensation must be based on evidence and not merely on guesswork. You have to determine the amount that would represent fair compensation for the pain and suffering that Laura Doull endured as a result of the Defendant or Defendants' negligence, if any.

Now, unlike medical records, which you have and you can look at, this is not a -- an area in which there's any particular document or -- or anything that's going to assist you specifically with regard to numbers. You rely on your good common sense and refer to the evidence that's been introduced to determine as to Laura Doull, not to anybody else, not to any hypothetical person, but as to Laura Doull based on the evidence that's been presented to you, what amount of money would fully and fairly compensate for the pain and suffering, both physical and mental, that she endured prior to her death. There is no mathematical formula or rule for calculating this area of damages. You consider, again, the issues introduced during trial on this issue, and you may apply your general life experiences, common sense, and judgment in reaching an award of damages that would represent fair and reasonable compensation for these harms or losses.

Now, with regard to Laura Doull's -- with regard to this particular part of the claim, another aspect -- just a moment -- that you may consider is any loss of her earning capacity. That is, between May 2011, when the evidence was that she collapsed and first began undergoing more -- more serious medical intervention, up till the date of her death, which was in October 2015, if there's any evidence that she had an earning capacity, an ability to earn money during that time period, but was unable to do so because of the fact that she had suffered -she was suffering from this condition, this harm, then that is another aspect that -- for which you may award damages. But again, you have to do that based not on guesswork, speculation, anything of that sort, but instead based on the evidence that's been introduced.

I will point out that people -- we all have an earning capacity. Even people who aren't working in the -- in the traditional sense of going into work and getting a paycheck once a week or once every two weeks, has an earning capacity that's based

on their general education and life experience, work experience. So that is what you may consider with regard to this aspect of the -- of the claim.

Now, another aspect that you may consider -- and I can see I'm getting toward the end of this side of the tape as well. So if you'd like to stand and stretch, take this opportunity to do so.

(Pause.)

THE COURT: Now, another aspect of this issue of damages is this; what I've been speaking about up till this point are losses, harm, injury suffered by Laura Doull herself and whether or not those aspects can be considered by the jury in any award of damages.

In addition to those aspects of damages, the jury may also consider what are called loss of consortium claims. And these are claims being made by Seth Doull, himself. So it's an award of compensation that the jury may consider as to Seth Doull. There's a separate claim of loss of consortium being made by Megan Doull and a separate loss of consortium claim for -- for Troy Doull.

Now, let me speak first of Seth Doull. That is a the spouse of a person who has been harmed or injured in some way as a result of the negligence of another, is entitled to recover for damages that the spouse, in this case, Seth Doull, has suffered as a result of the Defendant or Defendants' negligence. And again, this claim is called loss -- loss of consortium, and it allows recovery to the spouse of a physically injured person caused by the negligence of a third party or parties.

If you find -- with regard to this word consortium, it means a right that grows out of the marital relationship between, in this case, the husband and wife. It's the right to enjoy the society and companionship and the affection, including the right to sexual relations between the spouses, as a part of that marital relationship.

If you determine that the Defendant or Defendants' negligence caused Laura Doull to suffer and as a result of that -- that negligence caused Laura Doull to suffer certain injuries and/or harms and also that the negligence caused Seth Doull to have a loss of consortium, then you determine what amount of money would fully and fairly compensate him for his loss of consortium between the date of the -- we'll call it the date of the injury, that is essentially May 2011, and the date that Laura Doull died in October 2015. So this time frame that is that -- for that approximately four years and some of time. With regard to this particular aspect, you consider any evidence of the loss of companionship and society between Seth and Laura Doull during that time period, any evidence of loss of comfort, solace, or moral support from her to

him, any loss of enjoyment of sexual relationship -- relations between them, any restrictions on Mr. Doull's social or recreational life that he would have shared with his wife. And basically, any deprivation of the full enjoyment of the marital state.

You make your determination if there was a loss of consortium, and if so, the amount based on your common sense, good judgment, experience. There -- like -- like with certain other aspects, there's no special formula or rule with regard to this, but you make your determination based on the evidence that's been presented. You don't guess. You have to determine, based on the evidence, whether or not there was, in fact, any loss of consortium, and if so, how much amount of -- how much should Seth Doull be entitled to re -- recover on this particular aspect of the claim.

Now, with regard to loss of consortium, a consortium claim can also belong to a minor child or children. So one of the chil -- one of the claims is by Megan Doull who is entitled to seek damages for loss of her consortium up till the point when she reached the age of 18 because the loss of consortium claim belongs to the minor child. And this claim is a -- is called a loss of parental society, and it allows recovery to a child of a physically injured person where the injury has been caused by the negligence of another party or parties. This really means a right that grows out of the relationship between a parent and a child; that is between the mother and daughter in the case of Megan. It's a right to enjoy the society and companionship and affection as a part of the parent/child relationship.

If you determine that the Defendant or Defendants were negligent, that the negligence was a le -- the legal cause of injury or harm to Laura Doull, and that Megan Doull has suffered during the time period up till the point where her mother died, then you fairly and reasonably may compensate her for that loss.

And on this question, you may consider any evidence offered as to the loss of companionship and society between Megan and her mother, any loss to Megan of comfort, solace, or moral support from her mother, any restrictions to Megan on the social or recreational life that she might have shared with her mother, and the extent to which her life was significantly restructured as a result of the injuries to her mother. And basically, any deprivation of the full enjoyment of the parent/child relationship between the two of them.

And again, with regard to this claim as with regard to Seth Doull's claim as well as Troy Doull's claim, you must be convinced -- the Plaintiffs have the burden of proof on this. They must establish that there was, in fact, a loss of consortium. In other words, that it was more likely than not that there was a loss of consortium. As well as, they must have introduced evidence to assist you in determining what amount

of damages, if any, you will award in this case with regard to the loss of consortium claim.

With regard to Troy Doull, it's essentially the same thing. He was a minor child even up till the point, I believe, as I recall the evidence, when his mother died. But he's also at this point, although not at the time -- let me rephrase that. He was also, during that time period, a disabled child. And so you may take his own personal circumstances into account in evaluating what the loss of consortium to Troy Doull, as a disabled child, given the evidence that you've heard about the care that his mother gave to him up till the point of her death, in determining whether or not there will be an award of compensation to Troy for the loss of consortium.

But I remind you, with regard to each of these claims by Seth Doull, Megan Doull, and Troy Doull, you only award compensation if you determine that there was negligence that was the legal cause of the harm and/or injury suffered by Laura Doull and that as a result of the injuries to her, each of these individuals did, in fact, suffer a loss of consortium.

Now, members of the jury, as I explained to you a little bit earlier, there are two somewhat different aspects to this case. I've just described the negligence aspect of the case and -- and in this way I want to be sure I -- I highlight for you what we were speaking about during that time period. And that is that the damages about which we've been speaking that could be awarded either to Laura Doull, even though she's deceased, it goes to her estate, and her children and her spouse. Those -- those are all damages that apply to the time period from May 2011 through the date of her death in October 2015.

The next aspect I'm going to define for you is what's called a wrongful death claim. And so for this particular claim, much of -- many of the instructions I've already given you are going to be the same. So I will just refer back to them without going through the instructions in detail. But what's important for you to understand is that this particular claim, at least with regard to damages, would apply only to damages beginning at the date of Laura Doull's death and going forward from there, either up till this point or into the future from today.

So a wrongful death action is one brought by the personal representative of the decedent's estate. So Seth Doull is the personal representative of his deceased wife's estate. So it's been brought by Seth Doull on behalf of the estate.

Here, again, the Plaintiff, having brought this action, has done so to recover damages for the benefit of the decedent, that is Laura Doull's spouse, Seth Doull,

and her children, her next -- that is her next of kin, her children, her husband -and her husband. And that is for the benefit of them caused -the damages caused to them as a result of Laura Doull's death.

So for this particular claim, first, going back to the original negligence claim I gave you about the -- this aspect of whether or not there was, in fact, negligent conduct on the part of the nurse practitioner, on the one hand and the doctor, on the other hand, you have to determine first was there negligent care. Was there a breach of the duty of care owed to Laura Doull? Was that negligent conduct the legal cause of injury and/or harm to Laura Doull?

And the next aspect that the -- must have been proven is that that injury or harm to Laura Doull ultimately resulted in her death. And there is evidence that she did, in fact, die as a consequence of a number of different conditions. You've seen that on the -- on the death certificate. But among those conditions were CTEPH and pulmonary embolisms.

So if the Plaintiffs have proven that there was, in fact, negligence and that the negligent conduct was a cause of the injuries and/or harm to Laura that ultimately resulted in her death, then -- then the issue that you will be addressing is a separate aspect of, what are called, compensatory damages for the period of time beginning at her death and going forward thereafter.

There are some aspects of this particular wrongful death claim that may appear to be the same as what were covered in the claim -- the claims before her death, and I will try to distinguish those. What's important that you understand is this; even though there may be some duplication in those, a party cannot get double damages for one loss. But because these are separate claims and there are legal aspects with which we need not confuse you because it has nothing to do with the jury's decision, the jury does have to look at each -- each of the -- these types of claims separately even though there may appear to be, in certain aspects of the claims, some duplication. So I will explain that to you in just a moment.

So if, in fact, you do determine that there was, in fact, as I -- as I said -- and let me just get back to the questions that will be ultimately asked of you. That is that Anna C. Foster's failure to provide informed consent to Laura Doull, was that the legal cause in bringing about her death? With regard to Anna C. Foster's failure to diagnose and/or to – to recognize certain symptoms and send Laura Doull to a specialist, if you determine that -- that she was, in fact, negligent in that way and that -- that was the legal cause in bringing about Laura -- Laura Doull's death, as well as the same questions with regard to Dr. Miller -- that is, was -- if you

determine that his failure to provide informed consent to Laura Doull was the legal cause in bringing about her death and his failure to -- in his supervision of Nurse Practitioner Foster, his failure to diagnose or to recognize symptoms that -- and -- and send Laura Doull to a specialist, that that negligent failure was a -- was the legal cause of bringing about her death, if you were to determine any one or more of those, then I'm going to speak to you about the damages that would be awarded on this aspect which is the wrongful death aspect of the claim.

Again, as with the other claims, to some extent you do have some medical bills to -- to others, which you can look at with regard to this aspect of the claim. In other aspects, there's no mathematical formula, no specific document or other thing that's going to give you a specific number. As I described to you earlier with some of the other forms of damages that -- for which an injured person or party may be compensated, you rely on the evidence that's been presented and your good common sense and general life experiences in determining what amount of money would fully and fairly compensate the Plaintiff in question for those particular losses.

So let me just speak to you about what we mean by wrongful death damages. Under the wrongful death statute, the surviving spouse and surviving children of a deceased person are entitled to recover the fair monetary value of the deceased person to them.

So that would mean that Seth Doull, Troy Doull, and Megan Doull are entitled under the wrongful death statute here in Massachusetts to recover the fair monetary value of -- of Laura Doull to each of them. And that would include, but not be limited to, any services that she provided to each of them, any protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice that she would have provided to them after -- if she had not died. In other words, that's why you look at that -- the date of her death. It's going forward from the date of her death.

Now, with regard to the loss of services, loss -- next of kin are entitled to recover the value of any loss of services that Laura Doull regularly performed, before she died, to her family members. Even though those services may have been gratuitous. In other words, she wasn't paid for these services that she provided to her family.

You may also consider the cost of medical care to Laura Doull. Under Massachusetts law, the estate of a deceased person is entitled to recover the reasonable medical expenses incurred in -- in caring for the deceased person's injuries that were caused by the Defendant or Defendants' negligence.

Now, again, please understand that the amount, if any, that you would award here, that is under the wrongful death aspect of damages for medical expenses, may be the same or similar to an amount, if any, that you may award on the damages prior to Laura Doull's death. These are damages for her medical care up to the point up to her death that are related to that.

But let me assure you again, the Plaintiffs do not recover twice for the same damages. There are legal reasons with which you need not be concerned while you address this issue in the two separate aspects of the Plaintiffs' claims for damages.

You may also consider, as another area of damages, any loss of earning capacity prior to her death. The estate of Laura Doull is entitled to recover for the loss of earning capacity from the date of the injuries, that is May 2011, until the date of Laura Doull's death in 2015, October.

And again, this may appear to you to be a duplication, but you really need to look at both of these separately. And even though you may find that you are awarding damages in the same or similar amounts -- or they don't even need to be similar amounts in two different places -- that does not mean that the Plaintiffs are going to be entitled to get twice the compensation to which they would otherwise be entitled.

Conscious pain and suffering of Laura Doull prior to her death is another area. I've already described for you what that is. And so likewise, with regard to this aspect of damages under the wrongful death part of the claim, the damages may be the same, similar; they may be different in your view. But it's for the time period from the point -- you can't start any earlier than the point when in May 2011, but up to the point of her death. And again, you rely on all the evidence that's been presented in determining those particular factors.

Now, I'll go over these aspects with you in just a moment when I go over the verdict slip, but there's one more aspect of the claims that are before you that I need to discuss at this time, and that is this: there is -- there's been a claim of gross negligence made by the Plaintiffs in this case. So I'm going to define for you what we mean by gross negligence. But before I do that I want to make one thing absolutely clear. If you make a determination of gross negligence, you are not to in any way, based on that finding, increase the damages that you award. And that's why you'll see that the question on gross damages -- gross negligence appears after the other questions on damages on this particular questionnaire.

If the jury does determine that there was also, not just negligence, but gross negligence on the part of one or both of the Defendants here, Nurse Practitioner

Foster and/or Dr. Miller, then we will address that particular issue after the jury returns its verdict.

So I'm going to define for you what we mean by gross negligence. And again, the Plaintiffs have claimed that each of these healthcare providers caused Laura Doull's death as a result of gross negligence. And again, because they've made that claim, they have the burden of proving that it's more likely true than not that the negligence was gross negligence, not ordinary negligence, but gross negligence.

Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence, which is what I have defined for you up till this point. It is materially more -- it is a materially more -- let me say that again. It is materially more want of care than would constitute simply inadvertence. It is an act or omission respecting a legal duty that is of an aggravated character, as distinguished from a mere failure to exercise ordinary care. Gross negligence is very great negligence or the absence of slight diligence or the want of even scant care. It amounts to indifference to the present legal duty and to other forgetfulness of legal obligations so far as other persons may be affected.

It is a need -- needless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is, in -- in with regard to gross negligence, magnified to a high degree as compared with the degree of negligence that would be present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary carefulness, ordinary prudence. But it is something less than willful, wanton, and reckless conduct. Gross negligence -- let me skip that question -- that particular line.

Ordinary and gross negligence differ in degree of inattention. Both differ in-kind from willful -- all right. I'm going to ignore that sentence because it's not applicable here as well.

Now, some of the common indicia of gross negligence are deliberate inattention or voluntary incurring of an obvious risk or impatience of reasonable restraint or persistence in a palpably negligent course of conduct over an appreciable period of time. The degree of care required varies with the harm which is likely to result from the danger. You may find gross negligence where the Defendants' failure to perform a legal duty is likely to have a fatal or very serious result.

You are to look at the Defendants' conduct as a whole. You may consider combined failures to exercise due care in different areas as the basis for a finding of gross

negligence. If you determine that Laura Doull's death was a result of either Nurse Practitioner Foster's gross negligence and/or Dr. Miller's gross negligence, then the wrongful death statute would allow you to award an additional amount of damages. But I am not going to determ. – define that for you right now.

So, members of the jury, that is what we mean by gross negligence. And as I said, that will be a question that you will be directed to answer on the questionnaire, depending on your answers to other questions.

Now, members of the jury, with regard to the instructions that I have just given you, please bear in mind that the Plaintiffs had made -- have made separate claims against Nurse Practitioner Foster, on the one hand, Dr. Miller, on the other hand. And they have made different claims as to each of those Defendants. Please bear in mind you must consider each of these claims separately. With regard to your decision on one claim as to one Defendant or the other, they don't necessarily control your decision on the claims -- claim or claims against the other Defendant. So you have to look at each Defendant separately, each claim made as to each Defendant separately. And your decision as to a claim and/or as to a Defendant in no way controls your decision as to the other Defendant and/or any claims against that other Defendant.

Please remember that you must consider the evidence on each claim without any feelings of sympathy, prejudice, bias, fear, or favor. You do not concern yourselves with the effect, if any, of your decision on any of the members of the Doull family. You do not concern yourselves with the effect, if any, that your decision may have on either Nurse Practitioner Foster or Dr. Miller or on -- on either her or his professional reputations.

That's not the purpose for why you are here today.

Likewise, you should not concern yourselves with how others may view any decision you make in this case. I remind you again, that you have not come here to act as advocates for either side. That means you're not here to advocate for any member of the Doull family or for Laura Doull. You're not here to advocate for either Nurse Practitioner Foster nor for Dr. Miller. You are not here to advocate for any cause. That means you're not here to advocate for the medical profession. You're not here to advocate for patients. You are not here to advocate for how patients should be treated. You must remain neutral, objective judges of the facts of this case that has been put before you. The case is important both to every member of the Doull family, the three Plaintiffs here, as well as to Dr. Miller and to Nurse Practitioner Foster. And you must remain fair to each of them.

I remind you that your verdicts must be based on the evidence that's been introduced in the courtroom during the trial and on any reasonable inferences that you have drawn from that evidence. Your verdicts may not, in anyway, be based on speculation or guesswork.

Please consider the evidence that has been introduced as a whole. Please keep an open mind and do not make a decision until you've had an opportunity to examine the exhibits, to discuss the case with the other jurors, and to hear and consider the other jurors' views and opinions of the evidence.

You are about to undertake a serious task. You have a great responsibility in deciding this case. I have confidence that each and every one of you will undertake that responsibility with fairness, impartiality in accordance with the instructions that I gave you during the trial as well as the instructions that I have just given to you.

Now, members of the jury, there are some final instructions I'm going to be giving you in just a minute about the procedures that you'll be following during your deliberation.

Before I do that, I do need to speak briefly with the attorneys at the sidebar to see if there are any additional instructions that they would like me to give you. We have discussed this in advance, but sometimes I may have neglected to give you an instruction that I advised counsel I would give to the jury. Or perhaps sometimes a judge may misspeak and doesn't realize it when he or she is doing it. So they may ask me to correct something I've said. Hopefully this will not take very long, but if you'd like to stand and stretch, please take this opportunity to do so.

(On-the-record sidebar discussion with Mr. Sobczak, Mr. Dumas, Ms. Dalpe and Mr. Newton. Defendant not present.)

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THE COURT: Members of the jury, so it's 4:20, and I think my going over the verdict slip and explaining jury procedures is likely to go past 4:30. And there's still a few more things I need to discuss with the attorneys. So we're going to this: I'm

going to excuse you for the day right now. You're going to return tomorrow morning at nine o'clock. I have not completed my instructions quite yet. So I will finish up by explaining what you do during your deliberations tomorrow morning.

So please continue to follow all the instructions I've given you right along. Don't discuss the case among yourselves or with anybody else. Don't make any decisions. Even though you might start thinking about things right now, wait until you've received all of my instructions. And you'll begin your deliberations only after I send you out to formally begin your deliberations.

I don't think there's anything else I should tell. I don't think there's going to be any media coverage. Make sure you don't read or listen to it. And -- and as I've told you, periodically, there may be topics of a similar nature, TV, radio, newspaper, movie that you're watching, magazine, or book you're reading, just stay away from it so your decisions not influenced by that. Thank you. We will see you at nine o'clock tomorrow morning. Please leave -- oh, there's a hand up. Yes?

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THE COURT: All right. And I believe all of the jurors are here. So could we bring them out, please, and I will complete my instructions to them.

While we're waiting for the jurors to come in, I will state the following for the record: With regard to the various paragraphs or requested instructions that Mr. Sobczak listed yesterday, I reviewed each of them and in particular, I don't recall the number, but it was the one in which he -- you made a request pursuant to Collins v. Barron about admissions of negligence.

I will start by saying the fact pattern was distinctively different from this case. And the -- in that particular case because there was conflicting testimony between the plaintiffs and the defendant doctor as to an alleged admission that the plaintiffs claim the doctor made but the doctor disputed that he had used that language.

In that instance, the court indicated that if the jury were to accept a conclusory admission on the part of the defendant, that that could suffice, but there's no conclusory admissions that I viewed in this particular case, but regardless, I will instruct --

MR. SOBCZAK: Your Honor --

THE COURT: -- in general terms that the jurors can consider other evidence on -- on the issue of causation as I indicated I would do yesterday.

Could we bring in the jurors, please?

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THE COURT: Good morning. Before we resume, members of the jury, have any of you read anything about the case, heard anything about the case, discussed the case among yourselves or with anyone else since we recessed yesterday afternoon?

No affirmative responses. Does any juror have anything he or she would like to bring to my attention or anything you feel should be brought to my attention by your continued service as a juror on this trial or any other matter related to this case?

Again, I see no affirmative responses. All right. Thank you very much.

So members of the jury, I need to start my tape player again. As you may recall, yesterday when we recessed for the day, I had completed my instructions on the law. I was speaking to the attorneys at sidebar and I believe I had advised you that that's something that we all do as judges, after we've competed our legal instructions, is to speak briefly with the attorneys at sidebar to see if there are corrections I ought to make with regard to some -- some -- something about which I might have misspoken during my instructions or if there are any additional instructions that the attorneys would like me to give.

And so with regard to some of those -- with regard to that discussion we were having, both before I excused the jurors and after, there are some additional instructions I would like to give to you.

One of them is this, it's not so much of an instruction, it's some direction. And that is that I've spoken, as you know, in -- over the course of speaking of the different claims that are being made against both Nurse Practitioner Foster and Dr. Miller, and was speaking in particular about the -- both the informed consent claim as well as the negligence claim, the failure to diagnose or to recognize and refer out to a specialist.

You should understand that even though you've heard evidence that it was primarily Nurse Practitioner Foster who was meeting with and -- and giving care to Laura Doull, that there was also evidence that Dr. Miller was supervising and had both supervision and oversight responsibilities over nurse practitioner's care of all of

their patients and that would include Laura Doull. So it is in that -- within that context that the claims are being made against Dr. Miller.

I spoke briefly yesterday at some point, I don't recall quite when, about one of the exhibits. I believe it's Exhibit number 23; it's a death certificate that was displayed to you. And you've heard evidence about it over the course of the trial and I did misspeak when I was referring to the causes of death that are listed on that death certificate.

Most specifically, I said CTEPH was among them, well, I want to correct that comment. It is not, but regardless, members of the jury, you have -- you will have that Exhibit number 23 with you in the jury deliberation room and so you are free to review it with regard to exactly what it does say.

Now, members of the jury, another issue that arose is this: As you know, when I defined the elements of a negligence claim, which are essentially four. Number 1, that there is a standard of care, number 2, that the standard of care was breached, number 3 that breach of that standard of care, the act of negligence, was, what I defined as the legal cause of some injury, harm, or loss suffered by Laura Doull and as well, by her family members.

With regard to those first three elements, that is standard of care, breach, and causation, I instructed you each time that you have before you -- or had before you a number of different opinions offered by doctors who came into court, the expert witnesses who offered their opinions with regard to each of those issues. And my instruction was that you must consider those expert opinions.

I'm not saying that that's not the case here, but you may also, particularly with regard to the issue of causation, whether or not there was a breach that caused, in the legal sense, injury, harm, or loss to Laura Doull and her next of kin, her husband and children, you may also consider all of the rest of what's been introduced into tri -- into evidence over the course of the trial.

And so that would include, among other things, as you know, there's a lot of exhibits and many of the exhibit constitute medical records. Medical records of treatment and care that were given to Laura Doull over this period of time between 2011 and -- and the date of her death in 2015.

So if there are certified true and complete copies of doctors' reports, that is, either doctors or other medical providers within those records, and -- and I can tell you that there are quite a few of them -- those reports and medical records relating to medical services rendered to Laura Doull, they have been introduced and admitted

into evidence as exhibits. They will be available to you in the jury room over the course of your deliberations. So you'll be able to review them.

And you can consider those medical records as evidence, not only of the physicians or healthcare providers' treatment, diagnose, and prognosis with regard to Laura Doull, but also as evidence of any disability or incapacity resulting from the conditions so diagnosed. So again, you may consider those records as well on the issue of causation.

So members of the jury, let me just talk at this point, about the deliberation process that you will be going through. Number one, most people are familiar with what happens in a criminal trial. It's a different standard of proof, obviously, than the standard of proof I've defined for you, but another difference is that in a civil trial, unlike in a criminal trial, the verdict of the jury need not be unanimous. If this were a criminal trial, the jury could not reach a verdict unless all of the deliberating jurors agree.

That is not the case in civil cases. Here in the superior court, our juries are made up of 12 people, but in cases such as this one where the judge expects that the trial will go over a period of time, and it's not unusual that a juror may need to be excused before the case finishes because of some emergency or illness or some other reason, we sit additional jurors just to make sure that we do have 12 jurors at the end.

Well, fortunately for all of us, you've all been here right straight through, so there's been no reason that any of you were excused. However, in a civil case, only 12 of you, as in a criminal case, can deliberate.

So in a few minutes, Mr. Simanski, will be taking a barrel, I think, that we have here. Oh, there it is, right there on the edge of the witness stand. All of your numbers but one will be put in that barrel. He's going to roll it. He's going to just reach in and blindly and randomly pull out two numbers. Those two jurors will be the alternate jurors. The fact that you were seated at a particular time does not mean you're going to be an alternate.

With regard to the alternate jurors, they're not permitted to participate in deliberations, but that doesn't mean they get to go home and they're no longer and important part of the jury. So they will remain here at the courthouse, kept away from the deliberating jurors and -- and just in another room here behind the courtroom.

And the reason for that is, occasionally while jurors are deliberating an emergency may arise that requires that a deliberating juror be excused and in that instance, the alter an alternate would be sent in to substitute for that juror who's been excused.

And so whoever you are, the two of you, whoever you are that will become the alternate jurors, I am instructing that you can't talk about the case in any way for this reason. If you are sent to substitute for another juror, you would obviously have that discussion in mind. And the other jurors, with whom you would then be officially deliberating, have not had the opportunity to participate in that discussion or to even know word for word what the discussion was. So whoever the two of you are, you can talk about whatever you want, just make sure you don't talk about this case.

Now, the one juror who's not going to be in the barrel, whose number is not going to be in the barrel is the juror seated in seat 12. Thank you.

Would you be willing to serve as the foreperson on this jury?

JUROR 12: Sure.

THE COURT: Okay. So let me just describe to all the jurors what the foreperson's role is.

The foreperson essentially, is the person whose responsibility, to the extent that the foreperson and the rest of the jury thinks it's helpful, is to sort of organize the discussion. And at various points, the jurors may want to take a vote, so it might be the role of the foreperson or some other juror deliberating to kind of keep track of what the jurors are doing with regard to their votes. So really, we leave it up to the jury itself, the deliberating jurors to decide how they want to do that. But one of the things we do need to do, the judge does need to do is designate a foreperson for other reasons.

Number one, the foreperson's job is to record the verdict of the jury on a verdict slip that I will go over with you momentarily and it's kind of long.

The other thing is you have a pen? Yes, you do. Okay. So I just ask that the foreperson make sure that the verdict slip is recorded in pen, because this is part of the permanent record of the court and therefore, the verdict slip needs to be recorded in a permanent form.

When the jurors complete their deliberations, and when you complete your deliberations essentially is based on how you answer your questions. So sometimes

you may need to answer all of the questions, in other instances, depending on your answers, you may not need to answer every single one of the questions. But once the jurors have completed their deliberations, the foreperson's job is to sign the verdict slip and to put the date on which the jurors selected -- completed their deliberations. And you will see that that is on the final page of the -- the verdict slip that you will have in the room with you.

Now, with regard to the role of the foreperson, getting back to the fact that the jury's verdict need not be unanimous. When ten of the deliberating jurors agree to an answer to a question, then you have a verdict on that question.

And then the foreperson writes in -- if it requires words or numbers -- writes in the words and numbers to which at least ten jurors have agreed. And if it's a yes or no answer, the foreperson has made an X or a checkmark next to the answer which is yes or no.

Now, the foreperson might not agree. It may be that 10 or 11 of the other jurors all agree on an answer, but the foreperson does not. But the foreperson's role is to record the verdict of the jury, not -- not what he happens to think. So disagreement does not mean that the foreperson gives up his responsibility or does not write down what the verdict of the jury is.

Now, as you move through the questions, as I said, there need to be at least ten jurors in agreement in order for you to have a verdict, in other words, an answer to a particular question. It may be 11, it may be all 12; that's perfectly fine, but it needs to be a minimum of 10.

As you move through the questions, it might be that the number who agree on a particular question is not the same number on the next question or some question later on down the line. That's perfectly fine. It can be, as I said, 10, 11 or 12 but a minimum of 10. It may even be that as you move through the questions, that ten jurors agree to an answer on a particular question. You move on to another question and 10 different jurors or maybe it's a different number of jurors, 11 or 12 agree, that's perfectly fine. It does not -- it need not be the same people who are all in agreement, it's just a minimum of ten jurors in agreement and then you will have an answer to the question that's recorded as your verdict. And as I said, in just a minute I will go over that juror questionnaire with you.

Now, with regard to another role that the foreperson plays, is occasionally while jurors are deliberating they may have some questions or requests. It may be that you may ask the judge to repeat an instruction or to try to clarify an instruction that's

been given to you. As I said, I'm going to send my – my recorder and the tape and an outline of the instruction topics that I've given to you into the jury room so you're free to play back parts of it if you think that will be helpful. But sometimes jurors may decide we really would like the judge to repeat or clarify that instruction. So the foreperson's job is to write out as clearly as possible what it is that the jurors are requesting and to -- to do that in pen.

In addition to additional instructions on the law, the jurors may have other requests or questions and likewise, that's perfectly fine. But I do ask that the foreperson take responsibility for trying to, in as clear terms as possible, let us know what it is that you're looking for.

With regard to questions or requests, if you ask us any questions about the law -- about the facts, my response will be I can't tell you that. You have to rely on your own memory of what's been introduced and the exhibits that are in the jury room with you.

If you ask to see any of the things that were not actually admitted as exhibits, that is, anything that had a letter on it, my response will be no, we cannot send that in to you because it's not an exhibit. The exhibits are only those matters that were admitted with numbers, Exhibits 1 through 36.

One of those exhibits, I believe it's number 36, are some compact disks of images of -- of Laura Doull. By images, I mean, radiological images. And so you'll have those in the jury room with you, but obviously there's nothing in the jury room that will assist you in being able to view them. So if you would like to actually view any of those, if you would just send out a message, we will get a computer -- laptop computer of some sort that will enable you to do so. So something like that is perfectly fine to request as well.

Now, among the exhibits, you may see that some of them have some things blacked out. And that's purposeful because there are things that are either irrelevant or not admissible under our rules of evidence and so please don't try to look through and see what they say underneath, that would improper. And those are the things that are purposefully blacked out. You will see that they are blacked out. As you know, among the things that you will have in the jury room with you are actually -- is actually, I believe, it's Exhibit 1 or 2, Laura Doull's medical report that contains you've -- it's the orange folder right there on top.

Now, there are some things, as you know, you've heard evidence about being crossed out or whited out, you're perfectly free with regard to those things, to look

underneath to see if you can figure out what it says, if -- if you think that would be helpful. But at least with regard to the other matters, just as an example, for instance, Exhibit 23, the -- the death certificate has some things crossed out. Please don't in that -- in that particular instance, but in any other instance where you see similar blackouts, please don't try to read what it says underneath.

Now, with regard to another responsibility of the foreperson is this, once the jury has reached a verdict in this case, in other words, you've answered all the questions that you are required to ask -- you are required to answer, then the role of the foreperson will be, once you come into the courtroom, to announce in court what the verdict of the jury is, but I will explain that process. You're actually following the lead of Mr. Simanski who will go through the various questions and you just respond and let us know here in open court what the verdict of the jury was.

So are you willing to undertake all those responsibilities?

THE FOREPERSON: Yes.

THE COURT: Thank you so much.

Okay. So let us now go into the verdict slip. And what we've done is we've made photocopies of the verdict slip and we're going to hand one out to every one of the jurors because I think it'll be easier if you can read along with me.

(Pause.)

……..

So before go over those verdict slips, and I just ask that you turn them over, and I'll go over them with you.

One other thing I want to mention is, as you know, you've all been permitted to take notes throughout the course of this trial. You have all been permitted to take notes throughout the course of this trial and you'll be able to take your notebooks into the jury deliberation room with you. Please remember, these are just your notes. These are not evidence. The evidence is the testimony of witnesses as well as the various exhibits that have been admitted here during the trial. You also have been permitted to use those black notebooks during the course of the trial and I will permit you -- because I told you you could take notes on those pieces of paper as they're being referred -- you are permitted to take those, as well, into the jury room with you. But I -- I want to emphasize this, the fact that there are selected pages does not mean that any of this is any more important and you absolutely should not consider the

mere fact that there are some selected pages as this is more significant, more important, more credible evidence at all. The only reason why these particular selected pages were handed out to the jurors was to assist them as -- as a witness was testifying about particular things on a -- on a particular document to be able to more closely see those things.

Similarly, during the trial, as you remember, there were some of these pages that were put on the screen, other parts of the evidence as well that was put up on the screen. But the mere fact that things are singled out does not, in any way, mean it's any more important. It's entirely up to you to decide what is and is not significant. But please remember, there's a lot of documents here and it's up to you to decide as you go through the documents what is and is not important to the decision or decisions you make. I believe there are an additional three pages which were are not in your notebooks that Mr. Sobczak used yesterday. And they were put up on the screen for you to see and those, additionally, will be among the things as -- as your -- as your notebooks which were pulled out the records as a whole only just because the lawyer may have wanted to emphasize something in the particular record. But, likewise, the mere fact that this may be -- these are selected parts of the record, does not mean they're any more significant to your decision.

So there's a lot of records here. I -- I know the jurors have to make their decision as to how to -- how to deal with all of the records, but it's just very important that you all understand that the fact that the lawyers may have selected out certain parts of the records just to emphasize things and it does not mean that those documents are any more credible or any more important or should be given any greater reliability by the jury. That's your decision to make from all of the records that have been admitted.

Okay. So let's talk about the verdict slips. If you turn them over, this will give you an opportunity to -- to understand the answers you're going to be giving.

So there's 14 verdict slips that have been handed out, but you're not going to be taking 14 -- 12 verdict slips into the jury room with you. You'll only be taking in one and that is the one that the foreperson has right now, so I ask that you not write anything on it, Mr. Foreman.

And with regard to the verdict slips, the reason we don't send in multiple ones is because people could be making markings on them and it can become confusing. Very occasionally while jurors are deliberating, by the way, there -- there may be something written on a verdict slip and a juror -- the jurors may request a fresh copy, that's fine. But we just want to make sure that if you do have that kind of

error, that you make an X or a checkmark or something through the erroneous verdict slip and then use the -- the fresh copy if you do request one, but hopefully we don't need to do that.

Okay. So let's go over the verdict slip. As I said, as you discuss the case, you're going to, at some point, begin answering questions and these particular questions are set up in a particular way. Because, depending on your answer to a question, you may or may not need to answer the following question or questions.

So for instance, when you look at Q1, question one, and under it Al, answer one, you will see in parenthesis a direction as to what the jurors do next.

At the beginning of the process, those directions are not all that complicated. As we go -- as you get toward the end of the questionnaire, you will see that they are a little bit more complicated and I will try to explain to you why it is that those directions are there, just so that you'll have a general understanding about what are they talking about when they do or do not answer the first -- the following question.

So let's start with the first group, and you'll see at the top there's a reminder, 10 out of the 12 jurors must agree and in order to answer any single question but the same jurors not need not agree on each question. So that's just a reminder of what I told you earlier.

The first group of questions relates to the claims that have been made against the Defendant, Anna C. Foster, nurse practitioner. The first of those is that claim of lack of informed consent.

So the question is, "Did the Defendant, Anna C. Foster, N.P., fail to disclose material medical information to Laura Doull with respect to use of the prescribed progesterone cream?" And there's two possible answers yes or no.

Again, once 10 jurors or 11 or 12, agree to one of those answers the foreperson makes an X or checkmark next to the jury's answer. And if you answer yes to that question you go on to question 2. On the other hand, if you've answered no, then you would be going on to question 5, which is a different topic. So that's the reason you need not answer the questions in between.

Question 2 is, "Have the Plaintiffs proven that if the required information had been disclosed to Laura Doull by Anna" -- Anna "Foster, N.P., either she nor a reasonable person in the same circumstances would have chosen to undergo the progesterone cream treatment. And again, there's two possible answers, yes or no. If you answer

yes, then you'd go on to question 3, if you're answer's no, then you would skip to question 5.

Question 3 is, "Was Anna C. Foster, N.P.'s failure to provide informed consent to Laura Doull the legal cause of injury or harm to Laura Doull from May 2011 until her death in October 2015?" And again, two possible answers, yes or no.

Now, with regard to this question, again, you'll see that language, legal cause. By legal cause, I mean that definition that I gave you of cause or causation during my instructions yesterday.

Now, with regard to question 3, regardless of whether you answer yes or no, you're going to be going on to question 4, which is somewhat similar to question 3, but a little different.

Question 4 reads, "Was Anna C. Foster, N.P.'s failure to give informed consent to Laura Doull the legal cause in bringing about her death?" And again, two possible answers, yes or no.

Regardless of your answer there, you will go on to question 5. Question 5 refers to the evidence and the claim of neg -negligent failure to diagnose or refer Laura Doull to a specialist.

So the first of those questions is, "Was the Defendant, Anna Foster, N.P., negligent in her care and treatment of Laura Doull?" With regard to that issue, diagnosis and referral to a specialist, with regard to the -- the pulmonary embolisms or PEs as they were referred to during trial.

If your answer to question 5 is yes, then you go on to question 6. If your answer's no, then you're going to skip ahead to ques -- question 8.

Question 6 is, "Was the negligence of Anna Foster, N.P., the legal cause of injury or harm to Laura Doull from May" -- 11 -- May -- "May 2011 until her death in October 2015?" Again, yes or no.

Regardless of your answer to that question, you would go on to question 7, which reads, "Was the negligence of Anna Foster, N.P., the legal cause in bringing about Laura Doull's death? Yes or no."

Now, the difference between, for instance, question 6 and question 7 and above question 3 and question 2 -- I'm sorry, question 3 and question 4, is the difference between the straight negligence and the wrongful death claim and that's why even

though they may appear to be similar, they are not. So you do have to consider both of those questions separately.

So regardless of what your answer is to question 7, you would then go on to question 8, which begins the claims against Dr. Miller.

The first is lack of informed consent, which reads, "Did the Defendant, Robert J. Miller, M.D., fail to disclose material medical information to Laura Doull with respect to the use of the prescribed progesterone cream? Yes or no."

If your answer's yes, then you'd go on to the next question 9, if your answer's no, then you go head to question 12.

Question 9, "Have the Plaintiffs proven that if the required information had been disclosed to Laura Doull by Robert Miller, M.D., neither she nor a reasonable person in the same circumstances would have chosen to undergo the progesterone cream treatment?" And again, yes or no are the possible answers.

If you answer yes, then you'd go on to question 10, if you answer no, then you skip ahead to question 12.

Question 10 reads, "Was Robert J. Miller, M.D.'s failure to provide informed consent to Laura Doull the legal cause of injury and/or harm to Laura Doull from" -- May 11, I'm sorry "May 2011 until her death in October 2015?" Yes or no.

Regardless of your answer to that question, then you would go on to the next question 11, "Was Robert J. Miller, M.D.'s failure to provide informed consent to Laura Doull the legal cause in bringing about her death?"

And again, yes or no, but regardless of your answer, you move on to question 12 which is, "Negligent supervision" and again, this is with regard to the claim that Nurse Practitioner Foster and Dr. Miller, who was supervising and overseeing her care of Laura Doull failed to diagnose pulm – pulmonary embolisms or to recognize signs and symptoms and refer her to a specialist for that potential diagnosis.

"So was the Defendant, Robert Miller, M.D. negligent in his care and treatment of Laura Doull?" There are two possible answers here, yes or no.

And then you will see there is a very long list of directions after that. The first is, if your answer's yes, go to question 13. The next is essentially this, if your answer is no, but you answered yes to some of the earlier questions and they are all listed then, thereafter, then you would go on to the damages section of this questionnaire.

If -- and then there's another sent set of parenthesis which says if your answer to question 12 is no and you did not answer yes to any of the following questions -- and there's a number of numbers listed there - you don't need to go any further, you don't have to answer any other questions because your deliberations are complete. You have reached a verdict.

So I'm not going to go over each of those questions but essentially, as you're going through the questionnaire, if you come to this place and you -- you have, for instance, an answer of no, then you just go to that direction to see, well, what do we do next. And that may require that you go back to the earlier answers to questions.

Question 13, "Was the negligence of Dr. Miller the legal cause of injury or harm to Laura Doull from May 2011 until her death in October 2015?" Again, two possible answers, yes or no.

Regardless of how you answer this question, if you do go to this question, then you go on to question 14 and that reads, "Was the negligence of Dr. Miller the legal cause in bringing about the death of Laura Doull? Yes or no."

And likewise, under this -- these two possible answers, you will see that there are three different sets of directions about what you do depending on your answer.

If your answer to question 13 and/or question 14 is yes, then you go on to the damages section of this questionnaire and follow the directions.

And then there's another res -- there're another directions as to if your answers to both are no, but you answered yes to earlier questions that are listed there, then you go on to the damages section as well.

If your answers to both 13 and 14 are no and you did not answer yes to a number of other questions which are listed there, likewise, in that instance, as I told you with the earlier question and answers, you have reached a verdict, so you do not need to answer any of the remaining questions.

So the next section is the damages section of the questionnaire. And we start with negligence damages; that is prior to Laura Doull's death. So that's for the time period between May 2011 and October 2015. And under that you'll see there's an instruction, "Provide answers to these questions only if you answered yes to one or more of the following questions." And they're all listed there, there's four of them.

So if you answered yes to at least one of those questions or more of those questions, but at least one, then you will be answering these questions.

And so here it is at this point that if the jury has determined there was negligence, that was a legal cause of injury and harm and loss to Laura Doull that the jury would be writing down the amount of compensation that the jury believes is -- is fair and reasonable for those losses and -- and harm.

And so this says, "Please state in words and numerical figures the amount of money, if any, that you award as full and fair compensation for" and then you'll see there are different factors that are listed here.

So the first is for Laura Doull's past medical expenses, that is May 2011 through the date of her death October 2015. And below that you will see two lines, one of which has a dollar sign in front of it and a blank. The line below that is just blank. And you'll see below the first line it says, "Amount in numerical figures". Below the second, "amount in words." I may be stating the obvious, but I've had juries that didn't do this.

If you do make an award, the numerical figure and the figure in words need to be the same otherwise we have to send you back to try to find out what you mean.

B, is her -- Laura Doull's loss of earning capacity from May 2011 until the day of her death in October 2015. And similarly, there are lines for any award that jury makes here in both numerical figures and in words.

And the third section is Laura Doull's pain and suffering. That is the pain and suffering she endured between May 2011 and October 2015. And similarly, two separate lines for the jury to indicate in numerical figures and wor -- words any -- any award that they are making.

The next section, on the next page, is loss of consortium, and these are the claims that are being made by Laura Doull's husband and her two children. And this is for the period before her death, so that is again, between May 2011 and October 2015.

And you'll see below there, there's likewise, an instruction that tells you that you are to answer these questions, the loss of consortium questions only if you answered yes to one or more of the four questions that I've indicated there in the direction.

The first is Seth Doull. The second is Megan Doull. The third is Troy Doull. And likewise, you will see under each of those names and a little description of what we're speaking about here that there are lines, one of which would be -- in which the jury, if the jury finds there is a -- an award for loss of consortium where you would indicate in numerical figures and words the award that you are making for each of those separate individuals.

So with regard to Seth Doull, I will just read this, "Please state in words and numerical figures the amount of money, if any, that will fully and fairly compensate Seth Doull for his loss of companionship, society, comfort, solace, moral support, enjoyment of sexual relations, restrictions on his social or recreational life and deprivation of the full enjoyment of the marital state of his spouse, Laura Doull, prior to her death."

For Megan Doull and Troy Doull, the language is somewhat similar but a little different because these are children and not a spouse. So this reads that, "Please state in words and numerical figures the amount of money, if any, that will fully and fairly compensate" -- each of them and I'm not going to repeat it for each of them -- "for the particular child's loss of the companionship, society, comfort, solace, moral support any restrictions on the child's social or recreational life, any significant restructuring of that child's life as a result of that child's mother's injuries and deprivation of the full enjoyment of the parent-child relationship with the mother prior to her death."

Now, the next section, which begins on page 7, is entitled "Wrongful death". And if you remember this -- this is the claim that is based, in large part, on damages after Laura die --dea -- after Laura Doull died. And so you'll see again, there are instructions here, "Please provide answers to these questions only if you answered yes to one or more of the four listed questions." And those are the questions where the -- where the end of the question was, "resulting in her death". So that's why those questions are distinguishable from the four questions earlier.

So the question here is, "What is the fair monetary value of the decedent, Laura Doull, to each of her next of kin, including, but not limited to compensation for the loss of the services she regularly provided even if gratuitous, protection, care, assistance, society, companionship, comfort, guidance, counsel and advise of the decedent" -- that would be Laura Doull.

And so for this area, again, you have three individuals listed, Seth Doull, Megan Doull and Troy Doull. Likewise, under each of their names are two separate lines, one for a numerical figure, the other for the figure in words, if there is an award of compensation. But what it's important that you remember is with regard to these three -- this -- this section, under the wrongful death, this is from the date of her death going forward.

The other, where we spoke of loss of consortium was from the period of time of her injury up until the day of her death. So they're distinguishable periods of time.

Now, under that, you will see that there's another section which is under the wrongful death section. "Please state in words and numerical figures the amount of money, if any, that you award as" -- full and compe -- "full and fair compensation for the estate of Laura Doull's damages for Laura Doull's medical and hospital expenses necessitated by the injury which caused her death. And again, there are two separate lines, for numerical figures and this -- the -- the figure, if any award is given by the jury, in words as well.

Unlike the award to her next of kin, obviously, once she's deceased, there are no medical and doctor bills going forward. So this would be for the medical bills that were incurred up til the time of her death.

And as you may or may not remember, when I was instructing the jury yesterday, but this is where you would see this, this may be an identical figure to the one, if any, that you award going back on page 5, her past medical expenses. It may be the same, it may be similar, it may be altogether different. But what you need to understand is these -- both of these amounts, if you do make an award here, are for the same time period.

But also, just so that there's no confusion here and jurors don't start deducting or -- or putting down half figures, if for instance, the jury were to make an identical award both on page 5 and page 7 for Laura Doull's medical expenses, that doesn't mean that the -- that the Plaintiffs get twice the amount of what was actually incurred.

There's a reason -- legal reasons why this needs to be under two different sections, but what you need to understand is this does not mean that there's double recovery at all. It's just that full figure needs to be written down by the jury if there is an award for medical expenses. So it may seem a little confusing, but it's just one of those things that's a legal matter.

Similarly, in the next section, Laura Doull's conscious pain and suffering preceding her death. Similarly, that question which appears on page 8 as as with the medical expenses would, obviously, logically, apply only up till the point where she dies. It can't be going forward because she'd deceased. And so at that point, Laura Doull is no longer suffering or enduring physical and/or mental pain and suffering.

So that figure, as well, may be similar to or identical to an award that you may have made back on page 5 for her pain and suffering. But as with the medical expenses, the Plaintiffs aren't entitled to recover twice as much. They're only entitled to recover once, but this is another issue where for legal reasons, for which you need

not be concerned, the award needs to be written out in two different places because there's two separate claims.

Now, the final part of that question is loss of Laura Doull's earning capacity prior to her death. And as you may recall, that similarly was a question asked earlier on page 5. And so the jury would be awarding, in that instance, the loss of earning capacity.

Now, with regard to the next section, members of the jury, it's entitled, "Gross negligence". I defined that for you yesterday. You will see under that quest -- that set of questions an instruction that you answer these questions only if you answered yes to one or more of the following questions, that is questions 4, 7, 11 and/or question 14.

And so in each of those instances, the jury would have made a determination, if the jury did it, of yes on one or more of those questions if there was negligence, then you determine whether or not that negligence in par -- as to that Defendant, did or did not consistent more than ordinary negligence, but, in fact, constituted gross negligence, as it's been defined for you.

So the first question that you would be asked to answer there is this, "If you answered yes to question 4 and/or to question 7, was Anna C. Foster, N.P., grossly negligent? Yes or no."

And then you move down to the next question. If you answered yes to question 11 and/or question 14, "Was Robert J. Miller, M.D., grossly negligent? Yes or no."

Now, you will not see under this question – these questions any damages. There's a reason for that. We just want you to answer those questions. If, in fact, you have found one or the other or both of these Defendants negligent on one or the other or both of the specific claims, informed consent and the diagnosis claim.

And below -- at the bottom here, you will see in bold, it says, "I hereby certify that at least" -- 10 of the 12 -- "10 out of 12 of the deliberating jurors concur in the answers to the above questions."

And it's at this point that the foreperson signs the verdict slip and puts in the date on which you reached a verdict and if you are not aware of it, today is October 5th.

So whenever the jury reaches a verdict, then you would put in the date at that time.

And so the jury may be answering questions over the course of one day or more than one day, but there is no -- you don't sign anything until all of the questions that you need to answer have been answered.

And as I said, it may very well be that the jury does not need to answer all of these questions depending on answers you've given to some of the earlier questions. But the directions are in -- intended to explain to you what do we do next depending on this answer.

All right. So members of the jury I've always – already spoken to you about the if you have any questions or requests. Perfectly fine, just write it out, Mr. Foreperson, as clearly as possible and we will respond as quickly as we can.

I do need to discuss any questions or requests with the lawyers on the record so sometimes if I'm in the middle of a hearing on an unrelated matter, I need to recess that and get the witness, I'm sorry, the lawyers from this case into the courtroom, discuss it and determine how we will respond. Usually it doesn't take a lot of time but sometimes it takes a little bit.

If I can respond in a word or two, I will write my answer at the bottom of the question you've sent out. If I do that, Mr. Foreperson, don't throw away the question and answer. Keep them with the -- I would say with the exhibits, because my -your question and my answer is part of the permanent record.

On the other hand, if it appears appropriate for me to respond in more than just a few words, you'll be brought back here in the courtroom and we will respond here.

Now, as you are deliberating, I believe I told you all yesterday, during the lunch hour, unlike every other day before you began your deliberations, you were permitted to leave if you wished or stay here in the courthouse during the lunch hour. Once jurors are actually deliberating, they don't get to leave during the lunch hour. So we will provide lunch for you during the normal lunch time which is between one and two.

I expect, at some point, the court officers, maybe before you begin your deliberations, will take a lunch order just, even though you may not need it, at least so we have that done and the lunch order is usually put in about an hour in advance of the lunch hour.

And the reason we all follow the same basic time period is usually because otherwise people aren't available. So if you reach a verdict or have questions between one and two, it might very well be that we're not all here because that is

the normal court lunch hour. And so just bear with us. We're not ignoring you. We're not trying to make you stay any longer than necessary, but we need to have all the lawyers, the judge and the clerk and other court personnel available to take a verdict or even to respond to a question or questions.

Now, one thing I do at the end of the court day, if it gets to about four o'clock or so and we've not heard from the jury that they've reached a verdict, I will send a note into you. I want to explain in advance why I'm doing that. As you know, I've told you the end of the court day is 4:30. And I'm sure that some, perhaps all of you have made arrangements on the assumption you would not be staying any later than 4:30 whether it's childcare, transportation, plans to meet up with somebody.

The reason I send in a note is this; it is not to tell you, okay, members of the jury, you have to rush along because it's almost 4:30. That would be absolutely improper. You need to give this case full -- full consideration and not rush to judgment in any way. And it's not my intention to suggest that you ought to do so.

But the reason for the note is this; it's really just a way of saying, would you like to recess at this point and return tomorrow morning. And I send it in a little bit early because sometimes jurors say well, we -- we think if we can stay a little longer we can either finish our work or at least resolve one issue if we can stay a little past 4:30.

So by sending a note into you at about four o'clock, would enable -- if all the deliberating jurors agree -- would enable you to get a message through to somebody to say I'm going to be a little bit late, so they wouldn't be expecting you quite at the time you would otherwise be available for whatever your plans are.

Now, with regard to those issues, the one thing I will say is that -- and I believe the case is the same in this courthouse, am I correct, Mr. Simanski, that there's air conditioning here, but I think it goes off without our control promptly at 4:30. So sometimes it can get a little bit hot.

And another thing I like to point out to jurors, particularly jurors who are beginning their deliberations early in the morning, which you will be doing shortly after ten. It's a pretty long day and sometimes jurors feel that, even though they think, oh, we ought to stay longer, it may be more productive for you to just stop for the evening, clear your brains and come back the next day rather than rushing to judgment just to get something done.

But what's most important is that you understand I'm sending the note not for any reason other than to say, what would you like to do here, recess for the day or stay a little past 4:30.

Cellular phones are not permitted to be in the jury deliberation room with you. So the 12 of you who are deliberating, as you go into that deliberation room, your phones will be removed from you. If anybody has any other type of electronic device, a laptop or a tablet or anything of that sort, likewise, that will be removed from -- from you and you can't have it in the deliberation room, for a couple of reasons.

100 percent of your attention needs to be on these deliberations and so if people are sending messages, looking at messages, making phones calls, getting phones calls, obviously, that is not the case.

And the other reason we do that is there have been instances, I'm not saying any of you would do it at all, but there have been instances in the past years where, after the trial was finished, it came to the attention of people involved in the case that jurors were using electronic devices to get information related to the case even though none none of that had been presented in the courtroom and we don't want to have that happen, so that's the rule.

For the two alternates, we're not going to take away those electronic devices, et cetera, from you, but I just instruct you, please don't be making calls or texting anybody or emailing anybody or looking up anything that has anything to do with the case, either directly or indirectly. But we don't take the phones from those individuals.

And I just remind the two alternates, whoever you are, please just make sure you don't discuss the case in any way or make any decisions in the event that it might be necessary that you might be sent it to substitute for a juror who had been deliberating but had to be excused because of some unexpected emergency.

As I've told you before, I've been recording my instruction. There will actually be two tapes. We went over to a second tape. The outline has topics in the order in which I addressed them and for some, but not all of the topics, you'll see I've -- I will tell you which tape number, which side of that tape and roughly at what counter number I began discussing the topic in question.

And again, if there's a topic on the list and there's not a counter number or whatever next to it, it's not any indication that that's less important than the other topics, not at all. It's just helpful, I find, for periodically for the jurors to be able to see roughly,

well, I want to listen to this topic, I see the judge started the next topic here, so I will just -- we'll go back from there.

Just to give you some direction if you want to listen to a portion of my instruction as to where you are likely to find it on the recording.

So counsel, is there anything else with regard to procedures, Mr. Sobczak?

MR. SOBCZAK: No, you Honor.

THE COURT: Mr. Dumas?

MR. DUMAS: No.

Special verdict slip

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT DEPARTMENT

OF THE TRIAL COURT

FRANKLIN, ss. CIVIL ACTION NO. 1478CV00058

SETH DOULL as Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and SETH DOULL as next friend of TROY DOULL,

Plaintiffs,

v.

ANNA C. FOSTER, N.P.; and ROBERT J. MILLER, M.D.,

Defendants.

SPECIAL VERDICT QUESTIONS

(Instruction to the Jury: 10 out of 12 jurors must agree in order to answer any single question, but the same jurors need not agree on each question.)

CLAIMS AGAINST THE DEFENDANT ANNA C. FOSTER, N.P.

LACK OF INFORMED CONSENT

Q.1. Did the defendant, Anna C. Foster, N.P., fail to disclose material medical information to Laura Doull with respect to use of the prescribed progesterone cream?

A.1. **YES** _____ **NO** ✓

(If your answer to Q.1 is "YES" go to Q.2. If your answer is "NO", go to Q.5.)

Q.2. Have the plaintiffs proven that if the required information had been disclosed to Laura Doull, by Anna Foster, N. P., neither she nor a reasonable person in the same circumstances would have chosen to undergo the progesterone cream treatment?

A.2. **YES** _____ **NO** _____

(If your answer to Q.2 is "YES", go to Q.3.If your answer is "NO", go to Q.5.)

R.A.V - 237

Q.3 Was Anna C. Foster, N.P.'s failure to provide informed consent to Laura Doull the legal cause of injury or harm to Laura Doull from May 2011 until her death in October 2015?

YES _____ **NO** _____

(Regardless of your answer, go to Q.4.)

Q.4. Was Anna C. Foster, N.P.'s failure to provide informed consent to Laura Doull the legal cause in bringing about her death?

A.4. **YES** _____ **NO** _____

(Regardless of your answer, go to Q.5.)

NEGLIGENT FAILURE TO DIAGNOSE OR REFER TO A SPECIALIST

Q.5. Was the defendant Anna Foster, N.P. negligent in her care and treatment of Laura Doull?

A.5. **YES** ✓ **NO** _____

(If your answer to Q.5 is "YES", go to Q.6. If your answer is "NO", go to Q.8.)

Q.6. Was the negligence of Anna Foster, N.P. the legal cause of injury or harm to Laura Doull from May 2011 until her death in October 2015?

A.6. **YES** _____ **NO** ✓

(Regardless of your answer, go to Q.7.)

Q.7. Was the negligence of Anna Foster, N.P. the legal cause in bringing about Laura Doull's death?

A.7. **YES** _____ **NO** ✓

(Regardless of your answer, go to Q. 8.)

CLAIMS AGAINST ROBERT J. MILLER, M.D.

LACK OF INFORMED CONSENT

Q.8. Did the defendant, Robert J. Miller, M.D., fail to disclose material medical information to Laura Doull with respect to use of the prescribed progesterone cream?

A.8. **YES** _____ **NO** ✓

(If your answer to Q.8 is "YES", go to Q.9. If your answer is "NO", go to Q.12.)

Q.9. Have the plaintiffs proven that if the required information had been disclosed to Laura Doull by Robert Miller, M.D., neither she nor a reasonable person in the same circumstances would have chosen to undergo the progesterone cream treatment?

A.9. **YES** _____ **NO** _____

(If your answer to Q.9 is "YES", go to Q.10. If your answer is "NO", go to Q.12.)

Q.10. Was Robert J. Miller, M.D.'s failure to provide informed consent to Laura Doull the legal cause of injury and/or harm to Laura Doull from May 2011 until her death in October 2015?

A.10. **YES** _____ **NO** _____

(Regardless of your answer, go to Q.11.)

Q.11. Was Robert J. Miller, M.D.'s failure to provide informed consent to Laura Doull the legal cause in bringing about her death?

A.11. **YES** _____ **NO** _____

(Regardless of your answer, go to Q.12.)

NEGLIGENT SUPERVISION

Q.12. Was the defendant Robert Miller, M.D. negligent in his care and treatment of Laura Doull?

A.12. **YES** ✓ **NO** _____

(If your answer to Q.12 is "YES", go to Q.13)
(If your answer to Q.12 is "NO" and your answer was "YES" to any of the following questions: Q.3, Q.4, Q.6, Q.7, Q.10 and/or Q.11, then go to the "DAMAGES" section and follow the directions.)
(If your answer to Q.12 is "NO' and you *did not* answer "YES" to any of the following questions: Q.3, Q.4, Q.6, Q.7, Q.10 and/or Q.11, you need not answer any other questions as you have reached a verdict.)

Q.13. Was the negligence of Dr. Miller the legal cause of injury or harm to Laura Doull from May 2011 until her death in October 2015?

A.13. **YES** _____ **NO** ✓

(Regardless of your answer, go to Q.14.)

Q.14. Was the negligence of Dr. Miller the legal cause in bringing about the death of Laura Doull?

A.14. **YES** _____ **NO** ✓

(If your answer to Q. 13 and/or Q.14 is "YES", go to the "DAMAGES" section and follow the directions.)
(If your answers to *both* Q. 13 and Q. 14 are "NO", and your answer was "YES" to any of the following questions: Q.3, Q.4, Q.6, Q.7, Q.10 and/or Q.11, then go to the "DAMAGES" section and follow the directions.)
(If your answers to *both* Q.13 and Q.14 are "NO' and you *did not* answer "YES" to any of the following questions: Q.3, Q.4, Q.6, Q.7, Q.10 and/or Q.11, you need not answer any other questions as you have reached a verdict.)

DAMAGES

NEGLIGENCE DAMAGES (prior to Laura Doull's death: May 2011 – October 2015)
(Instruction to the jury: Provide answers only if you answered "YES" to one or more of the following questions: Q.3, Q.6, Q.10 and/or Q.13).

Please state, in words and numerical figures, the amount of money, if any, that you award as full and fair compensation for:

A. Laura Doull's past medical expenses (May 2011 – October 2015)

$_____
(Amount in numerical figures)

_____
(Amount in words)

B. Laura Doull's loss of earning capacity (May 2011 – October 2015)

$_____
(Amount in numerical figures)

_____
(Amount in words)

C. Laura Doull's pain and suffering

$_____
(Amount in numerical figures)

_____
(Amount in words)

LOSS OF CONSORTIUM (prior to Laura Doull's death: May 2011 – October 2015)
(Instruction to the jury: Provide answers only if you answered "YES" to one or more of the following questions: Q.3, Q.6, Q.10 and/or Q.13).

SETH DOULL: Please state in words and numerical figures, the amount of money, if any, that will fully and fairly compensate Seth Doull for his loss of companionship, society, comfort, solace, moral support, enjoyment of sexual relations, restrictions on his social or recreational life, and deprivation of the full enjoyment of the marital state of his spouse Laura Doull prior to her death.

$_____
(Amount in numerical figures)

_____
(Amount in words)

MEGAN DOULL: Please state in words and numerical figures the amount of money, if any, that will fully and fairly compensate Megan Doull for her loss of the companionship, society, comfort, solace, moral support, restrictions on her social or recreational life, any significant restructuring of her life as a result of her mother's injuries, and deprivation of the full enjoyment of the parent-child relationship of her mother Laura Doull prior to her death.

$_____
(Amount in numerical figures)

_____
(Amount in words)

TROY DOULL: Please state, in words and numerical figures, the amount of money, if any, that will fully and fairly compensate Troy Doull for his loss of the companionship, society, comfort, solace, moral support, restrictions on his social or recreational life, any significant restructuring of his life as a result of his mother's injuries, and deprivation of the full enjoyment of the parent-child relationship of his mother Laura Doull prior to her death.

$_____
(Amount in numerical figures)

_____
(Amount in words)

WRONGFUL DEATH (after the death of Laura Doull)

(Instruction to the jury: Provide answers only if you answered "YES" to one or more of the following questions: Q.4, Q.7, Q.11 and/or Q.14).

What is the fair monetary value of the decedent, Laura Doull, to each of her next of kin, including but not limited to compensation for the loss of the services she regularly performed (even if gratuitous), protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice of the decedent?

SETH DOULL

$_____

(Amount in numerical figures)

_____

(Amount in words)

MEGAN DOULL

$_____

(Amount in numerical figures)

_____

(Amount in words)

TROY DOULL

$_____

(Amount in numerical figures)

_____

(Amount in words)

Please state, in words and numerical figures, the amount of money, if any, that you award as full and fair compensation for the Estate of Laura Doull's damages for:

Laura Doull's medical and hospital expenses necessitated by the injury which caused her death?

$_____

(Amount in numerical figures)

_____

(Amount in words)

Laura Doull's conscious pain and suffering preceding her death?

$_____
(Amount in numerical figures)

_____
(Amount in words)

Loss of Laura Doull's earning capacity prior to her death?

$_____
(Amount in numerical figures)

_____
(Amount in words)

GROSS NEGLIGENCE

(Instruction to the jury: Answer these questions only if you answered "YES" to one or more of the following questions: Q.4, or Q.7, Q.11 and/or Q.14).

If you answered "YES" to Q. 4 and/or Q.7, was Anna C. Foster N.P grossly negligent?

YES _____ **NO** _____

If you answered "YES" to Q. 11 and/or Q. 14, was Robert J. Miller, M.D. grossly negligent?

YES _____ **NO** _____

I hereby certify that at least 10 out of 12 of the deliberating jurors concur in the answers to the above questions.

Foreperson of the Jury

DATED: October 10, 2017

DOULL v. FOSTER and MILLER (Franklin Superior Court No. 1478CV-00058)

JUROR SEAT NUMBER: 9

I do not wish to be contacted by any lawyer, any party, or an agent or representative of any lawyer or party about my service as a juror in this case.

Pamela Westgate

Juror's name:

R.A.V - 245

Restatement (Second) of Torts

§ 431 What Constitutes Legal Cause

The actor's negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and
(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Restatement (Second) of Torts

§ 432 Negligent Conduct as Necessary Antecedent of Harm

(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.

(2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

Restatement (Second) of Torts

§ 433 Considerations Important in Determining Whether Negligent Conduct is Substantial Factor in Producing Harm

The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:
(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
(c) lapse of time.

Restatement (Third) of Torts:
Liab. For Physical & Emotional Harm

§ 26

Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under Section 27.

Restatement (Third) of Torts: Liab. For Physical & Emotional Harm

§ 27

If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.

Restatement (Third) of Torts:
Liab. For Physical & Emotional Harm

§ 29 Limitations on Liability for Tortious Conduct

An actor's liability is limited to those harms that result from the risk that made the actor's conduct tortious.

MASSACHUSETTS GENERAL LAW
CHAPTER 234(A)

Section 67D: Voir Dire Procedures

Notwithstanding section 67A, the following procedures shall govern in all criminal and civil superior court jury trials:

(1) In addition to whatever jury voir dire of the jury venire is conducted by the court, the court shall permit, upon the request of any party's attorney or a self-represented party, the party's attorney or self-represented party to conduct an oral examination of the prospective jurors at the discretion of the court.

(2) The court may impose reasonable limitations upon the questions and the time allowed during such examination, including, but not limited to, requiring pre-approval of the questions.

(3) In criminal cases involving multiple defendants, the commonwealth shall be entitled to the same amount of time as that to which all defendants together are entitled.

(4) The court may promulgate rules to implement this section, including, but not limited to, providing consistent policies, practices and procedures relating to the process of jury voir dire.

MASSACHUSETTS GENERAL LAW
CHAPTER 234(A)

Section 74: Irregularities or Defects Causing Mistrial or Verdict to be Set Aside

Any irregularity in compiling any list of jurors or prospective jurors; or any irregularity in qualifying, selecting, summoning, confirming, postponing, excusing, cancelling, instructing, impanelling, challenging, discharging, or managing jurors; or any irregularity in limiting any term of juror service, in length or other incident of the term; or the fact that a juror shall be found to be not qualified under section four of this chapter; or any defect in any procedure performed under this chapter shall not be sufficient to cause a mistrial or to set aside a verdict unless objection to such irregularity or defect has been made as soon as possible after its discovery or after it should have been discovered and unless the objecting party has been specially injured or prejudiced thereby.

MASSACHUSETTS APPELLATE PROCEDURE
RULE 16: BRIEFS

(a) Brief of Appellant

The brief of the appellant shall be formatted and paginated as provided in Rule 20(a)(4), and contain under appropriate headings and in the order here indicated:

(1) Cover. The cover of the brief shall contain the information identified in Rule 20(a)(6)(B).

(2) Corporate Disclosure Statement. A corporate disclosure statement, if required pursuant to Supreme Judicial Court Rule 1:21, shall be contained within the brief.

(3) Table of Contents. The table of contents shall list each section of the brief, including the headings and subheadings of each section, and the page on which they begin.

(4) Table of Authorities. The table of authorities shall list each case, statute, rule, and other authority cited in the brief, with references to each page on which it is cited. The authorities shall be listed alphabetically or numerically, as applicable.

(5) Statement of Issues. The statement of issues shall concisely and particularly describe each issue presented for review.

(6) Statement of Case. The statement of the case shall briefly describe the nature of the appeal, the procedural history relevant to the issues presented for review, with page references to the record appendix or transcript in accordance with Rule 16(e), and the disposition of these issues by the lower court.

(7) Statement of Facts. The statement of the facts shall describe the facts relevant to the issues presented for review, but need not repeat items otherwise included in the statement of the case, and each statement of fact shall be supported by page references to the record appendix or transcript in accordance with Rule 16(e).

(8) Summary of Argument. In a brief with more than 20 pages of argument, or more than 4,500 words if produced in a proportionally spaced font,

there shall be a summary of the argument that contains a succinct, clear, and accurate statement of the arguments made in the body of the brief, which must not merely repeat the argument headings, and is to include page references to where in the body of the brief each argument is made.

(9) Argument. The argument shall contain:

(A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities and parts of the record on which the appellant relies. The appellate court need not pass upon questions or issues not argued in the brief; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues).

(10) Request for Attorney's Fees and Costs. Any request for appellate attorney's fees and costs must be included in the brief, with a citation to the authority therefor.

(11) Conclusion. The brief shall contain a short conclusion stating the precise relief sought.

(12) Signature Block. The signature block shall contain

(A) the printed and signed name(s), Board of Bar Overseers (BBO) number(s), if any, mailing and electronic addresses, and telephone number(s) of the person(s) who prepared the brief, and, if any individual counsel is affiliated with a firm or office, the office name; and

(B) the date of signing.

(13) Addendum. An addendum, contained within the brief, shall consist of the following:

(A) a table of contents listing each item contained therein and the page on which it begins;

(B) any appealed judgment or order (including any written opinion, memorandum of decision, or findings of fact and conclusions thereon relating to an issue raised on appeal, including a typed

version of any pertinent handwritten or oral endorsement, notation, findings, or order made by the lower court);

(C) copies of constitutional provisions, statutes, rules, regulations, or relevant parts thereof, as in effect at the relevant time, consideration of which is required for determination of the issues presented;

(D) a copy of any unpublished decision cited in the brief; and

(E) in a case where geographical facts are of importance, unless appropriate plans are reproduced in the printed record or record appendix, an outline plan (preferably based on exhibits in evidence). This outline plan should be suitable for reproduction on one 1 page of the printed law reports.

(14) Certificate of Compliance. The certification required by Rule 16(k) shall be contained within the brief.

(15) Certificate of Service. The certificate of service required by Rule 13(e) shall be contained within the brief.

MASSACHUSETTS SUPERIOR COURT

Rule 6: Jury Selection

1. Subject to applicable statutes, rules, and controlling authority, the trial judge in each case has discretion to determine a procedure for examining and selecting jurors designed to maintain juror privacy and dignity, identify explicit and implicit bias, and foster efficiency in the session and among sessions using the same jury pool. This rule provides a standard procedure for each civil and criminal case unless otherwise ordered by the trial judge, while permitting attorneys and self-represented parties a fair opportunity to participate in voir dire so as to identify bias.

2. Conference with the trial judge

   a. In civil cases, unless otherwise ordered, the court shall schedule a final trial conference in accordance with Standing Order 1-88, as may be amended from time to time. In criminal cases, unless otherwise ordered, a final pretrial conference shall be scheduled in accordance with Standing Order 2-86. These conferences with the trial judge shortly

before trial serve as the primary opportunity to discuss empanelment, including without limitation: the statement of the case to be read to the venire; the extent of any pre-charge on significant legal principles; the method and content of the judge's intended voir dire of jurors; the method and content of any attorney or party participation in voir dire; judicial approval or disapproval of proposed questions or subject matters; any time limits on attorney or party voir dire; the number of jurors to be seated; any agreement to allow deliberation by fewer jurors if seated jurors are dismissed post-empanelment; the content and method of employing any supplemental juror questionnaire; the number of peremptories; and the order and timing of the parties' assertions of challenges for cause and peremptory challenges.

b. If the court has not scheduled a final trial conference in a civil case or a final pre-trial conference in a criminal case, any party planning to submit a request, proposal, or motion regarding jury selection should request such a conference or submit a motion requesting voir dire procedures in time for a pretrial ruling by the trial judge. All parties shall avoid proposing jury selection procedures (including attorney/party voir dire) for the first time on the day of trial.

3. Voir dire by attorneys and parties

a. On or before the final trial conference in a civil case or final pre-trial conference in a criminal case, or 5 business days before trial if no such conference is scheduled, the parties shall submit in writing any requests for attorney/party voir dire; motions in limine concerning the method of jury selection; proposed subject matters or questions for inquiry by the parties or trial judge; any proposed supplemental questionnaire; any proposed preliminary legal instructions to the venire or juror panels; the location within the courtroom where jurors and parties will stand or sit during voir dire; and any other matter setting forth the party's position regarding empanelment.

b. The trial judge shall allow attorney or party voir dire if properly requested at or before the time set forth in paragraph 3(a), above. The trial judge may deem any subsequent request for attorney or party voir dire untimely, but may in the judge's discretion allow the request in the absence of prejudice to any other party or significant impact on trial efficiency or on other sessions using the same jury pool.

c. When attorney or party voir dire is allowed, the trial judge shall, at a minimum, allow the attorneys or parties to ask reasonable follow-up questions seeking elaboration or explanation concerning juror responses to the judge's questions, or concerning any written questionnaire. After considering the goals set forth in paragraph 1 above, the trial judge should generally approve a reasonable number of questions that (i) seek factual information about the prospective juror's background and experience pertinent to the issues expected to arise in the case; (ii) may reveal preconceptions or biases relating to the identity of the parties or the nature of the claims or issues expected to arise in the case; (iii) inquire into the prospective jurors' willingness and ability to accept and apply pertinent legal principles as instructed; and (iv) are meant to elicit information on subjects that controlling authority has identified as preferred subjects of inquiry, even if not absolutely required.

d. At the final trial conference in a civil case, or final pre-trial conference in a criminal case (or in a written submission in lieu of such conference), any attorney or party wishing to inquire into any of the following disfavored subjects must explain how the inquiry is relevant to the issues, may affect the juror's impartiality, or may assist the proper exercise of peremptory challenges:

    i. The juror's political views, voting patterns or party preferences;

    ii. The juror's religious beliefs or affiliation.

e. Counsel and Parties May Not Ask:

    i. Questions framed in terms of how the juror would decide this case (prejudgment), including hypotheticals that are close/specific to the facts of this case (any hypotheticals that may trigger this rule must be presented to the judge before trial).

    ii. Questions that seek to commit juror(s) to a result, including, without limitation, questions about what evidence would cause the juror(s) to find for the attorney's client or the party.

    iii. Questions having no substantial purpose other than to argue an attorney's or party's case or indoctrinate any juror(s).

iv. Questions about the outcome in prior cases where the person has served as a juror, including the prior vote(s) of the juror or the verdict of the entire jury.

v. Questions in the presence of other jurors that specifically reference what is written on a particular juror's confidential juror questionnaire.

f. The trial judge may impose reasonable restrictions on the subject matter, time, or method of attorney or party voir dire and shall so inform the attorneys or parties before empanelment begins.

g. In approving or disapproving voir dire questions and procedures, the trial judge, on request, should consider whether questions or methods proposed by the attorneys or parties may assist in identifying explicit or implicit bias.

h. If employing panel voir dire, the trial judge shall determine the procedure and may elect to follow the method set forth in Addendum A or adopt variations thereof. The trial judge may also elect to use some of the methods set forth in Addendum A even if not employing panel voir dire. Nothing in Appendix A restricts the trial judge from selecting an alternative method of voir dire, including but not limited to:

i. Filling empty seats as they arise due to challenges for cause or the exercise of peremptories. The trial judge may do this by clearing additional prospective jurors or filling in from additional already cleared jurors;

ii. The "Walker method": Through panel voir dire or otherwise, the trial judge may clear as indifferent a number of prospective jurors that equals or exceeds the total number of jurors needed, plus alternates, plus the total number of peremptory challenges held by the parties. See Commonwealth v. Walker, 379 Mass. 297, 299 n.1 (1979). But see Commonwealth v. Johnson, 417 Mass. 498, 507–508 (1994).

4. Empanelment

a. The trial judge shall ask all voir dire questions specifically required by statute, court rule, or controlling authority, but retains discretion as to

when and how to do so. The trial judge may allow individual voir dire, panel voir dire, or any combination

b. Questioning shall occur through individual voir dire if (i) required by statute, rule, or controlling authority; (ii) inquiry concerns private or potentially embarrassing information; or (iii) questioning would specifically reference what is written on a particular juror's confidential juror questionnaire.

c. The trial judge should consider some individual voir dire in all cases to (i) determine whether any juror has an impediment concerning hearing, language or visual ability, mental health, or comprehension and to determine whether a reasonable accommodation would enable the juror to serve; (ii) address any private or embarrassing information not disclosed in public portions of the voir dire; or (iii) identify any other impediment to jury service that the trial judge and parties might not observe without personal contact with the juror.

d. Attorneys and parties shall limit their questioning of any juror(s) to such subject matters and methods as previously approved by the trial judge and shall avoid questions set forth in paragraph 3(e) above, even as follow-up, without court approval.

e. Questions about the Law

    i. If the parties have obtained approval to ask voir dire questions about the law, the trial judge shall take appropriate measures to ensure that the jury is accurately and effectively instructed on the law. Such measures may include, but are not limited to: a brief pre-charge; requiring the questioner to use the words specifically approved by the judge; stating the law in a written supplemental questionnaire; or contemporaneous instructions by the trial judge at the time the question is asked.

    ii. If a juror asks counsel a question to clarify an aspect of the law, counsel shall request that the trial judge answer the question; the trial judge may interrupt if counsel attempts to respond to a juror question by instructing on such a point of law.

f. Any party may object to a question posed by another party by stating "objection," without elaboration or argument. The trial judge may rule on the objection in, or outside of, the juror's presence. The trial judge

may, on the judge's own motion, strike or rephrase a party's question and may interrupt or supplement a party's questioning to provide the juror(s) with an explanation of the law or the jury trial process, or to ask any additional questions that the trial judge believes will assist the trial judge in determining the juror's impartiality.

g. Counsel and the parties must ensure an accurate record of attorney or party voir dire. In an electronically recorded courtroom, counsel must stand near a microphone at all times. During panel voir dire in any courtroom, counsel must also call out the juror seat number (or juror number) of any individual juror who is questioned individually or who responds audibly. Failure to do so may constitute a waiver of any claim of error arising from any inaudible or unattributable portions of the record.

h. Challenges for Cause

   i. The court will consider all its observations, including the juror's responses, to determine whether or not the juror will be fair, focus on the facts of the case and follow the law despite a particular viewpoint or experience.

   ii. Whether at side bar or during panel inquiry, a juror's "yes" or "no" answer to a question about a viewpoint or experience may not, by itself, support a challenge for cause. If intending to challenge a juror for cause as a result of attorney or party voir dire, the questioner ordinarily should lay an adequate foundation showing that, in light of the information or viewpoint expressed, the juror may not be fair and impartial and decide the case solely on the facts and law presented at trial. The court may inquire further or may decide without further questioning, if the judge believes that the existing record is sufficient to resolve the challenge for cause.

i. Peremptory Challenges

   i. After the trial judge finds that each juror stands indifferent, the parties shall exercise their peremptory challenges. The trial judge may require exercise of peremptory challenges after completion of side bar inquiry of an individual juror, after filling the jury box

with jurors found to stand indifferent, or at some other time after the trial judge’s finding of indifference.

ii. If the trial judge does not expressly rule on a juror’s bias or impartiality, the trial judge's direction for the parties to exercise peremptory challenges constitutes an implicit finding that the juror stands indifferent. On request, made after the trial judge's direction but before exercise of a peremptory challenge, the trial judge shall make an explicit finding as to the juror's impartiality.

5. Supplemental juror questionnaires

Supplemental juror questionnaires are not protected by G.L. c. 234A, § 23 and cannot be kept confidential without complying with the impoundment procedures set forth in Trial Court Rule VIII. If using supplemental juror questionnaires, the judge shall consider methods to ensure the juror’s personal privacy and to promote the candor of responses, including but not limited to asking jurors whether they wish to keep responses confidential, asking the grounds for any such request, and complying with applicable impoundment procedures.

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer, either directly or through communications with the judge or otherwise, a desire not to communicate with the lawyer; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is initiated by the lawyer without the notice required by law; or

(d) engage in conduct intended to disrupt a tribunal.

Section 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

……

(18) Learned treatises

(A) Use in medical malpractice actions. Statements of facts or opinions on a subject of science or art contained in a published treatise, periodical, book, or pamphlet shall, insofar as the court shall find that the said statements are relevant and that the writer of such statements is recognized in his or her profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error, or mistake against physicians, surgeons, dentists, optometrists, hospitals, and sanitaria, as evidence tending to prove said facts or as opinion evidence; provided, however, that the party intending to offer as evidence any such statements shall, not less than thirty days before the trial of the action, give the adverse party or that party's attorney notice of such intention, stating the name of the writer of the statements; the title of the treatise, periodical, book, or pamphlet in which they are contained; the date of publication of the same; the name of the publisher of the same; and wherever possible or practicable the page or pages of the same on which the said statements appear.

(B) Use in cross-examination of experts. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits.

(iv) the judge's reasons for relying on the statement appear in the judge's findings pursuant to Subsection (24)(C).

……..

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2018-P-1622

SETH DOULL, as Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and TROY DOULL p.p.a. SETH DOULL,
APPELLANTS / Plaintiffs,

V.

ANNA C. FOSTER, N.P.; and ROBERT J. MILLER, M.D.
APPELLEES / Defendants.

ON APPEAL FROM A JUDGMENT
OF THE FRANKLIN SUPERIOR COURT

APPELLANT'S REPLY BRIEF

Prepared by:
Attorney for Appellants/Plaintiffs:

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Date: January 3, 2020

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, & AUTHORITIES

CASES

MASSACHUSETTS GENERAL LAWS

MASSACHUSETTS RULES

STATEMENT OF THE ISSUES

Whether the plaintiffs' substantial rights were violated because trial court instructed the jury on the wrong causation standard, in violation of the current and controlling laws of the Commonwealth, the facts of the case, and even the lower court's own rulings and proclamations.

Whether the plaintiffs' substantial rights were violated because trial court instructed the jury on the wrong negligence standard.

Whether the plaintiffs' substantial rights were violated resulting in verdict against the weight of evidence on the informed consent claims because the lower court improperly instructed the jury on the wrong legal standards, placed improper over-emphasis on expert evidence, improperly excluded relevant evidence and even made improper comments about relevant evidence on this issue.

Whether the plaintiffs' substantial rights were violated because the lower court systematically deprived the plaintiffs of a fair and balanced trial by abusing its discretion and: unreasonably restricted jury selection; unreasonably restricted cross-examination of the defendants' experts; unreasonably restricted cross-examination of the defendants; evidentiary rulings depriving plaintiffs of important evidence necessary to establish negligence and damages; systematic and improper admonishments of plaintiffs' counsel in front of jury for non-existent alleged violations while ignoring proven serious ethical violations of the defendants' counsel; systematic and persistent blocking by the lower court of the use of the phrase "patient safety" in medical malpractice claim despite it being relevant and admitted evidence; systematic allowing defendants to violate applicable court orders and laws of the Commonwealth in order to advance the defendants' theory of the case; and lower courts improper comments on evidence and trial process in front of the jury.

Whether the plaintiffs' substantial rights were violated by the lower court's refusal to present the defendants' active affirmative defenses to the jury and then ignoring/denying the motion for judgment notwithstanding the non-existent verdict.

Whether the plaintiffs' substantial rights were violated by the lower court's denial of plaintiffs' motion to amend the complaint to bring in a potentially responsible party when it was discovered and after said party admitted that its drug was or could have been systematically inconsistent and un-pure.

Whether the plaintiffs' substantial rights were violated because the lower court systematically deprived the plaintiffs of a fair and balanced discovery and litigation process by abusing its discretion and: ignoring plaintiffs' motion for speedy trial depriving plaintiff Laura Doull her day in court before she died; unreasonably denying plaintiffs' discovery of the defendants; unreasonably denying plaintiffs' discovery of the potentially co-defendant drug manufacturer; unreasonably denying plaintiffs' post-trial contact with the jurors; and unreasonably 'sanctioning' plaintiffs' counsel without grounds or due-process.

STATEMENT OF THE CASE

Plaintiffs, SETH DOULL, as Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and SETH DOULL as next friend of TROY DOULL, (hereinafter the "Plaintiffs") appeal from the jury verdict for the Defendants ANNA C. FOSTER, N.P. and ROBERT J. MILLER, M.D. (hereinafter the "Defendants") after finding both Defendants separately and individually negligent, but not the sole "but-for" cause of the Plaintiffs' harms, associated pre-, in-, and post- trial rulings, and selected discovery and litigation rulings, systematically depriving the plaintiffs of a fair and balanced access to justice.

In brief, Plaintiffs allege that Defendants for years negligently treated Laura[1] by, without informed consent, putting Laura on unproven, non-FDA-approved, hormone-replacement-drugs, causing her to develop venous-thromboembolism ("VTE") and multiple Pulmonary-Emboli ("PEs"), and then for months, if not years, ignored the signs and symptoms of PEs, causing her to develop chronic-thromboembolic-pulmonary-hypertension (CTEPH), leading to premature and painful death at age 43.

Relevant Procedural History

Plaintiffs refer to the Procedural History detailed in the Appellants' Brief, which is unchallenged or contradicted by the Defendants/Appellees.

STATEMENT OF THE FACTS

Plaintiffs refer to the Statement of the Facts detailed in the Appellants' Brief, and object to the Defendants/Appellees' statement which cherry picks certain aspects of trail evidence, misrepresenting the totality of the facts that were before the jury.

[1] Because all the Plaintiffs share the same last name, they will be referred to by their first names only.

SUMMARY OF ARGUMENT

After weeks of trial and evidence and days of deliberation, the jury found both Defendants, separately and individually, negligent, but concluded that said negligence was not the "sole/but-for" cause of the harm because of the wrong instruction of law by the Trial Court (rubber-stamping the Defendants' requests). Defendants/Appellants essentially conceded as much in their brief, failing to offer a SINGLE controlling Massachusetts authority standing for the proposition that in cases with multiple potential causes, the "substantial contributing factor" is the law. That result was prejudicial to the Plaintiffs, but not surprising, since the evidence demonstrated that multiple and different instances of Defendants' negligence were significant contributing factors of the harm, but not the "sole/but-for" cause, as with the multiple wrong-doers, and multiple contributing causes, not one thing, or person, could be the "sole" cause. Even the Trial Court conceded that there were multiple, and separate, defendants, and multiple causes (at minimum, Court conceded that the Defendants' request for the "natural course" instruction undermined the "sole" cause request), but doing the Defendants' bidding, the Trial Court gave the wrong jury instruction to ensure a defense verdict.

Although Trial Court has discretion in various aspects of conduct of trial (so long as that discretion is applied fairly and uniformly) the Trial Court has no discretion to ignore the standing and controlling law of our Commonwealth.

Although Defendants have made repeated arguments why the applicable law should change, at the time of trial the controlling law of our Commonwealth was (and still is) that in cases where there are (or can be) multiple causes **or** tortfeasers the appropriate formulation of legal cause is the "substantial contributing factor" and thus the Trial Court's instruction was erroneous, extremely prejudicial to the Plaintiffs, and new, fair, trial is warranted. Defendants/Appellants' argument that instructions given by the Court were "consistent" with Restatement (Third) of Torts – which is NOT the controlling authority in our Commonwealth – underlines the fact that the instructions were erroneous and improper.

Because, based on the current state of the law of our Commonwealth, and the evidence in this case, a new trial should be ordered, Plaintiffs also appealed the myriad of other errors of the Trial Court, but because of length limitations on arguments, said issues were addressed in less detail, with the entire*[2] records still before the Court.

[2] As previously noted, the Court's electronic system did not record/capture the morning portion of trial on October 2, 2017 and thus it was not part of the official transcripts. Defendants/Appellees moved to supplement the record with the transcript from their private stenographer – without opposition by the Plaintiffs – "so that the Court has the entire trial record" but instead only filed as "Supplemental Record Appendix" the excerpted testimony of one of their experts, Dr. Hill, omitting all the arguments and rulings that took place in the morning (addressing Dr. Hill's ignoring of a subpoena and court order, apparently at direction of defense counsel, concerning documents required to be brought with him, see generally TR-2410, when this issue came up again) or during the breaks

ARGUMENT

Because the Trial Court's myriad of errors violated Plaintiffs' "substantial rights," a new trial is required. *G.L. c. 231, § 119; Mass.R.Civ.P. 61*.

I. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED AS THE TRIAL COURT INSTRUCTED THE JURY ON THE WRONG CAUSATION STANDARD.

There can be no dispute that when the Court improperly instructs the jury on the law, and that error is prejudicial, a new trial is required. *Blackstone v. Cashman*, 448 Mass. 255, 270 (2007); *Comeau v. Currier*, 35 Mass. App. Ct. 109, 111–112 (1993). Jury instructions are required to be full, correct and clear as to the principles of law governing all the essential issues presented, so that the jury may understand its duty. *Kunkel v. Alger*, 10 Mass. App. Ct. 76, 83 (1980). When the Court fails "to present full, fair, **correct**, and clear instructions on the principles of law to the jury," as it did in this case, new trial is warranted. *Fein v. Kahan*, 36 Mass. App. Ct. 967, 967-968 (1994). Although it is true that trial court has discretion in framing the language of jury instruction, it is a reversible error "if a critical issue was not dealt with at all or was dealt with erroneously as a matter of law." *Kiely v. Teradyne*, 85 Mass.App.Ct. 431, 441 (2014) quoting from *Torre v.*

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in the testimony. Thus, despite the Defendants/Appellees motion and representation, the "entire trial record" is not before the Court.

Harris-Seybold Co., 9 Mass. App. Ct. 660, 678-679 (1980). Here, the trial court's instruction was erroneously as a matter of law ignoring the controlling authority.

A. THE SUBSTANTIAL CONTRIBUTING FACTOR INSTRUCTION IS THE LAW WHEN THERE ARE MULTIPLE POSSIBLE CAUSES OR TORTFEASORS.

It is undisputed that the current, controlling, law of our Commonwealth is that in cases where there are (*or can be*) multiple causes **or** tortfeasers the appropriate formulation of legal cause is the "substantial contributing factor." The Appeals Court recently addressed this issue in *Hannon v. Calleva*, 87 Mass. App. Ct. 1135 (2015) "because there was evidence that the plaintiff's injuries *may have been the result of more than one cause*." Specifically, the Court stated:

> The **substantial contributing factor instruction is normally given when there are multiple causes or tortfeasors**. In *Matsuyama v. Birnbaum*, 452 Mass. 1, 30, 890 N.E.2d 819 (2008), the Supreme Judicial Court stated that "[t]he 'substantial contributing factor' test is useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any individual defendant's conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm." In the present case, **the "substantial contributing factor" instruction was appropriate and helpful to the jury because there was evidence from which the jury could find that an event or events prior to the motor vehicle accident may have been the cause of Hannon's neck injury**. … See *O'Connor v. Raymark Indus., Inc.*, 401 Mass. 586, 592, 518 N.E.2d 510 (1988).

Hannon v. Calleva, 87 Mass. App. Ct. 1135, *5-*6 (2015); see also *Neurontin Mktg. & Sales Practices & Prods. Liab. Litig. v. Pfizer, Inc.*, 2010 U.S. Dist. LEXIS 82021 ("Under Massachusetts law, **a plaintiff seeking to establish causation in a case where an injury may be attributable to multiple causes must show that the defendant's conduct was a "substantial contributing factor" to the plaintiff's injury**. See *Matsuyama v. Birnbaum*, 452 Mass. 1, 30-31, 890 N.E.2d 819 (2008) (approving the use of the "substantial contributing factor" test for causation "in cases in which damage has multiple causes")")

Defendants/Appellees offer NO controlling law in dispute and argue that Restatement (Third) of Torts offers different standard, but did not, and cannot offer a single Massachusetts controlling authority adopting this R3 standard, either at the time of trial, or even now.

B. THE TRIAL COURT GAVE THE WRONG INSTRUCTION BECAUSE THERE ARE MULTIPLE POSSIBLE CAUSES AND/OR TORTFEASORS IN THIS CASE.

In this case the evidence is overwhelming that the plaintiff's[3] injuries *may have been* the result of more than one cause and/or more than one tortfeaser. Defendants/Appellees, in a last ditch attempt to justify the Court's use of the

[3] For the purpose of this section, the Plaintiff refers only to Laura and the all the causes, people, and entities that contributed to her harms, as the harms suffered by her family have separate causes (similar in some aspects and different in others).

wrong standard, claim that the error didn't matter (was not prejudicial) because there was only **one** possible cause of the harm. But that simply is not the case, as even the Trial Court noted that an instruction the Defendants asked for – concerning the "natural progression of plaintiff's disease" – was in fact **another possible cause of the injuries**. (TR/2784). The Court decided not to give that instruction to justify its use of the "but-for/sole", however, it still remained – and was the major element of the Defendants' case, from opening, through experts, and in closing – that the harm to Laura could have been caused, in part, by progression of medical condition, not the Defendants' negligence, thus multiple possible causes existed. Although it is true that the two Defendants did not point fingers at each other, but they did point fingers at "something" else that contributed to the Plaintiffs' harm. Given that there were multiple possible causes of the harm, the but-for/sole cause instruction was incorrect and the "substantial contributing factor" instruction should have been used. *Hannon v. Calleva*, 87 Mass. App. Ct. 1135, *5-*6 (2015). Just like the prior events in *Hannon* that may have contributed to the harm (with, or versus, the Defendants' conduct), here the Defendants' argument that the "natural progression" may have contributed to the harm (with, or versus, the Defendants' conduct/negligence).

Defendants/Appellees argue that there was only one cause because earlier detection would not make a difference (D. Brief at 34) but that is based on their

recitation of the facts based solely on their direct examination. When all the evidence before the jury is taken into account – including cross-examination – it is clear that delay diagnoses was a possible cause, because earlier detection would have made a difference.

Their own expert agreed:

> Q (by Plaintiff's expert) So now I want you to step back, forget CTEPH. Let's look at where -- before we get to the first PE. Based on your review of all the records, are you saying sitting here that Ms. Doull had a PE in her lungs at birth?
> A (by Dr. Hill, Defendants' expert) No.
> Q Okay. Did she have a PE -- a PE in her lungs at age 12?
> A Probably not.
> Q Okay. So from the day she started being a patient of Dr. Miller, she was PE free?
> A Likely.
> Q So now, we're looking at where in the 26 years a reasonable provider should have found it and that will be an issue for whether or not they were negligent. My question to you, Doctor, is --
> MS. DALPE: Objection.
> THE COURT: Sustained.
> BY MR. SOBCZAK:
> **Q My question to you, Doctor, is, had it been found, when the first PE appeared, would it have made a difference?**
> **A I think it would have,** but I don't know how you would have known.

(TR-2475, SRA-253)

> Q Again, I want to separate the indication to if it made a difference. Because as -- as of May 21, 2011, your opinion is it wouldn't have made a difference, correct?
> A Yes.
> **Q If it happened earlier, regardless of whether or not you believe they should have looked for it, if it was done earlier, it would have made a difference?**
> **A At some point, it's likely it would have made a difference, yes.**

Q Thank you, Doctor.
MR. SOBCZAK: That's all I have, your Honor.
(TR-2478, SRA-258)

The jury found both defendants negligent – and if said negligence was at least in part due to delayed diagnosis, as Defendants assume on page 32 of their brief – the Defendants' own expert testified to causation.

The myriad of other potential causes of Plaintiffs' harms that were before the jury (and thus part of the consideration) are detailed in the Appellants' Brief and are incorporated herein by reference.

C. THE TRIAL COURT'S ERROR WAS PREJUDICIAL AS THE JURY RETURNED A NO-CAUSATION VERDICT BASED ON THE WRONG INSTRUCTION.

There can be no dispute that the error had an effect on the jury since even though the jury found two separate defendants negligent, the jury could not find that neither one was the "sole/but-for" factor causing the harm (as that would be impossible, since multiple tortfeasors cannot each be the "sole" cause). Given the wide range of evidence supporting multiple causes, and the long time jury deliberated, had the jury been properly instructed that the individual defendant's negligence had to be a-substantial-contributing-factor (as testified to by both side's experts) and not the-sole-but-for-factor, a different verdict would result. Defendants/Appellees' argument that the lack of causation finding alone is

insufficient fails, as our Court have held that when the wrong instruction is given and adverse jury finding results, given the weight the jury may attach to such instruction, that is enough to require reversal. *Campbell v. Cape & Islands Healthcare Servs.*, 81 Mass. App. Ct. 252, 258-259 (2012)

II. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT COMMITTED MYRIAD OF ERRORS

Similar to their argument with regard to the wrong causation instruction (see section I infra) Defendants/Appellees' arguments on the remaining instructions and legal standards errors do not (and cannot) point to any legal authority to the contrary – because there is none; relaying only on Trial Court's "discretion" and one sided representation of the facts. It is undisputed that both the Defendants, and their multiple paid-for experts, offered "testimony" conserving alleged informed consent discussions, or alleged risks (or lack of) "natural" hormone therapy, but said testimony was without ANY documentary support, or scientific studies in support, and was contradicted by other testimony (from the same witnesses during cross-examination). Since the facts before the jury must be viewed in the light most favorable to the plaintiff, *Michnik-Zilberman v. Gordon's Liquor, Inc.*, 390 Mass. 6, 8 n. 1 (1983), Defendants/Appellees' arguments fail.

III. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT SYSTEMATICALLY DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED TRIAL BY ABUSING ITS DISCRETION AND WORKING FOR THE DEFENDANTS

Citizens of our Commonwealth have a constitutional right to a fair trial. When that right is trampled by the Court's biased rulings, a new, fair, trial is necessary. *Commonwealth v. Sneed*, 376 Mass. 867 (1978) ("We reverse and order a new trial, on the ground that the defendant did not have a fair and impartial trial." "We conclude that the defendant must have a new trial because the judge, in many and diverse ways, deprived the defendant of a fair and impartial jury trial. We discuss below only the most obvious illustrations of this improper intrusion.") In this case, the Defendants cannot deny the Court's disdain for the Plaintiffs, their claims, and their counsel, but only claim that because there trial court in so many and so diverse ways deprived Plaintiffs of a fair trial, due to the procedural space limitations on the briefs, the Plaintiffs' arguments on those errors is not long enough. And even though the Defendants/Appellees still have ample room to spare, they did not offer any opposition, or counter argument, on the issue of the affirmative defenses and the directed verdict motion.

IV. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO BRING IN A POTENTIALLY RESPONSIBLE PARTY WHEN IT WAS DISCOVERED AND AFTER SAID PARTY ADMITTED THAT THE DRUG ORDERED FOR PLAINTIFF WAS OR COULD HAVE BEEN SYSTEMATICALLY INCONSISTENT AND UN-PURE

The Trial Court should have allowed Plaintiffs leave to amend their complaint when it was finally discovered where the prescription progesterone creme came from and when its manufacturer (WI's Women's International Compounding Inc. ("WIC")) conceded that it could have been systematically inconsistent and un-pure. "a party may amend his pleading only by leave of court or by written consent of the adverse party; and **leave shall be freely given when justice so requires**." *Mass. R. Civ. P. 15(a)*, 365 Mass. 761 (1974).

Defendants/Appellees' opposition only parrots the Trial Court's stated reason for denying the motion of delay (adopting Defendants' arguments in opposition) ignoring the actual procedural history (which Defendants/Appellees did not contest) which shows that the Plaintiffs moved to amend nearly immediately after learning of this potential party's identity and responsibility. As such, the motion to amend should have been allowed. See also *Saldi v. Brighton Stock Yard Co.*, 344 Mass. 89, 95 (1962) (amendment allowed even during the course of trial); *Tinkham v. Everson*, 219 Mass. 164, (1914); *Pizer v. Hunt*, 253 Mass. 321 (1925) (amendments allowed even after trial). And with the third party

at trial, there should be no doubt that substantial contributing factor instruction should have been used for causation.

V. PLAINTIFFS' SUBSTANTIAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT SYSTEMATICALLY DEPRIVED THE PLAINTIFFS OF A FAIR AND BALANCED DISCOVERY AND LITIGATION PROCESS

Similar to the Court's "discretionary" rulings that were prejudicial to the Plaintiffs in-trial, the numerous rulings pre- and post-trial, that were unfounded and prejudicial to the Plaintiffs, were likewise so numerous that they would require a separate brief on each, thus they were addressed just briefly, but sufficiently for the Court to able to remedy these injustices at the future retrial. Defendants/Appellees' argument, again, only claims that due to the trial judge's discretion, the rulings (even if one side) are permissible, but even though trial judge's enjoy vast discretion, when it is abused, as it was in this case, the appellate courts need to step in. After all, the sanctity of our judicial system should be more important than a single trial judge[4].

[4] Given the disdain the trial judge expressed towards the Plaintiffs and their counsel, Plaintiffs would have moved for recusal for the re-trial, but since the Trial Judge is no longer sitting in this county and is in private practice now, that is no longer necessary.

VI. DEFENDANTS/APPELLEE'S PASSING REQUEST FOR FEES AND DOUBLE COSTS SHOULD BE DENIED; AS ANY AWARD OF FEES OR COSTS SHOULD BE TO THE PLAINTIFFS FOR THE SYSTEMATIC INJUSTICE SUFFERED

Ironically, after spending about half of their arguments claiming that Plaintiffs' briefs were not detailed or long enough, Defendants, in passing, in their "conclusion" request appellate fees and costs, claiming that the majority of the claimed errors are frivolous.[5] Said request should be denied, as majority of the Plaintiffs' brief addresses the major – and most egregious –issue (the Trial Courts, on Defendants' urging, applying the wrong legal causation standard) which is ripe and proper for appeal. If the Court is to consider ordering any fees and costs, Plaintiffs' should be the ones to receive their costs and fees, to make up for the injustice done to them by the Defendants, with the Trial Court's assistance.

CONCLUSION

There is no dispute that this was a highly contested trial. Unfortunately, due to space limitation, the original brief only touched on but few of the errors and those that were included were addressed in very limited fashion, with the exception of the issue of causation. The simple truth is the Trial Court gave the wrong instruction of law in order to guarantee a defense verdict. That error alone – if our

[5] But the Court can likely see that this request is done for different, and improper, purpose.

judicial system is to function based on legal precedent and respect for controlling law – should alone guarantee Plaintiffs a new trial.

Respectfully submitted,
SETH DOULL, as Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and SETH DOULL as next friend of TROY DOULL
By and through counsel,

/s/ Krzysztof G. Sobczak

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Date: January 3, 2020

CERTIFICATION

I certify that this brief complies with the applicable Massachusetts Rules of Appellate Procedure, including but not limited to: Rule 16(c); Rule 16(e) (references to the record);; Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). The applicable length limit of Rule 20 was ascertained, by use of "Times New Roman" proportionally spaced font, size 14, and the number of non-excluded words total 2,605 words (<4,500) using MS Office Word version 12.0.6785.5000.

/s/ Krzysztof G. Sobczak

Krzysztof G. Sobczak, Esq.

CERTIFICATE OF SERVICE

I, Krzysztof G. Sobczak, do hereby certify that I served a copy of these documents upon Appellees' current counsel of record,

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on this 3rd day of January 2020, through the Odyssey File & Serve System; which will be sent electronically to the registered participants as identified on the Case Service Contacts List; and/or paper copies will be sent by first class mail, postage prepaid to those indicated as non-registered participants.

/s/ Krzysztof G. Sobczak

_____

Krzysztof G. Sobczak, Esq.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12921

SETH DOULL, As Personal Representative of the Estate of LAURA DOULL; SETH DOULL; MEGAN DOULL; and TROY DOULL, ppa SETH DOULL
Plaintiffs-Appellants,

vs.

ANNA C. FOSTER, N.P. and ROBERT J. MILLER, M.D.
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE COUNTY OF FRANKLIN

BRIEF OF THE AMICUS CURIAE MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

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DATED: September 16, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

Other Authorities

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

The Massachusetts Defense Lawyers Association ("MassDLA"), amicus curiae, is a voluntary, non-profit, state-wide professional association of trial lawyers who defend corporations, individuals, and insurance companies in civil lawsuits. Members of the MassDLA work to promote the administration of justice, legal education, and professional standards and to promote collegiality and civility among all members of the bar.

As an association of civil defense lawyers, the MassDLA has a direct interest in the issues of public importance that affect MassDLA members and their clients. Those interests could be affected by the issues before the Court in this appeal, including whether the Court adopts a factual cause of harm standard in cases involving multiple potential tortfeasors or potential causes of injury.

As part of fulfilling its purpose, the MassDLA has previously filed amicus briefs in the appellate courts of the Commonwealth. The MassDLA offers its experience and perspective to the Court as amicus curiae to assist in its resolution of the matter now before it.

STATEMENT OF THE ISSUES PRESENTED

"In a case involving multiple potential tortfeasors or potential causes of injury, whether 'substantial contributing factor' may or must be used in lieu of 'but for' in the causation jury instructions; whether the court should adopt a 'factual cause' of harm standard, as provided in sections 26 and 27 of the Restatement (Third) of Torts (2005)." Announcement: The Justices Are Soliciting Amicus Briefs, Seth Doull & Others v. Anna C. Foster, N.P. & Another, SJC-12921, Docket Entry #2 (SJC entered Mar 13, 2020) ("Amicus Announcement").

STATEMENT OF THE FACTS

The MassDLA, as amicus curiae, adopts the statements of facts regarding the prior proceedings and factual background as submitted in the briefs of Anna C. Foster, N.P. and Robert J. Miller, M.D. (Defendants-Appellees), and Seth Doull as Personal Representative of the Estate of Laura Doull, Seth Doull, Megan Doull, and Troy Doull (Plaintiffs-Appellants).

STATEMENT OF THE CASE

MassDLA is answering the Commonwealth of Massachusetts Supreme Judicial Court's solicitation for amicus briefs in the matter of Seth Doull & Others v. Anna C. Foster, N.P. & Another, SJC-12921, to assist in determining the proper standard of causation to apply in a case involving multiple tortfeasors or potential causes of injury. In Doull v. Foster this issue arose

within the context of a medical malpractice claim arising out of a factual background involving several potential sources of injury, including, among others, multiple healthcare providers, a drug used during the course of treatment, and an undiagnosed underlying condition.

At base, the central issue under consideration concerns which standard of causation should or must be applied in a case involving multiple potential tortfeasors or sources of injury. Answering this question requires an assessment of both the substantial contributing factor test and the factual cause of harm standard. This will necessarily involve some discussion of the respective rationales of both causal standards, the origins, evolution, and current state of their use, and the potential advantages and disadvantages of using one standard in lieu of the other, especially within the context of cases involving multiple potential causes.

SUMMARY OF THE ARGUMENT

Presently, a court can use a jury instruction that encompasses a "substantial contributing factor" test in lieu of a "but for" test in a multiple tortfeasor case. O'Connor v. Raymark Industries, Inc., 401 Mass. 586 (1988). The "substantial contributing factor" test has never been intended as a wholesale replacement of "but for" causation, but it was

used by the O'Connor Court as a supplemental tool to help assess causation in a multi-defendant matter.

However, courts have failed to articulate the necessary concepts for factual determination by the factfinder. The confusion surrounding "substantial factor" as it is found in the Restatement (Second) of Torts (1997) has led to progressively loose applications and a diminished connection between causation and fact. The best approach to accurately and effectively untangle complex causal determinations would be to adopt a "factual cause" of harm standard as provided in Sections 26 and 27 of the Restatement (Third) of Torts (2010) represents a return to concepts central to the law of torts, including the "but for" standard.

ARGUMENT

I. Continued Dilution of O'Connor Erodes Well-Established Principles of Causation and Confuses Determinations of Liability Involving Multiple Causal Factors.

In O'Connor v. Raymark Industries, Inc., 401 Mass. 586 (1988), this Court charted a navigable course for cases involving potential multiple tortfeasors or sources of injury by defining core principles of causation, including "substantial contributing factor." Despite this Court's efforts to set sail on a clear course, subsequent courts have failed to define concepts of causation which has gradually led to treacherous

waters. As a result, the factfinder has lacked guidance as to the proper method for determining causation.

a. Abandonment of Key Premises from O'Connor Hinder Present Courts' Ability to Make Sound Determinations Involving Complex Causal Questions.

O'Connor involved a shipyard welder in the 1940s who, while welding, would cover himself with asbestos blankets made by Raymark Industries for protection from sparks. 401 Mass. at 587. Asbestos blankets made by Raymark Industries were made of Raybestos, which was "an asbestos cloth containing 65-95% asbestos." Shetterly v. Raymark Industries, Inc., 117 F.3d 776, 779 n.1 (4th Cir. 1997). At trial, the jury was instructed to find whether the plaintiff was exposed to asbestos from the asbestos blankets made by Raymark Industries, and if so, did such exposure substantially contribute to the cause of his mesothelioma. O'Connor, 401 Mass. at 588-589. The trial court noted that "[i]t doesn't have to be the only cause, but it has to be a substantial contributing cause ... It means something that makes a difference in the result." Id. at 589. The jury found that while the plaintiff was exposed to asbestos from the product, such exposure did not substantially contribute to the cause of his mesothelioma. Id. at 587. On appeal by the plaintiff, this Court held that the trial court properly instructed the jury on causation, finding that the trial judge's instruction was consistent with the principle of joint and

several liability and served to distinguish between a substantial factor and a negligible factor. Id. at 591-592.

When this Court decided O'Connor in 1988, asbestos litigation routinely involved products with high concentrations of asbestos generally used in a limited set of occupations and industries. The products in question contained extremely high concentrations of amphibole asbestos and most claims came from workers in "traditional" industries, including the shipyard and insulation trades. See Welch v. Keene Corp., 31 Mass. App. Ct. 157 (1991) (insulator exposed to asbestos from carrying, mixing, and applying asbestos-containing insulation products in 1950s); see also Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129 (D. Mass. 2009) (boiler technician exposed to asbestos at shipyards and industrial sites from 1950s to 1970s).

Today, exposure cases generally do not involve the same uniformity of products or levels of exposure that the O'Connor Court faced in the 1980s. Modern courts are faced with exposure trials that more often involve "trace exposure" to a myriad of products in a variety of trades in both occupational and non-occupational settings. See, e.g., Ingham v. Johnson & Johnson, Missouri Circuit Court, No. 1522-CC10417-01 (June 2018) ($4.7 million plaintiff verdict in case where 22 women alleged cancer caused by asbestos exposure from talcum powder); Lanzo v. Cyprus Amax Minerals Co., Middlesex County Superior Court, New Jersey,

No. L-7385-16 (April 2018) ($117 million plaintiff verdict where plaintiff alleged cancer caused by asbestos exposure from 30 years of talcum powder use).

Unlike O'Connor, exposure litigation is now a more sophisticated scientific inquiry involving microscopic levels of contamination, a vast body of knowledge concerning the nature of substances and their effects, and empirically verifiable findings. In response to this change, courts have retooled their approach to the admissibility of scientific evidence to handle cases involving novel products, low levels of exposure, and significant reliance on the testimony of expert witnesses. See Commonwealth v. Lanigan, 419 Mass. 15, 26-27 (1994). Rigorous evaluation of expert testimony in such increasingly complex cases is vital, but the ultimate utility of objective scientific evidence is necessarily diminished by a departure from the central teachings of O'Connor.

b. O'Connor Provides Essential Guidance for Effectively Resolving Complex Causal Questions.

O'Connor relies on the longstanding principle of causal determinations made where there are multiple potential tortfeasors: "If two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable."

401 Mass. at 591, quoting Chase v. Roy, 363 Mass. 402, 408 (1973).

A plaintiff should not have the burden of apportioning the injury, "at least to the extent of separating out the effect of the defendant's product from the combined effect" of all potential causes. O'Connor, 401 Mass. at 591. Put simply, where there are multiple defendants, a court's primary concern must be determining whether the defendants' conduct, as a single combined set of many potential factors, caused the plaintiff's injury. Id. at 591-592. This is a familiar and often straightforward determination under a factual "but for" standard of causation, but, as we continue to drift off the course charted by O'Connor, devolves into a subjective approximation of what the word "substantial" actually implies.

The O'Connor Court sought to forestall the confusing and potentially burdensome implications of the substantial contributing factor test by articulating that a substantial contributing factor is simply "something that makes a difference in the result." O'Connor, 401 Mass. at 592. Intuitively it seems clear that an action or lack thereof cannot logically be defined as a cause unless it shapes the outcome in some discernible way. Although there may be a spectrum of the potential intensity or importance of any given cause, a

substantial contributing factor is still something which is necessary for reaching a given result.

When evaluating the jury instructions provided in O'Connor, the Court states that when read in context, "the judge's statement served to distinguish between a 'substantial factor,' tending along with other factors to produce the plaintiff's disease and death, and a negligible factor, so slight or so tangential to the harm caused that, even when combined with other factors, it could not reasonably be said to have contributed to the result." O'Connor, 401 Mass. at 592. So, a substantial contributing factor is not a negligible factor. Id. It is an essential feature of an event, meaning that the outcome would not have been the same without it. Id.

Defining a substantial contributing factor as "something that makes a difference in the result," simply implies that "the plaintiff had the burden of proving that the defendant's product contributed in fact" to the eventual outcome "in a legally cognizable manner." O'Connor, 401 Mass. at 592. If a potential cause made no difference in the result, then it cannot possibly be considered a factual or legal cause. If a result would not have occurred without a certain factor, then that factor is a cause.

c. O'Connor Sets Forth the Frequency, Proximity and Duration Test for Causal Determinations.

The analytical framework set out in O'Connor was substantial enough to anchor any decision involving multiple causes or tortfeasors in a judicially manageable standard capable of consistent results. Unfortunately, rather than anchoring their analysis in the framework provided by O'Connor, far too many courts have allowed the ambiguity of the substantial factor test to guide their causation determinations, drifting far afield from analytically sound determinations of factual causation. Luckily, advances in science and the formulation of the law allow for Massachusetts courts to reap the benefits of the O'Connor framework, while discarding some of the uncertainties that courts have struggled with in the wake of that decision.

Although the knowledge surrounding the effects of asbestos exposure has advanced significantly since O'Connor was decided, it has long been accepted that the nature of some toxic tort cases, exemplified by those involving asbestos exposure, require courts to adapt the standard of proof necessary to establish causation. See Morin v. Autozone Northeast, Inc., 79 Mass. App. Ct. 39, 42-43 (2011). This is especially true with asbestos exposure due to the prolonged latency period of asbestos-induced mesothelioma, the multiple points of exposure, and the

indistinguishability of contributory exposures. Morin, 79 Mass. at 43. At the heart of these difficulties lie questions surrounding what constitutes sufficient exposure to asbestos-containing products to hold defendant manufacturers liable.

O'Connor addressed the issue head on by providing what has become a touchstone of toxic tort law -- the Frequency, Proximity, and Duration (FPD) Test. See O'Connor, 401 Mass. at 588. In its opinion, the O'Connor Court quoted the trial judge's well-reasoned jury instructions which defined the test as:

> "[E]vidence of some exposure, more than just casual or minimum exposure on a regular basis over some period of time where Mr. O'Connor was actually working with the product himself or in proximity to where others were working with the product." Id.

This analytical framework serves as the threshold burden that the plaintiff must satisfy before moving on to the next inquiry. Id. Although not explicitly stated, in addressing issues regarding scope of liability, the FPD test serves to satisfy the legal causation requirement. See id.

If the evidence presented by plaintiff establishes sufficient exposure in frequency, proximity, and duration to defendant's products, the next part of the inquiry requires that the plaintiff's exposure to the toxic product cause, or substantially contribute to cause, the harm plaintiff alleges. O'Connor, 401 Mass. at 589. Again, although the opinion does

not explicitly label it as such (a fact that likely contributed to the confusion that followed in the wake of the O'Connor decision), this second step in the framework satisfies the function of but for factual causation. This second component of the O'Connor framework, coupled with a survey of the development and current status of causation determinations, reveals that no matter the circumstances, the but for test plays a vital role in preserving the integrity of the factual causation requirement.

As discussed supra, the trial judge in O'Connor defined "substantial contributing cause" in his jury instructions as "something that makes a difference in the result" -- i.e., a but for cause of plaintiff's harm. See O'Connor, 401 Mass. at 589. In the context of a case involving multiple causes, a substantial contributing cause is what Section 27 of the Restatement (Third) of Torts (2010) considers a necessary component of a causal set sufficient to cause plaintiff's harm. In other words, but for that necessary component of the causal set, the plaintiff would not have suffered the same alleged harm. As is the case today, this Court was unequivocal in recognizing the general exception that in the context of a case involving multiple potential tortfeasors whose several negligent acts contribute concurrently so as to render neither a true but for cause of the harm, both defendants will still be held jointly and severally liable for the plaintiff's harm.

O'Connor, 401 Mass. at 591. However, what is implicitly recognized in that statement of the rule and explicitly recognized in Section 27 of the Restatement (Third) of Torts (2010) is the exception still requires that the factfinder determine that either of the concurrent causes, standing alone, would have (i.e., probably) been a but for cause of plaintiff's harm. See id.

Although largely praiseworthy for introducing the FPD test and the Court's required showing of legal and factual causation, the O'Connor decision is not without its own ambiguities and shortcomings. Relying on the limitation for trivial but for causes found in Sections 430, 431, and 433 of the Restatement (Second) of Torts (1997), the O'Connor Court used the definition of "substantial contributing cause" as "something that makes a difference in the result" to classify the second prong of the test as part of the determination of legal, rather than factual causation. O'Connor, 401 Mass. at 592. As noted above, in discussing the trial judge's instructions, the O'Connor Court also failed to clearly label which part of the causation determination each step in the two-pronged test corresponded to. See id. at 590-91. Nevertheless, the analytical framework O'Connor provided for causation is far more preferable than the misguided analysis of subsequent cases ignoring the instruction of O'Connor.

II. Factual Causation as Defined in the Restatement (Third) of Torts is the Proper Standard Where There are Multiple Potential Tortfeasors or Sources of Injury.

a. The Restatement (Third) of Torts Puts Causation Back on Course.

While the substantial contributing factor test initially presented a promising path toward answering difficult questions of causation, "its overuse, abuse, and the confusion generated by it in determining factual causation counsel against its continued employment." Restatement (Third) of Torts, § 26 cmt. j (2010). What once appeared as a navigable strait by defining substantial contributing factor has been diminished by overuse. The Restatement (Third) of Torts is the rudder needed to come about and sail the ship back onto the safe course charted by O'Connor.

b. The Restatement (Third) of Torts Reinvigorates Crucial Aspects of Clarity and Objectivity in Causal Determinations.

The Restatement (Third) of Torts provides clear standards of causation that use an objective "but for" assessment of facts. The relevant portions, as reproduced below, demonstrate the utility of a comprehensive approach to causation that is both simple enough to ensure consistent application and flexible enough to guide the determination of even the most complex questions of causation.

Section 26 Factual Cause:

> "Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a cause of harm under § 27." Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 26 (2010).

Section 27 Multiple Sufficient Causes:

> "If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm." Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 27 (2010).

The importance of this change may not be immediately apparent, but comments to the Restatement (Third) of Torts clarify the precise reasoning behind this return to a factual cause of harm standard, and why a simple and objective approach to causation is crucial in settling inquiries that are fundamentally factual in nature.

Regarding instances where there are multiple potential tortfeasors or sources of injury, the Restatement (Second) of Torts contains ambiguity which gives the factfinder "discretion to decide that, although a sufficient, but not necessary, cause exists, it is nevertheless not a factual cause of the harm." Restatement (Third) of Torts, § 27 cmt. b (2010). This can be explained in part by the inclusion of two words, which, when read together in context, allow subjective judgment to play a decisive role in a determination requiring an objective assessment grounded in fact.

First, the factfinder's substantial factor determination turns on the word "may," which immediately throws what should be an objective mandate into discretionary obscurity, giving the factfinder boundless choice to make independent judgments regarding central elements of causation. Restatement (Third) of Torts, § 27 cmt. b (2010). It is intuitively problematic to characterize an objective assessment of fact as a discretionary decision. The critical role of the factfinder is to make objective determinations based on the facts before them, and should not, in any way, hinge on a personal choice of infinite discretion.

Second, the adjective "substantial" is itself an evaluative term, devoid of any objective standard or constant metric. Restatement (Third) of Torts, § 27 cmt. b (2010). Even Black's Law Dictionary defines "substantial" in nine different ways, including "real and not imaginary," suggesting that anything in existence is substantial, and "important, essential, and material," which itself relies on terminology of subjective significance. See Substantial, Black's Law Dictionary (11th ed. 2019). While potential causes may have varying levels of influence on an outcome, the assessment of whether a factor is or is not a cause has a binary result. Injecting evaluative language of indefinite significance into a determination of

causation only serves to confuse the factfinder and undermine the objectivity required to properly assess the facts.

When "may" and "substantial," both indeterminate terms requiring subjective evaluation, combine to characterize a key factual determination, the resulting proposition unnecessarily imperils factfinder neutrality and subjects litigation to problematic uncertainty. While the subjective nature of the substantial contributing factor test may seem trivial at first glance, it is necessarily untenable when assessed in the proper context.

c. Factual Causation as Set Forth in The Restatement (Third) of Torts is Not a New Standard, but Instead a Clarification of Essential Characteristics of Causation in Accordance with Existing Law.

Adoption of a factual causation standard in line with the guidance of the Restatement (Third) of Torts does not create a novel approach to issues of causation, but instead represents a reminder of concepts central to the law of torts. At the core of these concepts is the return to the "but for" standard as the test for factual causation. See Restatement (Third) of Torts, § 26 (2010). This test for factual causation is desirable from both a practical and policy standpoint.

Although the but for test is not without its critics, it is conceptually the most straightforward standard for juries to understand when determining whether a defendant was the factual

cause of an injury. Essentially the inquiry surrounding the but for test is a question of "what if." Whether consciously or unconsciously, anyone who successfully navigates everyday life reverts to this "what if" question in determining the likely outcome resulting from their actions (or inactions). Thus, applying the counterfactual "what if" question posed by the but for test in order to determine the hypothetical state of the world in the absence of the defendant's alleged tortious conduct is something that practically every jury member is both familiar with and capable of doing. See T.A. Weigand, The Wrongful Demise of But For Causation, 41 W. New Eng. L. Rev. 75, 79-80 (2019).

Perhaps even more importantly, from a policy standpoint, the but for test endorsed by the Restatement (Third) of Torts is desirable as it is essential in furthering the concepts of individual responsibility and corrective justice, both essential characteristics underlying the purposes of our tort law. See id. at 80. Determining whether a defendant is the factual cause of a harm or injury is intended to be an objective inquiry: if the defendant's wrongful conduct caused plaintiff's harm or injury then it is a "but for" cause; if it did not cause that harm or injury, then it is not a "but for" cause. Thus, for the purposes of deciding factual causation, the binary choice posed by the but for test is much more adept for a jury to properly

apportion responsibility then the plethora of subjective determinations which could possibly come into play with the substantial contributing factor test.

III. Reliance on the Restatement (Second) of Torts is no Longer Appropriate.

a. Progressively Loose Applications of the Restatement (Second) of Torts Have Diminished the Connection Between Causation and Fact.

The concept of substantial contributing factor has its roots as a device for determining legal, not factual causation. See J. Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 303, 310 (1911). It was first mentioned in a 1911 Harvard law review article by Jeremiah Smith, who took issue with the foreseeability standard used for determining legal causation. See id. Aside from the oft-cited "twin fires" case, Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45 (Minn. 1920), the substantial contributing factor concept was not widely adopted until after it was included in the Restatement (Second) of Torts.

However, instead of proving to be a beacon of light providing safe guidance to judges, juries, and advocates trying to make causation determinations in difficult cases, the confusion surrounding the term "substantial factor" as it is found in the Restatement (Second) of Torts has led far too many a court into treacherous, uncharted waters. The Tenth Circuit

in June v. Union Carbide Corp., 577 F.3d 1234 (10th Cir. 2009), did a particularly exceptional job of explaining this confusion which has arisen amongst courts relying on the Restatement (Second) of Torts in making causation determinations.

June was a class action suit brought by the residents and representatives of a former Colorado uranium and vanadium mining town against the mining company, asserting claims for personal injury and medical monitoring allegedly caused by radiation exposure from the mines. 577 F.3d at 1236-1237. Similar to the arguments Appellants raise before this Court, since there were potential multiple or concurring causes for their injuries, the plaintiffs in June argued that Colorado applies the substantial factor test instead of the but for test usually applicable in determining factual causation. Id. at 1239. Relying on language from the Restatement (Second) of Torts, § 431 cmt. a, the plaintiffs in June claimed that an actor's conduct can be deemed to be causal "where it is of sufficient significance in producing the harm as to lead reasonable persons to regard it as a cause and to attach responsibility."[1] Id.

[1]The relevant language from § 431 cmt. a, is as follows:

> *a. Distinction between substantial cause and cause in the philosophic sense.* In order to be a legal cause of another's harm, it is not enough that *the harm would not have occurred had the actor not been negligent. Except as stated in § 432(2), this is necessary, but it is not of itself sufficient.* The negligence must

The Tenth Circuit, noting the difficulty and confusion surrounding the application of the substantial factor test, rejected plaintiffs' assertion that the circumstances of the case warranted an abandonment of but for causation in favor of the substantial factor test. June, 577 F.3d at 1239. The Tenth Circuit correctly noted that both the Restatement (Second) and Restatement (Third) of Torts require a determination of factual causation and employ the same standards in making that determination. See id. The court came to this conclusion through a careful reading and comparison of the provisions relating to causation in both Restatements. See id.; see also Restatement (Third) of Torts, §§ 26-27 (2010); Restatement (Second) of Torts, §§ 430-433 (1997). What follows below is summary of the June Court's analysis comparing the causation requirements in the Restatement (Second) and (Third) of Torts.

> also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that *the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause* . . . (emphasis added). Restatement (Second) of Torts, § 431 cmt. a (1997).

Notably, although § 431 cmt. a addresses 'legal cause,' the first portion of the text italicized recognizes the requirement of factual 'but for' cause in order to impose liability; the second italicized portion is the language plaintiffs relied upon in June when formulating their proposed test for factual causation.

Regarding the Restatement (Second) of Torts, the Tenth Circuit examined the provisions relating to factual and legal causation found in Sections 430, 431, 432, and 433. See June, 577 F.3d at 1240-1245. Of those four sections, the court noted that Sections 430, 431, and 433 all relate to legal causation, while Section 432 covers factual causation. See id.

Section 430 states that a negligent person is liable for another's harm only if the negligent conduct was a "legal cause" of the harm. Restatement (Second) of Torts, § 430 (1997). Section 431 then introduces the concept of "substantial factor" providing that "negligent conduct is a legal cause of harm to another if ... his conduct is a substantial factor in bringing about the harm" and no rule of law exempts him from liability. June, 577 F.3d at 1241; Restatement (Second) of Torts, § 431 (1997). Furthermore, in defining "substantial factor," Comment a to Section 431 provides that "[t]he word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using the word in the popular sense, in which there always lurks the idea of responsibility . . ." Restatement (Second) of Torts, § 432 cmt. a (1997).

Section 433 goes on to provide a list of considerations important in determining whether the actor's conduct constitutes

a substantial factor in bringing about harm to another.[2] June, 577 F.3d at 1241; Restatement (Second) of Torts § 433 (1997). Thus, when read in conjunction, the use of the term "legal cause" in Sections 430 and 431, the definition of substantial factor provided in Comment a to Section 431, and the list of considerations set forth in Section 433 to determine if an actor's conduct is a substantial factor in another's harm, make evident that Sections 430, 431, and 433 relate to the scope of liability determination traditionally reserved for the legal causation. June, 577 F.3d at 1241.

After examining the sections related to legal causation, the Tenth Circuit went on to discuss the factual causation requirement in Section 432 of the Restatement (Second) of Torts. June, 577 F.3d at 1241-45. Even a cursory glance at Section 432 makes clear that the Restatement (Second) of Torts retains the same requirements for factual causation and employs the same

[2] The factors set out in Section 433 are:

> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; (c) lapse of time. Restatement (Second) of Torts, § 433 (1997).

standards that can be found in the Restatement (Third). Section 432 states:

> (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.
>
> (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about the harm to another, the actor's negligence may be found to be a substantial factor in bringing it about. Restatement (Second) of Torts, § 432 (1997).

By comparison, the aforementioned factual causation requirement in the Restatement (Third) of Torts can be found in Sections 26 and 27, discussed supra at p. 18.

When read side by side, Section 26 of the Restatement (Third) of Torts mirrors Section 432(1) of the Restatement (Second) of Torts with both applying the same but for standard used to determine the factual causation requirement. Similarly, Section 432(2) of the Restatement (Second) of Torts recognizes what has become the exception for "multiple sufficient causes" in Section 27 of the Restatement (Third) of Torts. In concluding its discussion on the factual causation requirements found in both Restatements, the Tenth Circuit provided a coherent and well-reasoned statement of the test:

> To sum up, as we understand the Restatement (Second) and the Restatement (Third), a defendant cannot be liable to the plaintiff unless its conduct is either

> (a) a but for cause of the plaintiff's injury or (b) a necessary component of a causal set that (probably) would have caused the injury in the absence of other causes. In particular, conduct was not a "substantial factor", within the meaning of the term in the Restatement (Second), in bringing about a plaintiff's injury unless it satisfied (a) or (b), and also was a sufficiently significant factor under the considerations set forth in Restatement (Second), § 433. June, 577 F.3d at 1244.

Admittedly though, the use of the phrase "substantial factor" throughout sections of the Restatement (Second) of Torts relating to both factual and legal causation tends to obscure the line between these two separate components of the causation determination.

The Restatement (Third) of Torts abandoned the use of the term "substantial factor" because it proved to be "confusing and misused." Restatement (Third) of Torts, § 26 cmt. j (2010). Yet, countless cases before and, undoubtedly, countless cases in the future, will continue to drift rudderless into the treacherous waters created by the growing confusion that is the "substantial factor test." However, adoption of the factual causation standards set forth in Sections 26 and 27 of the Restatement (Third) of Torts will provide Massachusetts judges, jurors, and advocates with a comprehensible set of directions capable of consistent application. Indeed, it is the rudder that put the law of causation back on course -- benefitting all involved in the judicial process by avoiding the substantial

confusion that has been caused by the substantial contributing factor test.

b. Overbroad Applications of the Substantial Contributing Factor Test are No Longer Necessary or Appropriate.

The issue which has arisen in subsequent exposure cases is a lack of guidance for the factfinder as to the proper method for determining causation. In their jury instructions, judges have not mentioned the FPD test used to assess exposure, but instead have given free-floating instructions letting the jury find causation if a defendant's negligent conduct is a substantial contributing factor in the plaintiff's harm -- without giving the proper definition for a substantial contributing factor.

Jury instructions from two recent multiple tortfeasor cases illustrate how cases with the essentially the same set of facts get different variations of instructions absent more guidance. In Summerlin v. Philip Morris, Middlesex Superior Court, Massachusetts, Civil Action No. 1581-CV-05255 (Oct. 2018)[3], a trial ending in a split verdict, the jury instructions did not define the term "substantial contributing factor" or mention the difference between legal and factual causation. See Trial of

[3] Summerlin v. Philip Morris was tried against two cigarette makers and an auto parts company, which the plaintiff claimed were responsible for her husband's fatal cancer and subsequent death. The trial ended in a split verdict.

Summerlin v. Philip Morris, Oct. 9, 2018, Vol. 30 at 5304-5339. Whereas, in Ross v. A.O. Smith Corp., Middlesex Superior Court, Massachusetts, Civil Action No. 1381-CV-05580 (Oct. 2017)[4], the jury instructions define substantial contributing factor as "not an insignificant factor." See Trial of Ross v. A.O. Smith Corp., Sept. 28, 2017, Vol. 6 at 895. The jury instructions identified what a substantial contributing factor *is not* but left open uncertainties by not identifying what a substantial contributing factor *is*. Id. at 890, 895-896; compare O'Connor, 401 Mass. at 592 (defining substantial contributing factor as "something that makes a difference in the result").

When O'Connor was decided, the substantial contributing factor test may have been an appropriate tool for determining factual causation in the still burgeoning field of exposure litigation. However, the wide divergence from the central teachings of O'Connor, coupled with the scientific advancements of the past 32 years in our knowledge of the nature and effects of toxic substances, render the overbroad application of the substantial contributing factor test no longer necessary or desirable. What is needed in today's age of exposure litigation is a causation standard that will put the law back on the course

[4] Ross v. A.O. Smith Corp. was tried against an insulation contractor, which plaintiff claimed failed to warn her husband about the dangers of working in close proximity to asbestos. The trial ended in a verdict in favor of the plaintiff.

charted by O'Connor -- a causation standard with clearly defined and delineated tests for factual and legal causation.

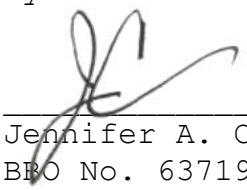
The most efficient means to right the course is to align with the factual causation standard of the Restatement (Third) of Torts. Sections 26 and 27 of the Restatement (Third) of Torts provide clear standards of factual causation that would eliminate any confusion caused by the substantial contributing factor test and ensure consistent application for even the most complex questions of causation. Adoption of the factual causation standard would not be an imposition as courts, juries, and advocates have already tested the waters. See O'Connor, 401 Mass. at 591-592 (defining substantial contributing factor as "something that makes a difference in the result.").

CONCLUSION

Based on the foregoing, MassDLA respectfully requests that this Honorable Court adopt a clear standard of factual causation set forth in Sections 26 and 27 Restatement (Third) of Torts (2010) to ensure objectivity and consistency in cases involving multiple tortfeasors or potential causes of injury.

Respectfully submitted,

MASSACHUSETTS DEFENSE LAWYERS ASSOCATION
By its attorneys,



Dated: September 16, 2020

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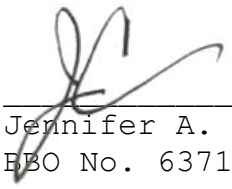
CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

I hereby certify that the foregoing brief complies with all of the rules of the court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

Signed under the pains and penalties of Perjury this 16th day of September, 2020.



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CERTIFICATE OF SERVICE

I, Jennifer A Creedon, hereby certify that I have filed the foregoing document through the eFileMA.com system and notice was sent electronically to the following participants and also a courtesy copy sent via first class mail, postage prepaid:

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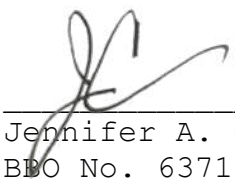

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Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-12921

SETH DOULL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LAURA DOULL, ET AL.,
PLAINTIFFS-APPELLANTS,

V.

ANNA C. FOSTER N.P. AND ROBERT J. MILLER M.D.,
DEFENDANTS-APPELLEES.

On Appeal From A Judgment Of The Franklin Superior Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

STATEMENT OF AMICUS CURIAE

The Massachusetts Academy of Trial Attorneys (Academy), offers this brief as amicus curiae in response to the question posed in this Court's March 13, 2020 announcement as to the appropriate use of the "substantial contributing factor" jury charge in cases involving multiple potential tortfeasors or causes of injury.

The Academy is a voluntary non-profit, Commonwealth-wide professional association of attorneys in the Commonwealth of Massachusetts. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; steadfastly to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of the law in the courts and the Legislature of the Commonwealth since 1975.

The Academy urges this Court to affirm the continued use of the substantial factor charge as routinely given in this Commonwealth, and to reject the invitation to adopt new law on this subject. The Academy takes no position on the specific issues raised by the plaintiffs-appellants in this appeal.

RULE 17(c)(5) DECLARATION

No affirmative declaration pursuant to the conditions set forth in Mass. R. App. P. 17(c)(5) is warranted by the preparation and financing of this brief.

STATEMENT OF ISSUES

I. Should this Court overrule long-established Massachusetts law that, in a case involving multiple alleged tortfeasors or potential causes of injury, the jury should be charged that a defendant is liable if his, her or its negligence is a substantial contributing factor in causing plaintiff's injury?

II. Is there any theoretical, public policy, or practical reason to reject current Massachusetts law on causation and substitute in its place some form of Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§26, 27?

STATEMENT OF CASE

In view of the limited issues addressed in this brief, the Academy takes no position on the parties' respective statements of the case.

STATEMENT OF FACTS

In view of the limited issues addressed in this brief, the Academy takes no position on the parties' respective statements of the facts.

SUMMARY OF ARGUMENT

The substantial contributing factor test has been used in the Commonwealth of Massachusetts for many years, with no reported instances of error or jury confusion. The substantial contributing factor test embodies legal principles that are applicable to a wide variety of factual scenarios, and rarely requires modification. It is therefore simple for trial judges to instruct and jurors to apply. Implementation of a new and confusing test at this juncture would be detrimental to the administration of justice in the Commonwealth. (pp. 14-32).

Adoption of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§26, 27, as advocated by the defendants, would create a complex structure of instructions that would require supplementation in certain factual scenarios. The disruption of the law

would not necessarily be limited to personal injury cases, but might extend to other areas of the law using substantial factor language. (pp. 32-38).

ARGUMENT

I. WITH MULTIPLE TORTFEASORS OR POTENTIAL CAUSES OF INJURY OR DEATH, THE TRADITIONAL SUBSTANTIAL CONTRIBUTING FACTOR TEST PROVIDES A CLEAR AND CORRECT BASIS FOR DETERMINING LIABILITY.

A. Introduction

For nearly a century, Massachusetts judges have charged juries to consider whether a defendant's conduct is a substantial contributing factor in bringing about harm or injury.[1] The instruction avoids the use of "legalese" or jargon; juries are commonly told that a substantial factor is "something that is not negligible, something that makes a difference in the result." O'Connor v. Raymark Indus., Inc., 401 Mass. 586, 592 (1988). And apparently the instruction has been used properly, as neither the defendants, the Academy, nor Massachusetts Defense Lawyers Association (MDLA) have discovered a single decision from any court in the

[1] Courts have used various language to describe this test, including "substantial factor," "substantial contributing factor," "contributing factor," or simply "contributing." The Academy treats these formulations as functional equivalents, and does not ascribe any significance to the precise words used in a particular case.

Commonwealth where the instruction was given in error.[2] Nevertheless, claiming jury confusion and loosening of legal standards of proximate cause, the defendants and the MDLA suggest that this Court should jettison well-established law to adopt the causation formulation in the Restatement (Third) of Torts §§26, 27. That is bad advice.

These Restatement sections suffer from two fatal flaws. First, their adoption would greatly complicate the process of instructing juries in a wide variety of cases. See Argument II, infra. Second, as the Restatement itself acknowledges, it offers an incomplete solution to the problem of proximate cause, and does not even purport to address certain multiple-cause situations, leaving a gap to be addressed by courts. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm §26 & comment f (2005). The defendants advance no cogent reason for this Court to substitute the Restatement's morass for a formulation that has served us well over many years in a wide variety of scenarios. The old saw has never been more apt: "If it ain't broke, don't fix it."

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[2] The Academy cites defendants' brief as "Def. Br." and MDLA's brief as "MDLA Br."

Indeed, the proponents have not even mustered the traditional "parade of horribles" in support of their argument to demolish existing law. They cite no Massachusetts cases, not one, where the substantial factor test has been incorrectly stated or erroneously given. Nor do they point to situations where the test has worked an injustice on some innocent alleged tortfeasor. In the absence of such real-world justification, the defendants are compelled to rely on the wringing of hands and gnashing of teeth of a few academics who, despite its successful use in multiple jurisdictions, bemoan the substantial factor test as weakening causation standards, and advocate a return to "but for" as the solution to some perceived ills. This Court should reject their request as an ill-conceived and unjustified solution in search of a problem and continue to apply the substantial factor test, at least in cases where there are multiple potential tortfeasors or more than one alleged cause of injury or death.

B. The current test is firmly grounded in Massachusetts law.

Although the substantial contributing factor test has its academic roots in the original Restatement of Torts released in 1934, its antecedents date back to at least the turn of the twentieth century. See, e.g., Burke v. Hodge, 217 Mass. 182, 184-185 (1914) (both defendants liable where

accident due to combined effect of two causes); Oulighan v. Butler, 189 Mass. 287, 293 (1905) (finding of proximate cause does not require sole cause, but "may be found in contribution of two or more wrongdoers"); Corey v. Havener, 182 Mass. 250, 251 (1902) (if both defendants "contributed to the injury, that is enough to bind both").

After publication of the first Restatement, this Court repeatedly cited its substantial factor test with approval. See, e.g., Whalen v. Shivek, 326 Mass. 142, 147 (1950) (negligent acts that were "substantial factor" in causing injury sufficient to establish liability of contractor even if others may also be liable); Quinby v. Boston & M. R.R., 318 Mass. 438, 444 (1945) (jury could have found that gate tender's negligence was "substantial factor in bringing about [] damage"), citing Restatement (First) of Torts §§431, 433 (1934); Vigneault v. Dr. Hewson Dental Co., 300 Mass. 223, 229 (1938) (negligence may be substantial factor in causing harm even if same harm might possibly have been suffered without negligence), citing Restatement (First) of Torts §432 (1934).

Through the years, this Court and the Appeals Court have continued to endorse the substantial contributing factor test in a variety of cases with multiple contributing causes. See, e.g., Bernier v. Boston Edison Co., 380

Mass. 372, 386-387 (1980) (judge properly instructed jury to consider whether defendant's negligence was "substantial factor" in bringing about harm, without regard to possible negligence of other parties); Chase v. Roy, 363 Mass. 402, 408 (1973) (two or more wrongdoers who negligently contributed to injury); Delicata v. Bourlesses, 9 Mass. App. Ct. 713, 720 (1980) ("established rule is that an injured party is permitted to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident"); Lawrence v. Kamco, Inc., 8 Mass. App. Ct. 854, 858 (1979) (liability for negligence that was substantial factor in causing harm, even though actual damage caused by intervention of another force). See also Young v. Atl. Richfield Co., 400 Mass. 837, 845-846 (1987) (Abrams, J., dissenting) (arguing that failure to post sign warning of dangerous condition in gas station warranted application of substantial factor test in Restatement (Second) of Torts §442B); Necktas v. Gen. Motors Corp., 357 Mass. 546, 550 (1970) (Spiegel, J., dissenting) (arguing that claim for breach of warranty was established with proof that conduct was substantial factor in bringing about harm), citing Restatement (Second) of Torts §433B (1965).

But the defendant and MDLA turn a blind eye to the long and storied history of the substantial factor test, instead treating O'Connor as an outlier that suddenly burst on the scene in the 1980s for the limited purpose of handling asbestos cases.[3] In fact, O'Connor broke no new ground but simply applied well-established law on the effect of negligence found to be a substantial contributing factor in causing harm. O'Connor, 401 Mass. at 591-592. Moreover, the assertion that "[t]he SJC found no reversible error in the trial court's incorporation of the 'but for' equivalent into the definition of substantial factor," Def. Br. at 25, grossly misstates perhaps the most notable aspect of the O'Connor decision. Namely, given the multiple actors involved it would have been reversible error for the trial judge to give a "but for" charge. O'Connor, 401 Mass. at 591. The Court noted:

> [f]urthermore, we agree with the plaintiff that she would be entitled to a new trial if the judge's instructions, viewed as a whole, might reasonably have led the jury to understand that,

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[3] See MDLA Br. at 9, 13. Contrary to the MDLA's assertion, Morin v. Autozone E.N., Inc., 79 Mass. App. Ct. 39 (2011), did not establish some new causation standard applicable only to asbestos cases; rather, the Appeals Court acknowledged certain factors unique to proof of exposure. Id. at 42-43. The remainder of Morin rests on legal principles dating back more than one hundred years.

> in order to recover, the plaintiff had to prove "but for" causation, or that she had the burden of identifying the particular effect of the defendant's product, in a way that distinguished it from the effect of the other asbestos products to which O'Connor was exposed. We agree that the law imposes no such requirement. We have said before, and we repeat, "that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable."

(Emphasis added). Id., quoting Chase v. Roy, 363 Mass. 402, 408 (1973). Far from holding that "but for" was the equivalent of "substantial factor," as the defendants suggest, the Court drew a distinction noting that the latter was correct while the former would have warranted a new trial. Id.

In fact, the false equivalency between "but for" and "substantial factor" aside, the MDLA acknowledges that the "analytical framework set out in O'Connor was substantial enough to anchor any decision involving multiple causes or tortfeasors in a judicially manageable standard capable of consistent results." MDLA Br. at 13. The Academy agrees, and suggests that nothing in the ensuing thirty years has eroded the clarity and consistency of the substantial factor charge endorsed by O'Connor.

Having accepted the original O'Connor language—which is, as noted, consistent with longstanding principles of Massachusetts law—the

MDLA somehow conjures that unspecified events have since undermined those principles. Without the benefit of a single citation, the MDLA makes several sweeping assertions about the state of Massachusetts law since O'Connor:

- "In [O'Connor], this Court charted a navigable course for cases involving potential multiple tortfeasors or sources of injury by defining core principles of causation, including 'substantial contributing factor.' Despite this Court's efforts to sail on a clear course, subsequent courts have failed to define concepts of causation which has gradually led to treacherous waters." MDLA Br. at 7-8.

- "[R]ather than anchoring their analysis in the framework provided by O'Connor, far too many courts have allowed the ambiguity of the substantial factor test to guide their causation determinations, drifting far afield from analytically sound determinations of factual causation." MDLA Br. at 13.

- "Nevertheless, the analytical framework O'Connor provided for causation is far more preferable than the misguided analysis of subsequent cases ignoring the instruction of O'Connor." MDLA Br. at 16.

- "What once appeared as a navigable strait by defining substantial contributing factor has been diminished by overuse. The Restatement (Third) of Torts is the rudder needed to come about and sail the ship back onto the safe course charted by O'Connor." MDLA Br. at 17.

Reading the MDLA's argument, one would fear that the O'Connor vessel has been boarded by pirates bound for the lawless open seas. Hardly.

As later cases show, Massachusetts courts have consistently and correctly applied the substantial factor test. See Argument I. C, infra. It would have been helpful to this Court, these parties, and the Academy if the MDLA had identified at least one of the "far too many courts" that have "drift[ed] far afield from analytically sound determinations of factual causation," or if it had identified even one of the "subsequent cases ignoring the instruction of O'Connor."[4] That it did not do so speaks volumes about the continued viability of the substantial factor test and the Massachusetts courts' ability to apply it correctly.

C. The current test has not led to any relaxation of traditional proximate cause standards or other perceived injustices.

Far from signifying the end of Western civilization, Massachusetts case law since O'Connor demonstrates that courts have continued to apply the time-tested principles of causation. Neither the defendants nor the MDLA cite a single decision where the trial court erred when using the

[4] The MDLA cites transcripts from Superior Court cases as evidence of the problem it seeks to solve. See MDLA Br. at 29-30. This Court should give no weight to arguments based on transcript fragments from two sources that are unavailable to the Court or the parties and that have not been the subject of appellate review.

substantial factor test. Nor have they pointed examples of substantial factor test leading to an absurd or unjust result. If, as the MDLA asserts, a ship has entered "treacherous waters," it is not a single vessel, but a vast armada comprised of this Court, the Appeals Court, and the entire Department of the Trial Court.

Indeed, a survey of post-O'Connor cases shows that Massachusetts courts understand the substantial factor test and continue to apply it clearly, correctly, and consistently.[5] To the extent that appellate courts have commented on the charge under review, it has been to approve and

[5] See generally, e.g., Parr v. Rosenthal, 475 Mass. 368 (2016); Kace v. Liang, 472 Mass. 630 (2015); Evans v. Lorillard Tobacco Co., 465 Mass. 411 (2013); Klairmont v. Gainsboro Rest., Inc., 465 Mass. 165 (2013); Anthony H. v. John G., 415 Mass. 196 (1993); Greater Boston Cable Corp. v. White Mountain Cable Constr. Corp., 414 Mass. 76 (1992); Parsons v. Ameri, 97 Mass. App. Ct. 96 (2020); Reid v. Boston, 95 Mass. App. Ct. 591 (2019); Dubuque v. Cumberland Farms, 93 Mass. App. Ct. 332 (2018); Santiago v. Rich Prods. Corp., 92 Mass. App. Ct. 577 (2017); Williamson-Green v. Equip. 4 Rent, Inc., 89 Mass. App. Ct. 1539 (2016); Soderberg v. Concord Greene Condominium Ass'n, 76 Mass. App. Ct. 333 (2010); Supeno v. Equity Office Props. Mgt., 70 Mass. App. Ct. 470 (2007); Federico v. Ford Motor Co., 67 Mass. App. Ct. 454 (2006); Brunelle v. W.E. Aubuchon Co., 60 Mass. App. Ct. 626 (2004); Carney v. Tranfaglia, 57 Mass. App. Ct. 664 (2003); Lally v. Volkswagen Aktiengesellschaft, 45 Mass. App. Ct. 317 (1998); Welch v. Keene Corp., 31 Mass. App. Ct. 157 (1991); Price v. Cole, 31 Mass. App. Ct. 1 (1991); Murray v. Goodrich Eng'g, 30 Mass. App. Ct. 918 (1991).

encourage its use in cases involving multiple potential causes. See Burns v. DeFelice Corp., 93 Mass. App. Ct. 1105 (2018) (Rule 1:28 disposition) (attached) (in cases with evidence of multiple potential causes, causation instruction using term "substantial contributing factor" should be given); Bonoldi v. DJP Hospitality, Inc., 90 Mass. App. Ct. 1104 (2016) (Rule 1:28 disposition) (attached) (approving use of substantial contributing factor test in cases where harm has multiple causes); Hannon v. Calleva, 87 Mass. App. Ct. 1135 (2015) (Rule 1:28 disposition) (attached) ("substantial contributing factor instruction is normally given when there are multiple causes or tortfeasors"); Pitts v. Wingate at Brighton, Inc., 82 Mass. App. Ct. 285, 292 (2012) (plaintiff "not required to prove that her fall was the sole cause of her injury, only that it was a substantial contributing factor").

Courts have encouraged the explicit use of the substantial contributing factor language. In Allen v. Slocum, 31 Mass. App. Ct. 926 (1991), the trial judge repeated the older language from Wallace v. Ludwig, 292 Mass. 251 (1935), instructing the jury that proximate cause was "that which in a continuous sequence and unbroken by any other cause,

produces a result without which the result would not have occurred."[6] Allen, 31 Mass. App. Ct. at 927. Although the Appeals Court found that the possibly misleading effect of the Wallace charge was mitigated by the judge's addition that there could be more than one proximate cause of an injury, it suggested that he "might have expanded" on his instructions. Id. at 928. See Hobbs v. TLT Constr. Corp., 78 Mass. App. Ct. 178, 180 (2010) (judge properly instructed on substantial factor to "flush out" potential liability through concurrent liability and indivisible injury). Compare Renzi v. Paredes, 452 Mass. 38, 44 n.10 (2008) (criticism of "substantial contributing factor" language has no bearing "where there are two alleged tortfeasors") with Matsuyama v. Birnbaum, 452 Mass. 1, 31 (2008) (substantial factor test "less appropriate" where "one defendant's malpractice alone is alleged to have caused the victim's diminished likelihood of a more favorable outcome"). Clearly the substantial factor language serves its purpose well, without error, confusion or unjust results.

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[6] The judge's actual charge replaced "other" with "new" in the original case, a substitution the Appeals Court noted "could have been misleading as it could be understood to exclude liability in a case of several, concurrently operating, contributing causes." Allen, 31 Mass. App. Ct. at 927.

D. The substantial contributing factor test provides juries with a clear formulation of the legal standard for proximate cause.

With guidance first offered in the original Restatement of Torts,[7] judges have successfully articulated the concept of a substantial factor over many years. This formulation was found in the trial court's charge in O'Connor, which instructed the jury thus:

> you have to find that the asbestos contained in this defendant's products was a substantial contributing cause of his illness and death. It doesn't have to be the only cause, but it has to be a substantial contributing cause.... It means something that makes a difference in the result. There can be and often are more than one cause present to produce an injury, and more than one person legally responsible for an injury or disease, so here, even if other manufacturers of asbestos-containing products were at fault, and their products contributed to Mr. O'Connor's disease, Raymark, Raybestos-Manhattan, is not thereby relieved from liability if you should find... that its

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[7] Comment a to the original §431 explained that: "[t]he word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense,' yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes." Restatement (First) of Torts §431 comment a (1934). This definition properly excludes causes more analogous to the famed "butterfly effect." See Butterfly effect – Wikipedia, at https://en.wikipedia.org/wiki/Butterfly_effect.

> Raybestos products were... a substantial contributing factor to his disease and... death. So you look to see... how much asbestos he was exposed to, whether he inhaled or retained any fibers from the asbestos, consider the medical evidence, how mesothelioma and asbestos are related, consider the evidence as to the effects on the body of different types of asbestos fibers, and then determine whether Raybestos fibers, if you find he was exposed to them, did cause his mesothelioma or contribute substantially to that disease.

(Emphasis added.) O'Connor, 401 Mass. at 589. The Court noted that this clarification "served to distinguish between a 'substantial factor,' tending along with other factors to produce the plaintiff's disease and death, and a negligible factor, so slight or so tangential to the harm caused that, even when combined with other factors, it could not reasonably be said to have contributed to the result." Id. at 591. The trial judge further assisted the jury by offering several examples of evidence to consider in determining whether the defendant's asbestos was a substantial factor in causing harm.

With minor variations, this language has become the gold standard in the Commonwealth over the past thirty years. Id. at 589. See Hannon, 87 Mass. App. Ct. at 1135 (Rule 1:28 disposition) ("judge's instruction properly differentiated between a substantial factor that could give rise to liability and a negligible factor that could not"); Massachusetts Superior

Court Civil Practice Jury Instructions §§2.1.9(b), 4.3.4(b), 11.2.11(b), 11.3.4(b), 11.7.2 (Mass. Cont. Legal Educ. 3d ed. 2014 & Supp. 2018).

Nor can one argue with a straight face that this instruction unduly confuses juries simply because the O'Connor jury requested reinstruction on this point. Def. Br. at 23. Lawyers and judges of a certain age will recall that at the time O'Connor was tried, in the mid-1980s, the practice of giving juries taped or typed versions of the Court's instructions for reference during deliberations was still many years in the future.

At that time, requests by juries to have portions of the charge repeated to them were a commonplace, and such a request hardly indicates widespread confusion. There is simply no reason to expect that the average juror would have difficulty understanding the substantial factor charge when applying it to determine whether a defendant's negligence "made a difference in the result."

E. Many factual scenarios require the substantial contributing factor test.

The "but for" test advocated by the defendants and the MDLA is harmless, and perhaps even proper[8] in a case where there is a single alleged cause of harm with no contributing causes, e.g., a healthy pedestrian in a cross walk struck by a speeding car with an obstructed view, or a shopper in the middle of a store aisle struck by a falling display shelf. But those cases are few and far between. Even Wallace, the case most often cited as authority for the "but for" charge, in fact involved a situation where recovery was sought for a death due to a complicated sequence of events that left the decedent in a weakened condition susceptible to disease. Wallace, 292 Mass. at 252, 257. While the decision contains the famous and often-quoted language that "the proximate cause is that which in a continuous sequence, unbroken by any new cause, produces an event and without which the event would not have occurred,"

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[8] Like the Appeals Court in Hannon, the Academy takes no position on whether the substantial contributing factor test may or must be used where there is no evidence of multiple cause or tortfeasors. See Matsuyama, 452 Mass. at 31 (substantial factor "less appropriate" where one defendant's negligence is alleged to have caused the harm).

id. at 254, the Court's full discussion contains principles of multiple causation that augur the later development of the substantial factor test introduced by the newly published first Restatement of Torts. Id. at 255-256. Indeed, Wallace is better read as an exposition of the principles of intervening causation than the genesis of the "but for" charge.

And the theoretical and practical flaws in the "but for" test are palpable in more complex situations. The classic example is where there are two causes, each independently sufficient to cause the harm. Neither cause would satisfy the "but for" test, because if either were removed, the one remaining would nevertheless bring about the harm. Thus, it cannot be said as to either cause that the injury would not have happened "but for" that cause. See e.g., Payton v. Abbott Labs, 780 F.2d 147, 157 (1st Cir. 1985) (applying Massachusetts law); Oulighan, 189 Mass. at 293; Boston & A. R. Co. v. Shanly, 107 Mass. 568, 579 (1871). The defendants attempt to avoid this clearly unsatisfactory and erroneous result by arguing that "but for does not mean exclusive but means necessary." Def. Br. at 20. But that argument fails as, in the case of two sufficient causes, neither is necessary.

Similarly, the "but for" test is wholly inadequate when two negligent causes, neither of which alone would be sufficient to cause the harm,

combine forces to result in injury. Massachusetts law has long recognized liability in this situation. See Matsuyama, 452 Mass. at 30 (substantial contributing factor useful with multiple tortfeasors who caused harm in aggregate, even though none was a but-for cause); Oulighan, 189 Mass. at 293. Even the defendants acknowledge that the substantial factor test is required on these facts, Def. Br. at 27-28, while the MDLA would apparently reject Massachusetts law and find no liability at all in such a situation. MDLA Br. at 16. Cases where some of the multiple causes are non-negligent similarly cannot be adequately covered by a but-for instruction. See O'Connor, 401 Mass. at 591 ("defendant's position is no better if the concurring acts of others were not negligent acts"); Camp v. Rex, Inc., 304 Mass. 484, 488 (1939) (plaintiff who fell from unsecured chair at wrestling match could recover for defendant's negligence which "helped to bring about injury," even if surge of crowd trying to watch fracas between contestants also contributed to her fall).

So even if this Court were to accept the defendants' invitation to overrule a century of settled law and adopt the Third Restatement, there would remain many situations where the substantial factor charge would still be required. Adding a new test would require judges, and sometimes

juries, to decide which test should be used in a particular case. As there is no evidence of injustice or other concerns about the substantial factor test as applied, there is no reason to invite confusion and error as suggested.

II. THE ADOPTION OF RESTATEMENT (THIRD) OF TORTS AS A SUBSTITUTE FOR THE SUBSTANTIAL FACTOR TEST WOULD COMPLICATE THE PROCESS OF INSTRUCTING JURIES.

A. The causation charge contemplated by the Restatement (Third) of Torts is unnecessarily complicated and would lead to judicial errors and jury confusion.

The defendants and the MDLA blithely advocate the adoption of two sections of the Restatement (Third) of Torts, Sections 26 and 27. While the defendants do not address the practical consequences of their proposed change, even the Restatement Reporter recognizes the potential for confusion and error resulting from the implementation of a "but for" test that does not apply in certain factual scenarios, *viz*:

> To be sure, in some cases, it may be unclear whether multiple causes are involved or multiple sufficient causes exist. When that situation obtains, the jury should be carefully instructed first to determine, based on the evidence, whether multiple causes or multiple sufficient causes exist. Then, the two appropriate standards for factual causation, the one in this Section [26] and the one contained in § 27, should be provided along with an explanation of which one is applicable, depending on the jury's resolution of the first causal issue.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm §26 comment i (2010). Worthy of Rube Goldberg, this construct of the problem and its proposed solution is virtually incomprehensible. It is difficult to imagine it being translated, in the crucible of the courtroom, to any test that a judge could explain much less that a jury could apply.

Comment f to Section 27, apparently intended to "clarify" or "refine" Section 26, is similarly obtuse:

> In some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff's harm. Nevertheless, when combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm. This circumstance thus creates the multiple-sufficient-causal-set situation addressed in this comment. The fact that an actor's conduct requires other conduct to be sufficient to cause another's harm does not obviate the applicability of this Section. See § 26, Comment c. Moreover, the fact that the other person's conduct is sufficient to cause the harm does not prevent the actor's conduct from being a factual cause of harm pursuant to this Section, if the actor's conduct is necessary to at least one causal set. Sometimes, one actor's contribution may be sufficient to bring about the harm while another actor's contribution is only sufficient when combined with some portion of the first actor's contribution. Whether the second actor's contribution can be so combined into a sufficient causal set is a matter on which this Restatement takes no position and leaves to future development in the courts. See Comment i.
>
> …

[And this:]

> When an actor's tortious conduct is not a factual cause of harm under the standard in § 26 only because one or more other causal sets exist that are also sufficient to cause the harm at the same time, the actor's tortious conduct is a factual cause of the harm.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm §27 comment f (2010).

Adopting these sections is far more likely to induce mutiny among the sailors on the ship than to correct its course. At a minimum, it would drastically increase the potential for significant error in jury charges and jury verdicts, and the resulting need to retry cases or appellate review, or both. Such a result would be inefficient in the best of times, but in the current climate, where jury trials have ground to a screeching halt creating a backlog that is likely to persist for years, the last thing this Court should do is create law that would increase the burden on the trial courts.

B. Adoption of the Restatement (Third) of Torts and concomitant abandonment of the traditional substantial contributing factor test would invite confusion and questions in other situations in which courts have used the test.

In addition to the confusion and potential for error in tort cases, adopting the Third Restatement would invite challenges to other precincts

of the law that use the substantial factor language. It would cast the law in many areas into disarray, as lawyers argue analogies to other situations and judges try to divine whether and how to apply the new test to these areas. Following are examples of other causes of action in which the "substantial factor" language has been used:

- **Deceit.** See Saunders v. Goodman, 8 Mass. App. Ct. 610, 616 (1979) (false representation about zoning permits was substantial factor in causing developer's financial loss).

- **Misrepresentation.** See Reisman v. KPMG Peat Marwick LLP, 57 Mass. App. Ct. 100, 112-113 (2003) (investors may recover where their reliance on fraudulent misstatement was "substantial factor in the decision to purchase and/or retain stock").

- **Contract.** See Curcuru v. Rose's Oil Serv., 66 Mass. App. Ct. 200, 210 (2006) (defendant liable for breach of warranty of workmanlike service under federal maritime law if breach was "substantial factor" in causing loss).

- **Legal malpractice.** See Kiribati Seafood Co., LLC v. Dechert LLP, 478 Mass. 111, 120 (2017) (court's legal error and attorney's malpractice may be concurrent causes of injury where substantial contributing factor test is useful, citing Matsuyama); Lawrence Sav. Bank v. Levenson, 59 Mass. App. Ct. 699, 707 (2003) (attorney liable for malpractice if negligence was "substantial factor" in causing loss).

- **First Amendment.** See Harris v. Board of Trustees of State Colleges, 405 Mass. 515, 523 (1989) (employee must show that constitutionally protected speech was "substantial factor" in employer's decision to dismiss him).

- **Worker's compensation fraud.** See Shaw's Supermarkets, Inc. v. Delgiacco, 410 Mass. 840, 843 (1991) (employee not entitled to worker's compensation benefits where employee's false representation about physical condition was "substantial factor" in employer's hiring decision).

- **Civil rights**. See Johnson v. Summers, 411 Mass. 82, 88 (1991) (plaintiff in Section 1983 civil rights case must show defendant's conduct was "substantial factor" in causing harm).

- **Disability accommodation.** See Smith v. Bell Atl., 63 Mass. App. Ct. 702, 710 (2005) (company's lack of reasonable accommodations was "substantial contributing factor in rendering [plaintiff] unable to work").

- **Chapter 93A.** See Brewster Wallcovering Co. v. Blue Mt. Wallcovers, Inc., 68 Mass. App. Ct. 582, 594 (2007) (G.L. c. 3A damages recoverable if conduct was substantial factor).

- **Voluntariness.** Commonwealth v. Monroe, 472 Mass. 461, 471 (2015) (defendant's physical and emotional condition "is a substantial factor in considering whether free will was overborne by police tactics").

- **Commercial disparagement.** See HipSaver, Inc. v. Kiel, 464 Mass. 517, 537 (2013) (recovery for specific pecuniary loss requires showing that publication of disparaging material was "substantial factor influencing the specific, identified purchaser in his decision not to buy").

- **Defamation.** See Murphy v. Boston Herald, Inc., 449 Mass. 42, 67 (2008) (defamed judge could recover for pain and suffering as to which defamatory statement was substantial factor).

- **Attorney discipline.** In re Kerlinsky, 428 Mass. 656, 664 (1999) (existence prior discipline is "substantial factor" in determining the level of discipline in subsequent case).

- **Criminal legal malpractice.** See Correia v. Fagan, 452 Mass. 120, 131 n.19 (2008) (attorney's negligence must be "a substantial factor contributing to plaintiff's conviction").

- **Hate crimes.** See Commonwealth v. Kelly, 470 Mass. 682 (2015) (rejecting argument that hate crime under G.L. c. 265, §39 requires showing that racial animus was either the sole reason or "'substantial factor 'motivating commission of the offense").

- **Confrontation rights.** Commonwealth v. DiBenedetto, 414 Mass. 37, 41 (1992) (government must show that admission of deposition testimony without opportunity for cross-examination was not "substantial factor" in jury's decision to convict).

- **Manslaughter.** Commonwealth v. McLeod, 394 Mass. 727, 745 (1985) (defendant may be convicted of manslaughter on showing that acts are "substantial factor" in causing death even in absence of joint liability theory).

- **Vehicular homicide.** Commonwealth v. Mandell, 29 Mass. App. Ct. 504, 506 n.5 (1990) (defendant may be liable for motor vehicle homicide even where pedestrian was contributorily negligent, if conduct was "substantial factor" in causing death).

While many of these areas do not specifically depend upon the Restatement of Torts, they share the common language of "substantial factor." These are commonly understood words in the English language which are commonly used in Massachusetts courts. It does not strain

credulity to fear that a change to their meaning in one setting would raise a question about the scope of that change.

CONCLUSION

For the foregoing reasons, the Academy urges this Court to affirm the continued viability of the substantial contributing factor jury charge in cases involving multiple tortfeasors and/or multiple possible causes of an injury.

Respectfully submitted,

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ADDENDUM

ADDENDUM
TABLE OF CONTENTS

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 265. Crimes Against the Person (Refs & Annos)

M.G.L.A. 265 § 39

§ 39. Assault or battery for purpose of intimidation; weapons; punishment

Effective: July 1, 2012
Currentness

(a) Whoever commits an assault or a battery upon a person or damages the real or personal property of a person with the intent to intimidate such person because of such person's race, color, religion, national origin, sexual orientation, gender identity, or disability shall be punished by a fine of not more than five thousand dollars or by imprisonment in a house of correction for not more than two and one-half years, or by both such fine and imprisonment. The court may also order restitution to the victim in any amount up to three times the value of property damage sustained by the owners of such property. For the purposes of this section, the term "disability" shall have the same meaning as "handicap" as defined in subsection 17 of section one of chapter one hundred and fifty-one B; provided, however, that for purposes of this section, the term "disability" shall not include any condition primarily resulting from the use of alcohol or a controlled substance as defined in section one of chapter ninety-four C.

(b) Whoever commits a battery in violation of this section and which results in bodily injury shall be punished by a fine of not more than ten thousand dollars or by imprisonment in the state prison for not more than five years, or by both such fine and imprisonment. Whoever commits any offense described in this subsection while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for not more than ten years or in the house of correction for not more than two and one-half years. For purposes of this section, "bodily injury" shall mean substantial impairment of the physical condition, including, but not limited to, any burn, fracture of any bone, subdural hematoma, injury to any internal organ, or any injury which occurs as the result of repeated harm to any bodily function or organ, including human skin.

There shall be a surcharge of one hundred dollars on a fine assessed against a defendant convicted of a violation of this section; provided, however, that moneys from such surcharge shall be delivered forthwith to the treasurer of the commonwealth and deposited in the Diversity Awareness Education Trust Fund established under the provisions of section thirty-nine Q of chapter ten. In the case of convictions for multiple offenses, said surcharge shall be assessed for each such conviction.

A person convicted under the provisions of this section shall complete a diversity awareness program designed by the secretary of the executive office of public safety in consultation with the Massachusetts commission against discrimination and approved by the chief justice of the trial court. A person so convicted shall complete such program prior to release from incarceration or prior to completion of the terms of probation, whichever is applicable.

Credits

Added by St.1983, c. 165, § 1. Amended by St.1996, c. 163, § 2; St.1998, c. 180, § 64; St.2011, c. 93, § 117, eff. July 1, 2012; St.2011, c. 199, § 8, eff. July 1, 2012.

90 Mass.App.Ct. 1104
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Andrea BONOLDI

v.

DJP HOSPITALITY, INC.,[1] and another.[2]

1 Doing business as Econo Lodge.

2 Kaco Food and Beverage, Inc., doing business as JJ's Sports Bar and Grill.

No. 15–P–780.
|
September 2, 2016.

By the Court (MILKEY, AGNES & MALDONADO, JJ.[3]).

3 The panelists are listed in order of seniority.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** This appeal arises from a slip and fall in the parking lot outside of JJ's Sports Bar and Grill (JJ)—an establishment the plaintiff frequented regularly. JJ leases the building from codefendant DJP Hospitality, Inc. (DJP). DJP owns the adjoining Econo Lodge and is responsible for the maintenance and repair of the parking lot. After trial, the jury returned verdicts in favor of both defendants, finding JJ not negligent and DJP negligent but concluding that its negligence was not a substantial factor in causing the plaintiff's injury.

The plaintiff appeals from the judgment, asserting that the judge improperly instructed that a defendant is liable if his conduct was a "substantial factor" in bringing about the harm. Additionally, the plaintiff appeals from the judge's denial of her motion for new trial pursuant to Mass.R.Civ.P. 59, 365 Mass. 827 (1974), which asserted that the verdicts were against the weight of the evidence. We affirm.

1. *Jury instruction.* The plaintiff first challenges the judge's negligence instruction regarding "the substantial contributing factor" test.[4] She asserts (without reference to any legal authority) that the judge should have instructed the jury, as she had requested, that each defendant's conduct was "a legal cause" of her harm. The plaintiff preserved her challenge to the instruction,[5] and "[w]e review [the] objection[ ] to [the] jury instruction[ ] to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party." *Dos Santos v. Coleta,* 465 Mass. 148, 153–154 (2013), quoting from *Hopkins v. Medeiros,* 48 Mass.App.Ct. 600, 611 (2000). We see no error.

4 The judge gave the following instruction:

> "The defendant's conduct was the legal cause of the plaintiff's injury if it was a substantial factor in bringing it about and without which the harm would not have occurred. In other words, if the harm would have occurred anyway, the defendant is not liable. It does not matter whether other concurrent causes contributed to the plaintiff's injuries, so long as you find that the defendant's conduct was a substantial factor. By substantial, I mean that the defendant's contribution to the harmful result, i.e., the defendant's negligence, was not an insignificant factor. The defendant's negligence must contribute significantly to the result. It must be a material and important ingredient in causing the harm. If the defendant's negligence was a substantial factor, then it is considered a legal cause of the plaintiff's injury, and the plaintiff is entitled to recover. If it was not a substantial factor, if the negligence was only slight, insignificant, or tangential to causing the harm, then even though you may have found the defendant negligent, they cannot be held liable to pay damages to the plaintiff on this claim."

5 The plaintiff proposed her own set of jury instructions on negligence and objected to the judge's instruction at the conclusion of the charge. See Mass.R.Civ.P. 51(b), 365 Mass. 816 (1974) (to preserve right to claim error on appeal, counsel must object to charge before jury begins deliberations).

"The 'substantial contributing factor' test [that the judge gave here] is useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any *individual* defendant's conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm." *Matsuyama v. Birnbaum,* 452 Mass. 1, 30 (2008). Here, there were two alleged tortfeasors—JJ and DJP, therefore, the instruction was proper. Furthermore, there was also a question regarding the causal

connection between the plaintiff's fall and her alleged injuries, especially since she had suffered from migraine headaches since her youth. Accordingly, on this record, we conclude the instruction was proper. Seeing no legal error, we end our analysis here. See *Global Investors Agent Corp. v. National Fire Ins. Co.,* 76 Mass.App.Ct. 812, 824 (2010).

2. *Motion for new trial.* The plaintiff also contends the judge improperly denied her motion for new trial in that the verdict, as to each defendant, was against the "great weight" of the evidence. She specifically contends that because "[t]he only evidence presented at trial regarding [her] accident was that she fell in a defective hole in the parking lot" there was no basis for verdicts favoring each defendant. We disagree.

***2** Only when "the verdict is against the clear weight of the evidence" may a trial judge set aside the jury verdict and order a new trial. *J. Edmund & Co. v. Rosen,* 412 Mass. 572, 576 (1992). On appeal, we give "considerable deference to a judge's disposition of a motion for a new trial, especially where he was the trial judge, and we will reverse the ruling only for an abuse of discretion." *Gath v. M/A–COM, Inc.,* 440 Mass. 482, 492 (2003). In our view, the evidence adduced at trial provided ample support for the jury's verdicts.

Contrary to the plaintiff's position, "negligence cannot be inferred from the mere happening of an accident." *Marshall v. Carter,* 301 Mass. 372, 378 (1938). The jury was not obligated to accept the plaintiff's uncontroverted testimony that she fell as a result of a defective hole in the parking lot. See *Matter of Saab,* 406 Mass. 315, 328–329 (1989). The defendants' zealous cross-examination of the plaintiff as to the time she arrived at JJ and the extent of her injuries could have diminished her credibility in the eyes of the jury. While finding DJP negligent in its lighting and maintenance of the parking lot, the jury could still have concluded that their negligence did not substantially contribute to the plaintiff's fall or to her claimed injuries. Rather, the jury could have attributed the plaintiff's fall to her physical state of being tired and having consumed alcohol. The jury could have disbelieved that she tripped in the area around a manhole cover, especially where she never reported that to either the emergency room personnel or other treating physicians. The jury was also free to discredit the plaintiff's testimony as to the scope and cause of her injuries. See *Meyer v. Wagner,* 57 Mass.App.Ct. 494, 505 (2003) ("It is the job of the jury, not the judge, to weigh conflicting evidence and to draw reasonable inferences"). For example, the jury could have concluded that the injuries the plaintiff suffered, especially the migraine headaches, preexisted and were the result of causes entirely unrelated to the accident, especially given her testimony that she suffered from migraine headaches since "early childhood."

Similarly, the evidence also supported the jury's finding that JJ was not negligent. As a commercial tenant JJ stood in a different footing from DJP. As the judge properly instructed, JJ's duty was "to warn persons on its property of all dangerous or unsafe conditions of which the tenant is aware in areas appurtenant to or belonging to the leased premises." See *Davis v. Westwood Group,* 420 Mass. 739, 743 (1995). Where "the only viable theory of negligence [against JJ] is a negligent failure to warn, the open and obvious nature of the danger causing the injury will therefore relieve [JJ] of any duty vis-a-vis that danger." *Dos Santos v. Coleta,* 465 Mass. at 158. On the evidence adduced at trial, the jury could have found that as a regular patron of JJ, the plaintiff was familiar with the parking lot, the location of the manhole cover, and the condition of the asphalt surrounding the cover—relieving, thereby, JJ of its duty to warn. Put another way, the jury could have concluded that the defect was open and obvious and that JJ was relieved of its duty to warn or, as the verdict read, that it was not negligent. We conclude, therefore, that both verdicts were amply supported by the evidence adduced at trial, and we perceive no abuse of discretion in the judge's denial of the plaintiff's new trial motion. *Adams v. United States Steel Corp.,* 24 Mass.App.Ct. 102, 103 (1987).

***3** *Judgment affirmed.*

Order denying motion for new trial affirmed.

All Citations

90 Mass.App.Ct. 1104, 57 N.E.3d 1065 (Table), 2016 WL 4577493

End of Document

93 Mass.App.Ct. 1105
Unpublished Disposition

Appeals Court of Massachusetts.

Michael BURNS & another[1]

v.

DEFELICE CORPORATION & another.[2]

1 Robert Houser.

2 DeFelice Incorporated.

17–P–879
|
Entered: April 6, 2018.

By the Court (Trainor, Kinder & Henry, JJ.[3])

3 The panelists are listed in order of seniority.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** On November 3, 2010, the plaintiffs' residence was destroyed by a natural gas explosion. After an administrative hearing, the Department of Public Utilities (DPU) concluded that the defendants, while performing excavation work with mechanical equipment nearby, violated multiple provisions of the Massachusetts dig safe statute, G. L. c. 82, §§ 40–40E, resulting in damage to the gas line that serviced the plaintiffs' residence. See DeFelice Corp. v. Department of Pub. Util., 88 Mass. App. Ct. 544 (2015) (affirming DPU's decision). Subsequently, the plaintiffs filed suit in the Superior Court alleging that by negligently damaging the gas line during excavation, the defendants caused the explosion that destroyed the residence. Specifically, the plaintiffs claimed negligence, trespass, nuisance, and a violation of G. L. c. 93A, § 2 (93A claim). Ultimately, the case was tried and the jury returned a verdict for the defendants on the common-law claims. The judge later dismissed the 93A claim for failure to timely serve a presuit demand letter.

On appeal, the plaintiffs claim the judge erred by (1) failing to properly instruct the jury regarding the prior DPU proceeding and causation, (2) excluding the unredacted DPU decision from evidence, and (3) dismissing the 93A claim. For the reasons that follow, we affirm the dismissal of the 93A claim, but vacate the judgment on the jury verdict and remand for a new trial on the plaintiffs' common-law claims—negligence, trespass, and nuisance.

Background. The factual background, the dig safe regulatory scheme, and the DPU's decision are clearly set forth in DeFelice Corp., supra., and we need not repeat them here. It is sufficient to say, in summary, that the DPU investigated the explosion, including the roles of the defendants and NSTAR (the utility provider). Following an evidentiary hearing, at which the defendants appeared and were represented by counsel, the DPU concluded that the defendants violated the dig safe statute. As pertinent here, the DPU concluded that (1) the defendants failed to properly inform the dig safe call center of the planned excavation, G. L. c. 82, § 40A;[4] and (2) failed to take reasonable precautions to avoid damage to underground gas lines during excavation, G. L. c. 82, § 40C. These conclusions were based on subsidiary factual findings that (1) the defendants failed to sufficiently identify the area to be excavated by either telephone calls to the dig safe call center or markings on site, and (2) the defendants excavated with mechanical equipment despite visible markings indicating underground gas lines. See DeFelice Corp., supra at 549–551.

4 NSTAR, as a utility provider, has a statutory obligation to mark gas lines only when an area has been properly identified for excavation. See G. L. c. 82, § 40B.

In this action, the plaintiffs sought summary judgment, arguing that the DPU decision conclusively established the defendants' negligence. The judge denied the motion, but ruled that the defendants were "collaterally estopped in this case from arguing that [they] did not violate the Dig Safe

law." Following opening statements, the judge reiterated that "[a]ny issue that has been decided, either by the [DPU] or by this Court, is obviously law of the case." The next day, the judge again emphasized that the DPU decision "[e]stopped [the defendants] from arguing that they did not violate the Dig Safe laws."

***2** The judge denied the plaintiffs' motion in limine to admit the entire DPU decision as an exhibit. However, she allowed the admission of a heavily redacted version, which included the conclusion that the defendants had violated the dig safe statute. The plaintiffs requested the following jury instruction regarding the import of the DPU decision:

> "the DPU found that [the defendants were] negligent when [they] damaged the gas line that exploded and destroyed [p]laintiffs' home. Earlier in this case, the Court found that the DPU findings on [the defendants'] negligence could not be relitigated. Therefore, I instruct you that [the defendants have] already been found negligent in [their] damage to the gas line, and you need not further decide that issue."

The plaintiffs also requested an instruction that a "Dig Safe Laws [violation] is prima facie evidence that the damage was caused by the negligence of the person that committed the violation." See G. L. c. 82, § 40C. The judge denied both requests.

Discussion. 1. Jury instructions. "We review objections to jury instructions to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party." Beverly v. Bass River Golf Mgmt., 92 Mass. App. Ct. 595, 603 (2018) (quotation omitted). We examine the instructions as a whole to determine whether they accurately reflect the applicable law. Ibid. Although the judge has "significant latitude" in fashioning the instructions, there is error where the jury are not instructed on an important issue raised by the trial evidence. Comeau v. Currier, 35 Mass. App. Ct. 109, 111–112 (1993).

We turn first to the plaintiffs' claim that the judge failed to properly instruct the jury regarding the legal effect of the prior DPU decision.[5] The judge unequivocally ruled in her summary judgment decision that the defendants were "collaterally estopped in this case from arguing that [they] did not violate the Dig Safe law." She repeated during trial that her decision on collateral estoppel was the law of the case. Despite these admonitions, the defendants challenged the DPU investigation and decision throughout the trial and forcefully argued to the jury that the defendants had "complied fully with the obligations of law under Dig Safe."

5 We are not persuaded by the defendants' argument that the plaintiffs waived their objections to the jury instructions by failing to object after the instructions were given. While a better practice would have been for the plaintiffs' counsel to renew their objections with specificity at the end of the judge's charge, we think the objections were adequately preserved. The plaintiffs clearly stated their objections and the grounds therefore at the charge conference, where the judge stated, "I will note your objection to those decisions for the record." See Mass.R.Civ.P. 51(b), 365 Mass. 816 (1974); Rotkiewicz v. Sadowsky, 431 Mass. 748, 750–751 (2000). Thus, it is clear that the judge was on notice of the objection and the primary purpose of the rule was achieved.

In this context, where the jury heard that the DPU had previously concluded that the defendants violated the dig safe statute, and the defendants, contrary to the judge's earlier ruling, argued the opposite, it was important to give the jury clear guidance regarding the legal meaning of the DPU decision. Here, the instructions failed to do so. The judge did not instruct on the dig safe statute, the result of the DPU proceeding, or the concept of collateral estoppel. The judge explained only that "a statutory violation may be considered as some evidence of negligence, but it is not conclusive evidence that there was a breach of the duty of care." This generic instruction, although an accurate statement of law, was inadequate in this case.

***3** Once the judge ruled that collateral estoppel applied in these circumstances, see Bellerman v. Fitchburg Gas & Elec. Light Co., 470 Mass. 43, 60–62 (2014) (collateral estoppel properly applied to factual findings of DPU in administrative hearing), the jury should have been instructed that the defendants had violated the dig safe statute as determined by the DPU. The jury should also have been instructed that the statutory violation was prima facie evidence of the defendants' negligence regarding damage to the gas line. G. L. c. 82, § 40C, inserted by St. 1998, c. 332 ("[D]amage to a pipe" without first giving proper notice of excavation is "prima facie evidence in any legal ... proceeding that such damage was caused by the [excavator's] negligence"). The failure to so instruct was error.[6]

6 We do not suggest that the judge should have given the plaintiffs' requested instruction on this point. That

> proposed instruction merged the concepts of negligence and the dig safe violation in a way that may have confused the jury. However, "[e]ven though the request was not strictly accurate ... , it was sufficient to direct the consideration of the judge to an important principle of law not adverted to in the charge, an omission which well may have resulted in harm to the [plaintiffs]." Petras v. Storm, 18 Mass. App. Ct. 330, 335–336 (1984), quoting from Bergeron v. Forest, 233 Mass. 392, 402 (1919).

We next consider the potential impact of that error on the jury's deliberations. "An error in jury instructions is not grounds for setting aside a verdict unless the error was prejudicial—that is, unless the result might have differed absent the error." Blackstone v. Cashman, 448 Mass. 255, 270 (2007). Here, we agree with the plaintiffs that the defendants' failure to properly inform the dig safe call center of the planned excavation, and failure to take reasonable precautions to avoid damage to underground gas lines, matters previously decided by the DPU, were central issues in the case. The absence of instructions on these points fundamentally altered the scope of the jury's task, leaving them free to reconsider issues already settled as the law of the case. This error affected the substantial rights of the plaintiffs on their claims of negligence, trespass, and nuisance.[7]

7 Because we conclude that it was prejudicial error not to instruct the jury regarding the DPU decision and the dig safe statute, we need not address the claimed error in the judge's instruction on causation. We note, however, that in cases with evidence of multiple potential causes, the causation instruction using the term "substantial contributing factor" should be given. See Matsuyama v. Birnbaum, 452 Mass. 1, 30 (2008).

2. Admissibility of the DPU decision. The plaintiffs moved in limine to admit the entire thirty-eight page DPU decision as an exhibit at trial along with a copy of this court's decision affirming the DPU in DeFelice Corp., 88 Mass. App. Ct. 544. The judge denied the motion, in part, allowing admission of a redacted version of the DPU decision consistent with the holding in Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 353–355 (1995). The plaintiffs claim this limitation was error. We review for abuse of discretion. See Dahms v. Cognex Corp., 455 Mass. 190, 198 (2009) ("We do not disturb a judge's decision to admit evidence absent an abuse of discretion" [quotation omitted]).

In Resendes, we affirmed the admission of a redacted DPU decision at trial. The redaction was such that the DPU decision contained only primary facts as opposed to evaluation and opinion. Resendes, supra. We are not persuaded by the plaintiffs' argument that this case is distinguishable. The judge acted within her discretion when she allowed the admission of the redacted DPU decision. To the extent that the plaintiffs challenge the scope of the redaction, the objection has been waived. Once the judge ruled that a redacted DPU decision would be admitted, the parties agreed on the scope of the redaction.

***4** Finally, the plaintiffs offer no authority for the proposition that this court's decision affirming the DPU should have been admitted as an exhibit at trial. The judge did not abuse her discretion in denying the plaintiffs' motion in limine on that basis.

3. 93A claim. The complaint alleged that the defendants' conduct violated G. L. c. 93A because it was unfair, deceptive, and failed to comply with a public safety statute. The judge appropriately reserved the 93A claim for her own judgment rather than submit it to the jury. See Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 168–169 (2013). In a written decision, she dismissed the 93A claim for lack of jurisdiction, concluding that the plaintiffs failed to meet the statutory prerequisite for filing such a claim.

General Laws c. 93A, § 9, "requires a plaintiff to make a written demand letter asking for reasonable relief thirty days prior to filing a lawsuit." Lingis v. Waisbren, 75 Mass. App. Ct. 464, 468 (2009) (quotation omitted). Here, it is undisputed that the plaintiffs sent their demand letter and filed the complaint the same day. We discern no error in the judgment of dismissal, where the plaintiffs failed to meet their burden of establishing compliance with the statute. See id. at 468. See also York v. Sullivan, 369 Mass. 157, 164 (1975) ("[T]he thirty-day requirement is a prerequisite" to suit).[8]

8 The defendants' request for "fees and costs associated with this appeal" is denied.

The judgment of dismissal on the G. L. c. 93A claim is affirmed.

The judgment on the jury verdict is vacated and the matter is remanded for further proceedings consistent with this memorandum and order.

87 Mass.App.Ct. 1135
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Daniel HANNON
v.
Jaclyn CALLEVA.

No. 14–P–1061.
|
July 7, 2015.

By the Court (FECTEAU, AGNES & SULLIVAN, JJ.[5]).

5 The panelists are listed in order of seniority.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** This appeal arises out of a motor vehicle tort case in which the plaintiff, Daniel Hannon, appeals from a jury verdict in favor of the defendant, Jaclyn Calleva, and from the denial of his motion for new trial. For the reasons that follow, we affirm.

Background. On April 7, 2007, Hannon was the driver of a large commercial van stopped at a red light on Main Street in Watertown. Calleva, who was driving a Toyota Corolla, pulled to a stop behind him. Calleva testified that while stopped at the light, she heard the beeping sound of a truck backing up and looked around to find the source of the sound. As she did so, her vehicle came into contact with the rear bumper of Hannon's van. Calleva hypothesized that Hannon may have backed up into her or that her foot may have slipped off the brake and her vehicle rolled into the van. The responding police officer testified that Calleva informed him "she was traveling eastbound on Main Street, was distracted, looked down, and struck the vehicle in front of her, the van." There was conflicting testimony as to the damage to either vehicle.

Three days after the accident, Hannon sought medical attention, complaining of neck pain. At trial, Hannon claimed that this accident caused his now-chronic neck pain. Hannon testified about his past work and medical conditions that could have contributed to his neck pain, including treatment for a shoulder injury four months before the motor vehicle accident.[1] Hannon testified that after the accident he struggled to return to work, but could not perform his duties, and that neither physical therapy nor trigger point injections helped his recovery.

1 Hannon worked for Verizon as a telephone installation repairman technician for about thirty-seven years. This work consisted of physical labor, including placing and climbing ladders. In December of 2006, Hannon was treated at Caritas Medical Group for pain in his shoulder arising from a rotator cuff tear. During the visit he also complained of tightness in the back of his neck that had been "going on for many months."

At the conclusion of closing arguments, the judge instructed the jury that Hannon's claim was comprised of three elements: whether Calleva owed him a duty of care, whether she breached that duty of care, i.e., was negligent, and whether Calleva's negligence "was [a] substantial contributing factor in causing injury or harm to the plaintiff." After explaining the first two elements, the judge elaborated on the meaning of "proximate cause."[2] Hannon objected to the judge's instruction on causation. The judge had previously declined to use Hannon's proposed instruction on that issue. The jury answered special questions and found that Calleva was negligent in allowing her vehicle to come into contact with Hannon's van, but that her negligence did not cause Hannon's neck pain.

2 The judge gave the following jury instructions:

> "To prove proximate cause, the plaintiff, Mr. Hannon, must show that there is a greater likelihood or probability that the harm complained of was due to the causes for which the defendant was responsible, than it was not.
>
> "The plaintiff is not required to eliminate entirely, all possibility that the defendant's conduct was not the cause. It is enough if he establishes that it is more probable that the event caused by the defendant, than it was caused by another event.
>
> "It is for you to determine upon consideration of all the evidence, whether it is more likely than not that Mr. Hannon's injuries would not have occurred but for the defendant's action or inaction.
>
> "The plaintiff is not required to prove that the defendant's conduct was the sole cause. Most events in life are the product of more than one cause or force. It is enough if Mr. Hannon proves

> that the defendant's negligence was a substantial contributing factor to bringing about the injury."

Discussion. 1. *Jury instruction.* "An error in jury instructions is not grounds for setting aside a verdict unless the error was prejudicial—that is, unless the result might have differed absent the error."[3] *Blackstone v. Cashman,* 448 Mass. 255, 270 (2007). Hannon objected to the judge's instruction regarding causation, specifically the references to "substantial contributing factor." Hannon maintained that the instruction confused the jury. In addition to renewing that assertion on appeal, Hannon asks us to adopt the recommendation made in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 (2010), to eliminate any reference to "substantial contributing cause" in the instruction on causation because such language is potentially confusing.[4] In this case, it is unnecessary to decide whether use of the "substantial contributing factor" formulation of legal cause in a case in which there is no evidence of multiple causes or tortfeasers is inappropriate because there was evidence that the plaintiff's injuries may have been the result of more than one cause.

3 Calleva maintains that even if the inclusion of the language was error, it was harmless in light of the jury charge as a whole which properly stated the "but-for" standard. See *Blackstone v. Cashman,* 448 Mass. 255, 270 (2007).

4 The Restatement (Third) of Torts § 26, Reporter's Note to comment j, at 367, recommends the elimination of the "substantial factor" language from the causation instruction except where there are multiple sufficient causes: "To the extent that substantial factor is employed instead of the but-for test, it is undesirably vague. As such, it may lure the factfinder into thinking that a substantial factor means something less than a but-for cause or, conversely, may suggest that the factfinder distinguish among factual causes, determining that some are and some are not 'substantial factors.' Thus, use of substantial factor may unfairly permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm or may unfairly require some proof greater than the existence of but-for causation."

***2** The substantial contributing factor instruction is normally given when there are multiple causes or tortfeasors. In *Matsuyama v. Birnbaum,* 452 Mass. 1, 30 (2008), the Supreme Judicial Court stated that "[t]he 'substantial contributing factor' test is useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors in which it may be impossible to say for certain that any *individual* defendant's conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm." In the present case, the "substantial contributing factor" instruction was appropriate and helpful to the jury because there was evidence from which the jury could find that an event or events prior to the motor vehicle accident may have been the cause of Hannon's neck injury. The judge's instruction properly differentiated between a substantial factor that could give rise to liability and a negligible factor that could not. See *O'Connor v. Raymark Indus., Inc.,* 401 Mass. 586, 592 (1988).

2. *Motion for new trial.* A denial of a motion for new trial is within the sound discretion of the trial judge and "will be reversed only for a clear abuse of [that] discretion." *Galvin v. Welsh Mfg. Co.,* 382 Mass. 340, 343 (1981). See *Robertson v. Gaston Snow & Ely Bartlett,* 404 Mass. 515, 520 (1989). Hannon asserts that his motion for a new trial was improperly denied because the jury verdict was "markedly" against the weight of the evidence. We disagree. In his memorandum of decision on the motion, the judge explained how the jury might have viewed the evidence:

> "The jury here had more than sufficient evidence to support its verdict. The jury heard testimony, corroborated by photographs, that Calleva's much smaller and lighter car made very slight contact with Hannon's heavy commercial van (so little contact that neither car moved or was even scratched). The jury also heard that Hannon's van had an energy-absorbing bumper, and that Hannon did not complain of neck pain until three days after the accident. Further, all medical tests performed on Hannon showed no physical injury. Hannon's medical expert, Dr. Saris, testified only that he believed Hannon's neck was hurt and that a whiplash injury is a possible result from a car accident. The jury properly weighed the evidence and [were] entitled to accept or reject Dr. Saris'[s] opinions in the context of all other evidence."

Hannon has failed to demonstrate that the judge abused his discretion.

Judgment affirmed.

Order denying motion for new trial affirmed.

All Citations

87 Mass.App.Ct. 1135, 33 N.E.3d 1268 (Table), 2015 WL 4079832

Restatement (First) of Torts § 431 (1934)

Restatement of the Law - Torts | June 2020 Update

Restatement (First) of Torts

Division Two. Negligence

Chapter 16. The Causal Relation Necessary to Responsibility for Negligence

Topic 1. Causal Relation Necessary to the Existence of Liability for Another's Harm

Title A. General Principle

§ 431 Legal Cause; What Constitutes

Comment:

Case Citations - by Jurisdiction

The actor's negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and
(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Comment:

a. Distinction between substantial cause and cause in the philosophic sense. In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. Except as stated in § 432(2), this is necessary but it is not of itself sufficient. The negligence must also be a substantial factor as well as an actual factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

[REDACTED]

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Restatement (First) of Torts § 432 (1934)

Restatement of the Law - Torts | June 2020 Update

Restatement (First) of Torts

Division Two. Negligence

Chapter 16. The Causal Relation Necessary to Responsibility for Negligence

Topic 1. Causal Relation Necessary to the Existence of Liability for Another's Harm

Title A. General Principle

§ 432 Negligent Conduct as Necessary Antecedent of Harm

(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been negligent.
(2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about.

[REDACTED]

Restatement (First) of Torts § 433 (1934)

Restatement of the Law - Torts | June 2020 Update

Restatement (First) of Torts

Division Two. Negligence

Chapter 16. The Causal Relation Necessary to Responsibility for Negligence

Topic 1. Causal Relation Necessary to the Existence of Liability for Another's Harm

Title A. General Principle

§ 433 Considerations Important in Determining Whether Negligent Conduct is a Substantial Factor in Producing Harm

Comment:
Case Citations - by Jurisdiction

The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm;

(c) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(d) lapse of time.

[REDACTED]

Restatement (Second) of Torts § 433B (1965)

Restatement of the Law - Torts | June 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 16. The Causal Relation Necessary to Responsibility for Negligence

Topic 1. Causal Relation Necessary to the Existence of Liability for Another's Harm

Title A. General Principles

§ 433B Burden of Proof

(1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.
(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.
(3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

[REDACTED]

Restatement (Second) of Torts § 442B (1965)

Restatement of the Law - Torts | June 2020 Update

Restatement (Second) of Torts

Division Two. Negligence

Chapter 16. The Causal Relation Necessary to Responsibility for Negligence

Topic 1. Causal Relation Necessary to the Existence of Liability for Another's Harm

Title C. Superseding Cause

§ 442B Intervening Force Causing Same Harm as That Risked by Actor's Conduct

Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

[REDACTED]

Restatement (Third) of Torts: Phys. & Emot. Harm § 26 (2010)

Restatement of the Law - Torts | June 2020 Update

Restatement (Third) of Torts: Liability for Physical and Emotional Harm

Chapter 5. Factual Cause

§ 26 Factual Cause

Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27.

Comment:

[REDACTED]

i. Multiple causes distinguished from multiple sufficient causes. The recognition of multiple causes in Comment *c* should be distinguished from multiple causes that overdetermine the outcome, a situation addressed in § 27. Comment *c* recognizes that for *any* harm that occurs, multiple factors will be necessary in a but-for sense. No modification of the but-for standard is necessary or appropriate to account for the multiple causes in every causal set. By contrast, § 27 addresses a much more limited situation—that in which there are separate causes (more accurately, separate causal sets), each of which is independently sufficient to cause the plaintiff's harm. Thus, the plaintiff's harm is "overdetermined" because, while either of the causal sets would produce the harm, neither is by itself a but-for cause of the harm. In that limited situation, the but-for standard of this Section is supplemented in § 27. For illustrations of multiple sufficient causes and multiple causes, see § 27, Illustrations 1 and 2.

Frequently, plaintiffs allege that multiple tortious acts or omissions caused their harm. This is especially true in negligence actions because of the flexibility of the reasonable-care standard. Quite often, each of the alleged acts or omissions is a cause of the harm, i.e., in the absence of any one, the harm would not have occurred. So long as the factfinder determines that any one of the alleged acts was tortious and a but-for cause of the harm, that is sufficient to subject the actor to liability.

In a few cases, especially ones in which the plaintiff alleges multiple omissions by a single defendant, doubt may exist whether each of the defendant's acts or omissions was, independent of the others, a but-for cause of the plaintiff's harm. This is a specialized version of the problem addressed in § 27, Comment *i*. For purposes of applying the but-for standard in this Section, the factfinder may consider all such tortious acts or omissions by a defendant in determining whether, in their absence, the plaintiff's harm would not have occurred.

Illustration:

3. David's airplane was seriously damaged when he was forced to land the plane without the retractable gear

in the down position. David sues Chaser Aircraft, the manufacturer of the plane. David claims that Chaser neglected to include instructions in its service manual of the need to be sure of a minimum clearance between two parts in the landing-gear assembly when reassembling the gear after routine servicing. David's plane was serviced at Chaser because Chaser needed to complete unrelated warranty work to the aircraft. The Chaser mechanic who worked on David's plane was fired shortly after the work was completed for repeatedly failing to consult service manuals when working on a plane, and David includes a claim based on the mechanic's negligence. Neither the omitted instruction nor the mechanic's negligence in failing to consult the manual is, by itself, a but-for cause of the harm to David's plane because neither one alone would have produced the harm to David's plane. See § 27, Comment *i.* Nevertheless, if the factfinder determines that a company providing a service manual with the omitted instruction and the same company with a mechanic who properly consulted the service manual would have prevented the damage to David's plane, Chaser's multiple negligent acts are a factual cause of the plane damage.

[REDACTED]

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Restatement (Third) of Torts: Phys. & Emot. Harm § 27 (2010)

Restatement of the Law - Torts | June 2020 Update

Restatement (Third) of Torts: Liability for Physical and Emotional Harm

Chapter 5. Factual Cause

§ 27 Multiple Sufficient Causes

If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.

Comment:

[REDACTED]

f. Multiple sufficient causal sets. In some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff's harm. Nevertheless, when combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm. This circumstance thus creates the multiple-sufficient-causal-set situation addressed in this Comment. The fact that an actor's conduct requires other conduct to be sufficient to cause another's harm does not obviate the applicability of this Section. See § 26, Comment *c*. Moreover, the fact that the other person's conduct is sufficient to cause the harm does not prevent the actor's conduct from being a factual cause of harm pursuant to this Section, if the actor's conduct is necessary to at least one causal set. Sometimes, one actor's contribution may be sufficient to bring about the harm while another actor's contribution is only sufficient when combined with some portion of the first actor's contribution. Whether the second actor's contribution can be so combined into a sufficient causal set is a matter on which this Restatement takes no position and leaves to future development in the courts. See Comment *i*.

Illustration:

3. Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul's car, which is parked at a scenic overlook at the edge of a mountain. Their combined force results in the car rolling over the edge of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel Paul's car past the curbstone, but the combined force of any two of them is sufficient. Able, Baker, and Charlie are each a factual cause of the destruction of Paul's car.

That there are common elements in each of the sufficient causal sets does not prevent each of the sets from being a factual cause pursuant to this Section.

Illustration:

4. Jonathan raises salmon in a pond on his property. Due to an unusual rainfall, a chemical, potentially toxic to salmon, leaks into the pond from natural deposits some distance from Jonathan's property. However, the chemical concentration in the pond remains below the threshold that causes harm to salmon. Shelley and Mia, who engage in industrial operations near Jonathan's property, each negligently allow the escape of the same chemical from their operations. Shelley's and Mia's chemical is deposited in Jonathan's pond at the same time; each is sufficient with the existing contamination to raise the chemical concentration of the pond to a level that kills all of the salmon. Each of Shelley's and Mia's negligence is a factual cause of Jonathan's loss of salmon.

With the explanation provided in this Comment about the scope of this Section, a more precise, if also more complicated version of the black letter in this Section might be stated as:

> When an actor's tortious conduct is not a factual cause of harm under the standard in § 26 only because one or more other causal sets exist that are also sufficient to cause the harm at the same time, the actor's tortious conduct is a factual cause of the harm.

[REDACTED]

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CERTIFICATE OF COMPLIANCE

I, Thomas R. Murphy, hereby certify that the forgoing brief complies with the rules of court, including, but not limited to:

Mass. R. App. P. 16(a)(13) (addendum);

Mass. R. App. P. 16(e) (references to the record);

Mass. R. App. P. 18 (appendix to the briefs);

Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. App. P. 21 (redaction).

I further certify, pursuant to Mass. R. App. P. 16(k), that the forgoing brief complies with the length limitation in Mass. R. App. P. 20 because it is printed in a proportional spaced font, Book Antiqua, at size 14 point, and contains 6,020 words in Microsoft Word 2013.

/s/ Thomas R. Murphy

Thomas R. Murphy, BBO No. 546759

Date: September 30, 2020

CERTIFICATE OF SERVICE

I certify that on the 30th day of September, 2020, I served the foregoing brief on the parties in this matter by electronic delivery via the efileMA system to their attorneys of record or, if such attorneys are not registered with efileMA or if such parties are *pro se* and not registered with efileMA, via Priority Mail. The attorneys served are:

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