EFiled: Oct 30 2013 11:54PM EDT
Filing ID 54472557
Case Number 392,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NADIV SHAPIRA, M.D. and NADIV SHAPIRA, M.D., LLC,	:	
	:	No.: 392, 2013
Defendants Below, Cross Appellants,	:	On Appeal from the Superior Court of the State of Delaware, in and for New Castle County, C.A. No. N11C-06-092 MJB
v.	:	
CHRISTIANA CARE HEALTH SERVICES, INC.,	:	
Defendant Below, Appellant / Cross Appellee.	:	
and	:	
JOHN HOUGHTON and EVELYN HOUGHTON, his wife,	:	
Plaintiffs Below, Appellees,	:	

CROSS APPELLANTS NADIV SHAPIRA, M.D. AND NADIV SHAPIRA, M.D., LLC'S OPENING BRIEF

ELZUFON AUSTIN TARLOV & MONDELL, P.A.

JOHN A. ELZUFON – I.D. #177
GARY W. ALDERSON – I.D. #3895
300 Delaware Avenue, Suite 1700
P.O. Box 1630
Wilmington, DE 19899-1630
(302) 428-3181
Attorneys for Defendants Below, Cross Appellants Nadiv Shapira, M.D. and Nadiv Shapira, M.D., LLC.

Dated: October 30, 2013

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

NATURE AND STAGE OF THE PROCEEDINGS

In this Appeal, from a jury verdict rendered November 14, 2012, in favor of John and Evelyn Houghton ("Plaintiffs") Defendant/Cross-Appellant, Nadiv Shapira, M.D. ("Dr. Shapira") argues that several evidentiary and legal decisions below denied him a fair trial and as such, appellate relief in the nature of a new trial is required.

This is a medical negligence case arising out of injuries sustained from complications resulting from the insertion, on December 10, 2009, at Christiana Hospital ("Christiana"), by Dr. Shapira, into John Houghton ("Mr. Houghton" or "Plaintiff") of a medical device known as the On-Q soaker catheter ("On-Q").

Plaintiffs filed suit against Dr. Shapira and Christiana Care Health Services ("CCHS") on June 8, 2011, alleging, *inter alia*, as to Dr. Shapira that he failed to obtain Mr. Houghton's informed consent. It is known, as a fact, that the jury verdict had to have been based, at least in part, on informed consent because CCHS was found independently liable[1] and Plaintiffs' only claim against CCHS involved the informed consent process[2].

Numerous pretrial motions were filed which largely focused on the extent to which the parties would be allowed to present evidence on the alleged "experimental" nature of the On-Q treatment for rib fracture pain. Part of this

---

[1] D.I. 221 p. 2. (AA 535).
[2] 11/9/12 Tr 46:14-17 (Prayer conference). (AA 401).

Appeal discusses how the erroneous rulings by the Trial Court were so prejudicial to Dr. Shapira that he was unable to put on a defense to Plaintiffs' allegations regarding the informed consent issue.

A separate informed consent issue concerns whether a physician seeking a patient's informed consent must disclose matters not directly related to the actual treatment proposed, such as the physician's relationship with a device manufacturer, potential financial conflicts of interest, and applicable institutional research protocols related to the procedure or device in question. As such, part of this Appeal explains why, as a result of the Trial Court's erroneous interpretation of Delaware's Informed Consent Statutes, 18 *Del.C.* §§ 6801(6) and 6852, the case presented by Plaintiffs was so prejudicial to Dr. Shapira that the jury was unable to return a fair and proper verdict on the informed consent issue.

Additionally, the jury's "original" verdict allotted 65% liability to Dr. Shapira and 35% to CCHS. Thereafter, and erroneously, the Trial Court granted CCHS' request that the jury be compelled to return and reallocate the 35% portion of fault.

Finally, Mr. Houghton moved after trial for Pre- and Post-Judgment Interest pursuant to 6 *Del.C.* §2301(d). The later part of this Appeal explains why the Trial Court's decision allowing Pre-judgment interest was erroneous pursuant to its finding of when the trial commenced.

SUMMARY OF ARGUMENT

1. The Trial Court erred by interpreting the Informed Consent Statutes, 18 *Del.C.* §§ 6801(6) and 6852, as requiring that a physician must disclose matters not directly related to the actual treatment which was proposed to the patient, such as the physician's relationship with a manufacturer, any potential conflict of interest, and any applicable Institutional Review Board ("IRB") research protocols.

2. The Trial Court erred when it allowed Mr. Houghton to present evidence that he was allegedly enrolled in a study to test a new and unproven use of the On-Q, thereby implying that it was an "experimental" procedure (which it was not) and, as such, should have been advised of this information pursuant to the informed consent protocol used when a patient is enrolled in a study. These erroneous rulings were compounded when the Trial Court granted Plaintiffs' motion to deny Dr. Shapira the opportunity to present a key point developed during discovery: that the CCHS trauma surgeons, in whose care Mr. Houghton was entrusted, did not, at the time of his treatment in December 2009, consider that using the On-Q for the treatment of rib fracture pain was "experimental."

3. The Trial Court erred as a matter of law, on November 14, 2012 (reiterated in its June 27, 2013 Opinion and Order) when it granted CCHS' request, over Dr. Shapira's objection, that the jury reconvene after rendering its "original" verdict, which set forth the respective degrees of fault among the Defendants, to

"re-allocate" how much of CCHS' 35% fault arose from the conduct of CCHS' admitted employee, Dr. Jerry Castellano, versus how much arose from the conduct of CCHS' apparent agent, Dr. Shapira. The verdict, as to Dr. Shapira, was already excessive, warranting relief, and having the jury reconvene, after its original verdict, was likewise in error.

4. The Trial Court erred as a matter of law by concluding in its June 27, 2013 Opinion and Order that the trial began on October 31, 2103 (as contended by Mr. Houghton) not on October 24, 2013 (as contended by Defendants) thereby holding that Mr. Houghton's settlement demand was made more than 30 days before trial, thus permitting the award of pre-judgment interest.

5. The proximate cause instruction given to the jury was erroneous as a matter of law.

STATEMENT OF FACTS

The treatment of John Houghton at Christiana Hospital

On December 7, 2009, Mr. Houghton, age 72, was transported to the Christiana Hospital Emergency Department ("ED") for emergency treatment after falling off a ladder. Radiographs taken in the ED revealed that he had three fractured ribs and a fractured pelvis.[3] He was started on a medication regime to relieve his pain and was admitted to the service of Christiana Hospital's trauma team.[4]

There came a point in time when the trauma team determined that Mr. Houghton's medication regime was not producing satisfactory results and he needed interventional anesthesia. The trauma team requested a consult with Dr. Shapira for On-Q consideration and placement.[5]

On December 8, 2012, Dr. Shapira responded to the consult, examined Mr. Houghton and recommended the insertion of On-Q soaker catheter. Mr. Houghton signed a consent form and Dr. Shapira inserted the On-Q.[6]

---

[3] PX 5 (4634-4635). (AA 478-479).
[4] (Trial witnesses alphabetical: Drs. Bradley, Cipolle, Fulda, Giberson and Tinkoff).
[5] DX 1, Tab 2 (0732) (AA 533).
[6] DX 1, Tab 11 (0027-0029) (AA 528-530).

During the consent discussion Dr. Shapira did not tell Mr. Houghton anything about his relationship with I-Flow, about the ongoing cardiac surgery study, his data collection or his proposed protocol.

The parties agreed that the December 8, 2009, the On-Q placement was successful.[7] Unfortunately, on December 9, 2009, Mr. Houghton became confused and inadvertently pulled out the On-Q.[8]

Accordingly, on December 10, 2009, Dr. Shapira had another informed consent discussion with Mr. Houghton, similar to the one conducted on December 8, 2009. Mr. Houghton consented, again, to have another On-Q placed. Another consent form was signed,[9] and Dr. Shapira re-inserted the On-Q.[10] Unfortunately, on December 10, 2009, this On-Q went under one of the ribs and into Mr. Houghton's abdominal cavity, resulting in injuries.

The On-Q

The On-Q is a medical device manufactured by I-Flow. It delivers local anesthetic agents directly to a pain source either at a surgical site itself or upon sensory nerves adjacent to an injury. The On-Q is a latex-like flexible catheter with holes in it, much like a soaker hose, through which local anesthetic is delivered

---

[7] 11/2/12 Tr 10:12-11:2 (stipulated facts presented to jury). (AA 261-262).
[8] DX 1, Tab 7 (1027) (AA 532).
[9] DX 1, Tab 14 (0035) (AA 531).
[10] DX 1, Tab 12 (0025-0027) (AA 526-528).

directly to the pain source. It is an FDA-approved device for treatment of post-operative surgical pain.[11]

For the treatment of post-operative surgical pain, the surgeon places the On-Q in the open wound while the patient is still under the effects of anesthesia.[12]

When used for non-surgical pain relief, such as treatment for rib fracture pain (*i.e.* Mr. Houghton), a semi-rigid metal tunneling device is used to insert the catheter under the skin and over the ribs. The tunneling device is inserted by palpation and concurrent recognition of anatomic landmarks.

Dr. Shapira's experience with the On-Q in the treatment of rib fractures

Dr. Shapira is a Board-Certified thoracic surgeon. Dr. Shapira first used the On-Q for rib fracture pain in July of 2005.[13] Dr. Shapira began keeping a database after making approximately 32 insertions into approximately 15 rib fracture patients. According to the data, Mr. Houghton was the 156th patient to receive an On-Q for rib fracture pain, and his insertions were the 415th through 418th made by Dr. Shapira since July of 2005.[14]

It is undisputed that, at all times relevant, the only physician at Christiana Hospital who inserted the On-Q for use in rib fracture patients was Dr. Shapira.

---

[11] Cipolle 11/1/12 Tr 134:13-16. (AA 257) Dr. Cipolle is a trauma surgeon employed by CCHS.
[12] Banbury 11/2/12 Tr 216:22-217:4 (AA 264-265) Dr. Banbury is a cardiac surgeon employed by CCHS.
[13] Database patient #1, PX 4. (AA 475)
[14] *Id.* (AA 477).

On April 23, 2008, Dr. Shapira sent an email to the Chair of the CCHS Department of Surgery, Michael Rhodes, M.D., that he was preparing a "randomized protocol" comparing PCA (patient controlled analgesic) versus the On-Q plus PCA[15] and enclosed a proposed protocol[16].

In that email Dr. Shapira also reported to Dr. Rhodes, that he had completed a manuscript reporting on his experience with the first 26 On-Q rib fracture patients and expected to submit this for publishing.[17] He also provided Dr. Rhodes with a copy of an abstract that a resident, Dr. Sahm, had presented at a regional trauma meeting and reported that Dr. Sahm and he were preparing a manuscript for submission to the Journal of Trauma.[18] This was one of several articles that Dr. Shapira submitted for publication. At the time of the trial none of these articles had been accepted for publication by any peer journal.

Dr. Shapira's relationship with I-Flow

Dr. Shapira's interest in the On-Q for rib fracture patients became known to I-Flow and there came a point when he signed a contract to be part of the I-Flow speaker's bureau.[19] That contract was in effect in December 2009, having been

---

[15] PX 6 Tab 10 (3880) (AA 525).
[16] PX 6 Tab 4 (3647-3651) (AA 518-522).
[17] PX 6, Tab 4 (3810) (AA 524).
[18] *Id.* (AA 524).
[19] PX 6, Tab 7 (3831) (AA 523).

renewed in October 2009. Dr. Shapira presented peer-to-peer talks with physicians and others at CCHS and other facilities, on the use of the soaker catheter in the treatment of rib fractures. There are also records which show that he consulted with I-Flow representatives for marketing purposes on at least one occasion.[20] In 2009, I-Flow paid Dr. Shapira $19,669.68 for these activities.[21]

The use of the On-Q at Christiana Hospital for rib fracture patients

The danger of non-displaced rib fractures, such as Mr. Houghton's, are not usually the actual fractures; the danger arises from the intense pain these cause which prevents one from coughing and/or taking deep breaths which can potentially lead to severe pulmonary compromise and/or pneumonia, possibly resulting in intubation, artificial ventilation and even death. When oral and parenteral medication cannot control the pain, these patients need a form of interventional pain management. The traditional "gold standard" for such second-tier pain management was insertion of an epidural catheter by an anesthesiologist to administer a nerve block. However, at Christiana Hospital in December of 2009, this was no longer the case. The pain intervention preferred by the CCHS trauma team, Mr. Houghton's treating physicians, for the treatment of rib fracture patients had become the On-Q soaker catheter system which only Dr. Shapira inserted. Dr. Shapira was not a member of the CCHS trauma team, and unless consulted by one

[20] *Id.* at 199 (AA 523).
[21] *Id.* at 193 (AA 523).

of these trauma physicians, Dr. Shapira would not be involved in rib fracture treatment[22] (including that of Mr. Houghton).

During the discovery phase of the case the CCHS trauma surgeons testified that the use of the On-Q in the treatment of rib fracture pain was not an experimental use at CCHS.[23] The Trial Court's ruling[24] that these CCHS surgeons were not allowed to so testify at the trial is a major component of this Appeal.

The Cardiac Study at Christiana Hospital Involving the On-Q

On December 18, 2007, Dr. Shapira signed the application as principal investigator for a multicenter study involving On-Q in ***cardiac*** patients: "Multicenter Infection Surveillance Study Following Cardiac Surgical Procedures."[25] That application describes the patients who are potential subjects in the study and notes that the standard of care for post-cardiac surgery pain relief is narcotics, which one group of patients will receive, and another group will receive the "On-Q plus the current standard of care at the hospital." At pages 3382-85 of this document is a lengthy consent form given to patients who enrolled in this study. At trial, Mr. Houghton contended that a similar lengthy consent form, not

---

[22] Cipolle 11/1/12 Tr 97:22-98:17 (AA 247-248); Gudin 11/2/12 Tr 243:5-12; Bradley 11/7/12 (am) Tr 16:2 (AA 356); Tinkoff 11/7/12 (pm) Tr 8:10-18 (AA 371a); Fulda 11/13/12 Tr 16:20-17:7 (AA 408-409). Dr. Gudin was Plaintiff's anesthesia expert. Dr. Bradley was the CCHS trauma surgeon who ordered the On-Q consult on Houghton. Dr. Fulda is the Vice Chair of CCHS Emergency surgery.

[23] Cipolle Depo 88:21 (AA 94); Giberson Depo 57:21-58:3 (AA 111); Tinkoff Depo 48:12-14 (AA 99). Drs. Giberson and Tinkoff are Associate Vice Chairs of CCHS Emergency Surgery.

[24] 9/28/12 Tr 29:7-12 (AA 134).

[25] PX 6, Tab 5 (3384-3421). (AA 480-517).

the "routine" consent form which he actually signed, should have been given to him, *even though he was not being treated by Dr. Shapira for cardiac care.*

Pretrial Motions and the Trial

The parameters of the evidence of what the jury was allowed to hear, and not allowed to hear, were established by the various rulings by Judge Brady with reference to the pretrial motions. Based on the pretrial rulings, Mr. Houghton was able to portray the following to the jury:

- that using the On-Q for rib fracture paint treatment is relatively new,[26] a use that Dr. Shapira "designed on his own" to replace the existing procedure required by the standard.[27]

- that the only physician at CCHS who has ever inserted the On-Q in rib fracture patients was Dr. Shapira,[28] also that Shapira is the only physician in Delaware who uses the On-Q for the treatment of rib fracture pain,[29]

- that the On-Q is not used in the treatment of rib fracture pain when Dr. Shapira is not available (e.g. when he is on vacation),[30]

- that there are other surgeons at CCHS who potentially could do this procedure but no one is interested in being trained on it or have not taken the

---

[26] Gudin 11/2/12 Tr 228:2 (AA 267); Shapira 11/9/12 (am) Tr 69:2 (AA 399).
[27] 10/31/12 Tr 6:16 through 7:10 (AA 227-228).
[28] Cipolle 11/1/12 Tr 84:16-18 (AA 246), 123:3-5 (AA 253); Streisand 11/2/12 Tr 111:15-23 (AA 294); Bradley 11/7/12 (am) Tr 13:6-9 (AA 355); Giberson 11/9/12 (am) Tr 19:20-23 (AA 383); Fulda 11/13/12 Tr 11:20-23. (AA 405).
[29] Streisand 11/2/12 Tr 51:3-8 (AA 289).
[30] Tinkoff 11/7/12 (pm) Tr 15:8-15 (AA 372); Giberson 11/9/12 (pm) Tr 30:5-10 (AA 388); Fulda 11/13/12 Tr 12:1-7 (AA 406), 28:14-16 (AA 411).

time to learn how to do it,[31] even though the procedure is teachable and no special training is needed,[32]

- that no one should use this procedure to treat rib fracture patients as there is no standard of care for its use,[33] that this is a procedure which Dr. Shapira developed himself[34] and is so new there is no even a billing code assigned to it.[35]

- that the cardiac study is proof that the standard of care is medication not the On-Q,[36] which is the same as a study performed at Cooper Hospital which stated that the standard of care was medication and not the On-Q.[37]

- that Dr. Shapira's data collection proved that the procedure was experimental,[38]

- that Dr. Shapira's articles describing the use of the On-Q had not yet been accepted by any peer-reviewed medical journal,[39] and that prior to December 2009 there was no peer reviewed literature on the use of the On-Q for the treatment of rib fracture pain,[40]

- that Dr. Shapira himself had written that the use of the epidural in rib fracture patients is the gold standard,[41]

---

[31] Cipolle 11/1/12 Tr 115:28 (AA 249); Giberson 11/9/12 Tr 23:22 (AA 385); Tinkoff 11/7/12 (pm) Tr 22:20-23:11 (AA 378-379); Fulda 11/13/12 Tr 27:12-15 (AA 410), 28:10-13 (AA 411).
[32] Smith 11/2/12 Tr 174:23–175:12 (AA 273-274); Giberson 11/9/12 (pm) Tr 30:23-31:1. (AA 388-389).
[33] Streisand 11/2/12 Tr 39:13-15 (AA 284).
[34] Streisand 11/2/12 Tr 51:9-13 (AA 289).
[35] Block 11/5/12 Tr 160:18 -161:16 (AA 303-304); PX 6 Tab 10 (3880). (AA 525).
[36] Streisand 11/2/12 Tr 48:20- 49:2 (AA 286-287); Gudin 11/2/12 Tr 26:8-15 (AA 283a).
[37] Streisand 11/2/12 Tr 24:23-25:10 (AA 282-283), 49:5 (AA 287); Gudin 11/2/12 Tr 26:8-15 (AA 283a).
[38] Streisand 11/2/12 Tr 94:3-5. (AA 293)
[39] Cipolle 11/1/12 Tr 120:2-5 (AA 250); Castellano 11/5/12 (am) Tr 50:7-14 (attempted to publish an article that the On-Q was safe and effective) (AA 340); Tinkoff 11/7/12 (pm) Tr 16:4 (AA 373); Shapira 11/9/12 Tr 51:8-11 (AA 395), 69:2-3 (AA 399)(A new solution to an age old problem).
[40] Smith 11/2/12 Tr 182:20 (AA 275)
[41] Streisand 11/2/12 Tr 19:14-23 (AA 281).

- that the use of the On-Q in rib fracture patients was "off label" and thus was not FDA approved,[42]

- and that the fact that Dr. Shapira was developing a protocol for the use of the On-Q evidenced that it was still unproven and in its investigational stage.[43]

- The entirety of Dr. Shapira's relationship with I-Flow, including the amount her received from I-Flow in 2009, which Plaintiffs contended constituted a conflict of interest and should have been part of the informed consent discussion with Mr. Houghton.[44]

- ...that Mr. Houghton should have been told that the placement of catheters is a method with which Dr. Shapira was part experimenting with to see if it works better than or as effective as the already existing method.[45]

Although Plaintiffs were enabled to present all of the above evidence to the jury, Dr. Shapira was prohibited from arguing and proving that the treating physicians, who are in charge of rib fracture patients at CCHS, did not consider the On-Q system to be experimental. These were the same physicians who were treating Mr. Houghton and who called-in Dr. Shapira for an On-Q consultation and placement.

---

[42] Streisand 11/2/12 Tr 47:18-21 (AA 285).
[43] Gudin 11/2/12 Tr 264:12-15 (AA 274).
[44] Houghton 11/8/12 Tr 36:11-20 (AA 381).
[45] Streisand 11/2/12 Tr 52:10-19 (AA 290).

ARGUMENT

I. THE TRIAL COURT ERRED BY INTERPRETING THE INFORMED CONSENT STATUTES, 18 *DEL.C.* §§ 6801 AND 6852, TO REQUIRE THAT A PHYSICIAN MUST DISCLOSE MATTERS NOT DIRECTLY RELATED TO THE ACTUAL TREATMENT THE PHYSICIAN PROPOSED TO THE PATIENT, SUCH AS A RELATIONSHIP WITH A MANUFACTURER, ANY POTENTIAL CONFLICTS OF INTEREST, AND ANY INSTITUTIONAL RESEARCH PROTOCOLS.

1. Question Presented

Did the Trial Court err and abuse its discretion by allowing Plaintiffs to argue that the standard of care for informed consent requires that a physician explain things such as his relationship with a device manufacturer, any potential conflicts of interest, and any institutional research protocols; none of which are included in the plain language of Delaware's Informed Consent Statutes, 18 *Del.C.* §§ 6801 and 6852?[46]

2. Standard and Scope of Review

Questions of statutory interpretation are questions of law that this Court reviews *de novo*.[47]

---

[46] D.I. 194 (AA 152-158), 197 (AA 160-161); 10/23/12 Tr 3:6-38:10 (AA 183-218) The colloquy therein intertwined both of the informed consent issues now on appeal. The decision on the "statutory" informed consent question appears at 5:20-6:15).

[47] *Del. Bay Surgical Servs. v. Swier*, 900 A.2d 646, 652 (Del. 2006).

3. Merits of the Argument

Dr. Shapira hereby adopts the legal and factual arguments on this issue set forth by CCHS in its Opening Brief and additionally argues as follows.

The erroneous interpretation of 18 *Del. C.* §§ 6801(6) and 6852 had a significant impact on what the jury heard. The most damaging testimony came from Dr. Bradley, the physician who consulted Dr. Shapira for the On-Q: "...and had you known that Dr. Shapira was receiving that kind of money in his back pocket, you would not have let him put that catheter in Jack Houghton; that was your testimony?"[48]

Other highly prejudicial testimony painted a picture that Dr. Shapira put money considerations before patient well being:

> ...the pamphlet that you testified you wouldn't do for free..."[49];
>
> And you're making money with I-Flow, correct?"[50];
>
> We also know that Dr. Shapira was being paid for services he was providing to the manufacturer of the product... [51];
>
> ...no one does this thing for free...[52];
>
> And you understand that this money was going into Dr. Shapira's back pocket; right?[53]

---

[48] Bradley 11/7/12 (am) Tr 78:14-17 (AA 363).
[49] Shapira 10/31/12 Tr 100:1-2 (AA 235).
[50] Shapira 10/31/12 Tr 121:18-19 (AA 241).
[51] Streisand 11/2/12 Tr 50:19-21 (AA 288).
[52] Shapira 11/9/12 (am) Tr 65:18-19. (AA 396)
[53] Gross 11/7/12 (pm) Tr 87: 3-4 (AA 370).

This is only part of the vast quantity of evidence presented, none of which had anything to do with medical care and all of which was so highly prejudicial to Dr. Shapira to require a new trial.[54]

[54] Plaintiffs' Opening 10/31/12 45:22 (AA 229); Shapira 10/31/12 Tr 96:9 – 101:1 (AA 231-236), 103:6 – 106:1 (AA 237-240), 121:5 – 124:14(AA 241-244); Cipolle 11/1/12 Tr 121:8 – 126:2 (AA 251-256); 143:15 – 144:17 (AA 258-259); Streisand 11/2/12 Tr 50:19 – 51:4 (AA 288-289);51:18 – 52: 6 (AA 289-290), 52:20 – 53:9 (AA 290-292); Smith 11/2/12 Tr 194:9 – 197:5 (AA 276-279); Gudin 11/2/12 Tr 239:17 – 241:2 (AA 268-270); Castellano 11/5/12 (am) Tr 8:12 – 19:6 (AA 308-319), 24:15 – 25:23 (AA 321-322), 25:8 – 42:11 (AA 322-339), 69:8-16 (AA 341), 71:18-72:2 (AA 342-343); Block 11/5/12 (am) Tr 153:22-160:16 (AA 296-303), 165:10 – 167:4 (AA 305-306a); Shapira 11/5/12 (pm) Tr 17:14 – 20:6 (AA 345-348), 22:16 – 23:18 (AA 349-350), 46:23 – 48:20 (AA 351-353); Shapira 11/9/12 (am) Tr 35:13 – 38:12 (AA 391-394), 65:9 -21 (AA 396), 66:21 – 67:21 (AA 397-398); Giberson 11/9/12 (pm) Tr 25:18 – 26:11 (AA 386-387); Bradley 11/7/12 (am) 16:2 – 19:16 (AA 356-359), 75:21 – 77:17 (AA 360-362), 78:12-19 (AA 363); Tinkoff 11/7/12 (pm) Tr 18:7-18 (AA 374), 19:22 – 22:6 (AA 375-378); Gross 11/7/12 (pm) Tr 82:9 – 87:14 (AA 365-370); Houghton 11/8/12 Tr 36:11-14 (AA 381); Shapira 11/9/12 (am) Tr 35:13 – 38:12 (AA 391-394), 65:9-21 (AA 396), 66:21 – 67:21 (AA 397-398); Fulda 11/13/12 Tr 12:20 – 13:4 (AA 406-407); Plaintiffs' Closing 11/13/12 Tr 42:13 – 53:22 (AA 416-427).

II. THE TRIAL COURT MADE SEVERAL ERRONEOUS AND PREJUDICIAL EVIDENTIARY RULINGS, THE NET EFFECT OF WHICH WAS THAT DR. SHAPIRA WAS PRECLUDED FROM PRESENTING A CRITICAL DEFENSE TO PLAINTIFFS' ALLEGATIONS INCLUDING *INTER ALIA*, THAT DR. SHAPIRA'S TREATMENT VIOLATED THE STANDARD OF CARE BECAUSE IT ALLEGEDLY WAS "EXPERIMENTAL."

1. Question Presented

Did the Trial Court err and abuse its discretion, causing immense and irreparable prejudice to Dr. Shapira, by permitting Plaintiffs to present evidence that the On-Q procedure for rib fracture pain was experimental while simultaneously denying Dr. Shapira the opportunity to present evidence that the CCHS trauma surgeons did not consider the On-Q for rib fracture pain to be experimental at CCHS?[55]

2. Standard and Scope of Review

This Court reviews evidentiary rulings for an abuse of discretion.[56] Before deciding whether the Trial Court abused its discretion or erred as a matter of law, this Court must consider whether the rulings at issue were correct.[57] Once this Court finds an abuse of discretion or error, it must then decide whether the abuse

---

[55] *See* Orders at D.I. 177 (AA 144-145), 179 (AA 146-147), 181 (AA 148-149), 189 (AA 151), 195 (AA 159), and 204 (AA 180-181). *Also see* 9/28/12 Tr 8:20-38:15 (AA 113-143)(Specifically as to the limitations upon the testimony of the CCHS trauma surgeons at 24:20-26:17). (AA 129-131). Also see 10/23/12 Tr 3:6-38:10 (AA 183-218)(The colloquy therein intertwined both of the informed consent issues now on appeal).

[56] *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 533 (Del. 2006), *Whittaker v. Houston*, 888 A.2d 219, 222 (Del., 2005); *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1092 (Del. 2000).

[57] *Barriocanal v. Gibbs,* 697 A.2d 1169, 1171 (Del. 1997).

or error created prejudice so significant that the appellant was denied a fair trial.[58] In a case such as this, where the excluded evidence "goes to the very heart" of appellant's case and "might well have affected the outcome" of the trial, such abuse or error warrants a new trial even if there was other evidence "of the same general character" or "the rejected evidence was cumulative."[59]

3. Merits of the Argument

As set forth in the STATEMENT OF FACTS (at pages 11-13) Plaintiffs were allowed to present an overwhelming amount of evidence which suggested or directly stated that the On-Q procedure was experimental. However, this was a thoroughly erroneous premise: It was established, during the discovery phase of this litigation, that by December 2009, the trauma surgeons at Christiana Hospital had concluded that when one of their patients needed pain medication at a level that could be provided by either the On-Q or the traditional epidural, the trauma surgeons requested the On-Q from Dr. Shapira.[60] Accordingly, at Christiana Hospital, the use of the On-Q for rib fracture pain was not experimental. It was the only modality used.[61]

---

[58] *Eustice v. Rupert,* 460 A.2d 507, 510 (Del. 1983).
[59] *Green v. A.I. duPont Inst. of Nemours Found.*, 759 A.2d 1060, 1063 (Del. 2000) quoting *Watts v. Del. Coach Co.*, 58 A.2d 689, 696 (Del. Super. 1948).
[60] Cipolle Depo 36:14-16 (AA 95); Tinkoff Depo 27:11-28:4. (AA 98).
[61] Cipolle Depo 71:20-24 (AA 96); Tinkoff Depo 28:20-22. (AA 98).

Given the erroneous rulings by the Trial Court, it was ***critical*** that Dr. Shapira be permitted to present evidence that the On-Q was ***not*** experimental. He needed the testimony of those at Christiana Hospital knowledgeable on the medicine of the case, in other words, those most knowledgeable on why Mr. Houghton was offered an On-Q on December 8, 2009, those witnesses being the CCHS trauma surgeons: Drs. Fred Giberson, Gerald Fulda, Mark Cipolle, and Glen Tinkoff.

Accordingly, one of the Trial Court's most damaging evidentiary rulings was in granting Plaintiffs' Motion to limit the number of defense expert witnesses.[62] Plaintiffs argued that they only had three experts to opine that On-Q usage for rib fracture treatment was experimental (and thus not within the standard of care) whereas Defendants intended to call nine experts in rebuttal.[63] The basis for Plaintiffs' Motion was that identical testimony from nine experts was prejudicial and cumulative per D.R.E. 403.[64] Dr. Shapira replied that Plaintiffs' Motion included CCHS trauma surgeons Giberson, Fulda, Cipolle, and Tinkoff in

---

[62] D.I. 93 (AA 100-103).

[63] *Id.* at ¶¶ 4-5. (AA 101) Houghton retained and identified Dr. Jeffery Gudin from northern New Jersey, Dr. Ronald Paynter from Long Island, New York, and Dr. Robert Streisand from Westchester County, New York. In rebuttal, Shapira retained and named Dr. Ernest Block from Melbourne, Florida, Dr. Stephen Smith from Columbia, South Carolina, and Dr. Ronald Gross from Springfield, Massachusetts. Dr. Shapira also was identified as an expert in keeping with *Barrow v. Abramowicz*, 931 A2d 424 (Del. 2007). Also see *Turner v. Del. Surgical Group, et al*, 67 A3d 426 (Del. 2013).

[64] D.I. 93 at ¶ 9. (AA 103).

its "head count" of nine experts[65] even though the only reason these CCHS trauma surgeons were identified as "experts" was so that Plaintiffs could not claim surprise as to their testimony.[66] These doctors were proffered as "actors/viewers," and as such, should have been treated "as an ordinary witness" per *Palmer v. Dolman*.[67]

The Trial Court ruled that although the CCHS trauma surgeons could testify that the On-Q "was the standard course of treatment" at CCHS,[68] any testimony "that in their mind" or as "they viewed the use of this procedure, it was not experimental" would constitute an impermissible expression of an opinion.[69] This ruling was both internally illogical as well as an abuse of the court's discretion.[70] It eviscerated Dr. Shapira's primary defense in rebuttal to Plaintiffs' experts' testimony that On-Q usage for rib fracture treatment was not within the standard of care because it was experimental.[71]

Palmer v. Dolman,[72] which Dr. Shapira cited and the Trial Court ignored, held that Super. Ct. C. Rule 26(b)(4)

---

[65] D.I. 148 at ¶ 8 (AA 106-109).
[66] *Id.* at ¶ 9. (AA 108) *Also see* D.I. 62, Shapira's Second Supplemental Expert Discovery Response. (AA 79-86)
[67] 1986 WL 4877 (Del. Super. Apr. 21, 1986).
[68] 9/28/12 Tr 25:16. (AA 130)
[69] *Id.* Tr 26:13-17. (AA 131)
[70] *Sammons,* 913 A.2d at 528.
[71] Streisand 11/2/12 Tr 52:16-19 (AA 290).
[72] 1986 WL 4877.

> "does not address itself to the expert whose information was acquired not in preparation for trial, but rather because he was an actor or viewer with respect to the transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an 'ordinary witness.'[73] A distinction is made between 'examining physicians' and 'treating physicians,' the latter not being considered experts under 26(b)(4) in cases where the physical condition of a patient is in issue."[74]

The Trial Court's ruling on Plaintiffs' Motion did not seem to be based upon Plaintiffs' contention that the defense proffered too many experts to testify (that the On-Q was not experimental); instead it appears to have been based on the notion that testimony by the CCHS trauma surgeons that the On-Q was experimental would constitute impermissible opinion testimony. This was an erroneous conclusion since these surgeons were allowed to offer opinion testimony that the On-Q "was the standard course of treatment" at CCHS. Allowing testimony on one opinion (routinely used) without testimony on the other (not experimental) forced the jury to speculate as to why the On-Q was routinely used at CCHS if experts (from elsewhere) still considered it unacceptable, untried and/or unproven. Taken in concert with the other evidence proffered by Plaintiffs explains why the jury likely concluded that the On-Q's use remained experimental at CCHS, *since the CCHS trauma surgeons were not permitted to testify otherwise.*

---

[73] *Id.* at *1, quoting *Notes of Advisory Committee on 1970 Amendments to Rules, U.S.C.S. Court Rules*, at 247 (1982).
[74] *Id.* (Internal cites omitted).

Further, Dr. Shapira's Motion to exclude evidence that the creation of his database proves that the On-Q was experimental was also erroneously denied.[75] Dr. Shapira collected data on all patients (up to and including Mr. Houghton) upon whom he had inserted an On-Q for rib fracture pain. Plaintiffs' experts opined at deposition that this data collection showed that the On-Q use was experimental,[76] but the head of the CCHS IRB, Dr. Jerry Castellano, testified that *simple data collection was not evidence of experimental On-Q use.*[77]

If the IRB at CCHS, where Dr. Shapira practices medicine, took the position that his data collection was ***not*** evidence of an experimental use of the On-Q for rib fracture pain, then as to Dr. Shapira, evidence that the On-Q use for rib fracture pain was experimental should not have been allowed. Nonetheless, the Trial Court's rulings forced the jury to speculate on a critical issue (and defense) in the case.

---

[75] D.I. 95 (AA 104-105), D.I. 179 (AA 146-147).
[76] Gudin Depo 19:1-4 (AA 90); Streisand Depo 73:16-19 (AA 88).
[77] Castellano Depo 10:12-18 (AA 75), 11:2-9 (AA 754), 23:2-6 (AA 76), 31:11-32:4 (AA 77), 41:2-10 (AA 78).

III. THE TRIAL COURT ERRED BY GRANTING CCHS' REQUEST, OVER DR. SHAPIRA'S OBJECTION, THAT THE JURY "RECONVENE" TO "RE-ALLOCATE" HOW MUCH OF CCHS' 35% PORTION OF LIABILITY IN THE JURY'S "ORIGINAL" VERDICT WAS ATTRIBUTABLE TO THE CONDUCT OF CCHS EMPLOYEE DR. JERRY CASTELLANO, VERSUS THE CONDUCT OF CCHS' APPARENT AGENT DR. SHAPIRA, AND BY REFUSING TO STRIKE THE SUPPLEMENTAL VERDICT.

1. Question Presented

Did the Trial Court err when it ordered the jury to deliberate upon the Supplemental Verdict Sheet which asked the jury to reallocate CCHS' 35% causal liability and by refusing to strike the supplemental verdict?[78]

2. Standard and Scope of Review

This Court reviews jury instructions and special interrogatories given to the jury for error as a matter of law.[79]

3. Merits of the Argument

Although the Trial Court appropriately denied CCHS' Motion to Reform the Original Verdict Sheet,[80] it was error for the court to even allow a Supplemental Verdict Sheet to be submitted to the jury and it was further error to refuse to strike the supplemental verdict in its June 27, 2013 Opinion and Order denying CCHS' Motion to Reform the Verdict. The rationale set forth in that Opinion and Order[81]

---

[78] 11/14/12 Tr 14:12-14 (AA 464); D.I. 234. (AA 549-552).
[79] *Culver v. Bennett*, 588 A.2d at 1096.
[80] D.I. 261, beginning at p.12. (AA 570).
[81] 11/9/12 Tr 100:19-101:20 (AA 402-403).

for denial of the Motion equally demonstrates the error of submitting the Supplemental Verdict Sheet to the jury as well as the refusal to strike the supplemental verdict. The Supplemental Verdict Sheet was contrary to both the jury instructions given and the "original" Verdict Sheet and was simply CCHS' attempt to alter the jury's original 65%/35% apportionment of liability; which the Trial Court improperly permitted CCHS to change by failing to strike the supplemental verdict. CCHS never objected to the jury instructions regarding its potential responsibility for the conduct of its apparent agent, Dr. Shapira. In this regard, the parties submitted a stipulated set of partial instructions to be read to the jury prior to opening statements.[82] These included an agency instruction which stated that:

> "if you find that Mr. Houghton's injuries were the result of a negligent act committed by Dr. Shapira, and that at the time of the negligent act Dr. Shapira was an employee or agent of [CCHS] acting within the scope of his employment or agency, then the negligence is the legal responsibility of both [CCHS] and Dr. Shapira."[83]

The parties discussed those instructions with the court at the Pretrial Conference on October 23, 2012,[84] and no objection was raised to this instruction. The court and parties discussed the jury instructions and interrogatories on November 9, 2012,

---

[82] D.I. 199 (AA 162-179)
[83] *Id.* at p.6 (AA 170)
[84] 10/23/2012 Tr 53:20-58:11 (AA 219-224).

and CCHS did not object to the agency charge.[85] During his closing, Plaintiffs' counsel went over the actual jury interrogatories[86] and subsequently the Trial Court *sua sponte* suggested giving an instruction on whether Dr. Shapira was an agent of CCHS[87] again with no objection or application from CCHS.

During his closing, CCHS' counsel spoke about the jury interrogatories and explained how Dr. Shapira could be an agent of CCHS, stating specifically that he made this argument because "I just don't want you to get confused, because I think there's a potential for that"[88] in regard to the questions they would be answering. In response, Plaintiffs' counsel explained the allegation of Dr. Shapira's apparent agency with CCHS.[89] After closings, the Court again asked counsel if there were any final points regarding the instructions or interrogatories before the Charge. CCHS raised none.[90] The Charge included, *inter alia*, the instruction on Dr. Shapira's possible apparent agency relationship to CCHS,[91] possible apportionment of fault,[92] and the jury interrogatory sheet.[93] The jury left to deliberate and counsel was asked if there were any objections to the instructions as

---

[85] *Id.* at 63. (AA 225).
[86] Fulda 11/13/12 Tr 72:21-74:14. (AA 412-414).
[87] 11/13/12 Tr 75:7-15. (AA 429).
[88] *Id.* 123:18-125:20. (AA 430-432).
[89] *Id.* 133:10-18. (AA 433).
[90] *Id.* 141:16-142:3. (AA 434-435).
[91] *Id.* 147:17-150:3. (AA 436-439).
[92] *Id.* 162:18-163:3. (AA 440-441).
[93] *Id.* 171:13-174:7. (AA 442-445).

read. Again there were none.[94] The jury returned a verdict finding Dr. Shapira 65% and CCHS 35% causally liable to Plaintiffs. Immediately following, CCHS counsel argued at sidebar that there was "confusion" about the vicarious, versus independent, liability of CCHS and requested that the jury return to deliberate on the relative apportionment of the 35% of liability it had attributed to CCHS; as between its employee, Dr. Castellano, and its agent, Dr. Shapira.[95] As a factual matter, there was no indication of confusion by the jury. The jury sent out two notes while deliberating, neither of which dealt in any way with apportionment of liability.[96] Over Dr. Shapira's objection[97] the Court directed the jury to return to deliberate and the jury returned a verdict that 25% of CCHS' (35%) liability was attributable to Dr. Castellano and 75% to Dr. Shapira.[98]

CCHS moved, on November 27, 2012, to reform the original verdict to indicate 91.25% (total) liability attributable to Dr. Shapira and 8.75% (total) to CCHS to reflect the jury's alleged reallocation of CCHS' 35% liability in its Supplemental Verdict Sheet.[99] Dr. Shapira opposed this Motion,[100] which the Trial Court denied in its June 27, 2013 Opinion and Order.[101] Dr. Shapira adopts, by

---

[94] *Id.* 175:8-178:22. (AA 446-449).
[95] 11/14/12 Tr 7:18-20:21. (AA 457-470).
[96] 11/13/12 Tr 179:5 – 183:5 (AA 450-454); 11/14/12 Tr 2:4-10. (AA 456).
[97] 11/14/12 Tr 14:13-14. (AA 464).
[98] *Id.* Tr 27:6-20. (AA 474).
[99] D.I. 227 pp. 2-3. (AA 542-543).
[100] D.I 233. (AA 544-548).
[101] D.I. 261 at pp. 12-21 (AA 570-579).

reference, the court's findings therein in support of its decision to deny CCHS' Motion. However, for those same reasons, the court erred in even allowing the jury to consider the Supplemental Verdict Sheet at all and in failing to strike the supplemental verdict upon the denial of CCHS' Motion to reform the Original Verdict Sheet.[102] It is error for a Trial Court to uphold a jury verdict that is contrary to the instructions given,[103] yet here the Trial Court went even further by requiring that the jury reform its verdict after having been instructed on how that verdict should be rendered in the first place and how they were to answer the interrogatories given.

As argued below and recognized by the Trial Court in its June 27, 2013 Order, [104] there was no legal bases to support this reformation at trial or the later reformation CCHS sought by Motion. Plaintiffs agreed that the instructions given the jury were clear[105] and the Court correctly concluded that the jury "made an independent finding that [CCHS] was negligent."[106] The court therefore erred in submitting the Supplemental Verdict Sheet; the original verdict was clear and consistent with the instructions given before deliberation and was correct as a matter of law.[107] By refusing to strike the supplemental verdict, the Trial Court

---

[102] *Id.* at p.21. (AA 579).
[103] *Dana Companies, LLC v. Crawford*, 35 A.3d 1110, 1113 (Del. 2011).
[104] D.I. 261 Tr Fn 76 on p.19 (AA 577).
[105] 11/14/12 Tr 9:8-9 (AA 459), 12:5-11 (AA 462).
[106] 11/14/12 Tr 8:4-5 (AA 458).
[107] *Culver v. Bennett*, 588 A.2d at 1096.

erroneously permitted CCHS to make a substantive change to the jury's rightful allocation of liability; it was CCHS' stated intent to shift 75% of its 35% share of causal liability back to Dr. Shapira, contrary to the clear intent of the jury as per its original verdict, which should not be permitted to stand.[108]

Assuming CCHS is correct that there may very well be a future conflict over the bases of that 35% liability finding, it was still improper to place that question before this jury after it had already rendered its verdict based upon the instructions it had been given and the evidence it considered. Public policy and precedent dictate that juries be allowed to independently reach their conclusions based upon instruction of the law given *before* deliberation so as to avoid even the appearance of undue or improper influence upon the bedrock of American jurisprudence, independent deliberation on the facts brought forth by the parties and the law as instructed by the judge. To that point, the jury was given little or no additional instruction before being sent back in to deliberate on the supplemental verdict.[109]

Delaware law requires that "enormous deference" be given to jury verdicts,[110] "[i]n fact, the Delaware Constitution directs this Court 'that on appeal from a verdict of a jury, the findings of the jury, if supported by the evidence, shall

---

[108] *Lavin v. Silver,* 2003 WL 21481006 (Del. Super June 10, 2003) (it is not sound policy to permit a substantive amendment to a jury verdict subsequent to the jury making its award).
[109] 11/14/12 Tr 24:15-26:5. (AA 471-473).
[110] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).

be conclusive.'"[111] For these reasons, Dr. Shapira respectfully requests that this Court remand with instruction to strike the supplemental verdict.

[111] *Id.*, quoting *Del.Const.*, art. IV, § 11(1)(a).

IV. THE TRIAL COURT ERRED BY AWARDING PLAINTIFFS PRE-JUDGMENT INTEREST BECAUSE ITS DECISION THAT TRIAL BEGAN ON OCTOBER 31, 2012, NOT OCTOBER 24, 2012, WAS CONTRARY TO 6 *DEL.C.* §2301(d).

1. Question Presented

Was it error for the Trial Court to decide that Plaintiffs' September 26, 2012 settlement demand met the requirement of 6 *Del.C.* §2301(d) that it be made no less than 30 days "prior to trial," thus justifying the award of pre-judgment interest?[112]

2. Standard and Scope of Review

Questions of statutory interpretation are questions of law that this Court reviews de novo.[113]

3. Merits of the Argument

It is undisputed that Plaintiffs presented a separate written demand less than the final verdict to each Defendant on September 26, 2012. The court and parties convened on Wednesday, October 24, 2012 to select a jury per the "original" Case Scheduling Order.[114] The Court and parties convened again on Wednesday, October 31, 2012 for opening statements and the start of testimony.[115] The jury

---

[112] D.I. 233 (AA 544-548).
[113] *Del. Bay Surgical Servs.* 900 A.2d at 652.
[114] D.I. 26 (AA 71-73) That Order was amended twice by Stipulated Order at D.I. 40 and 59 but the dates for jury selection and "commencement" of trial remained the same.
[115] This was delayed from Monday, October 29, 2012 because of Hurricane Sandy. (AA____)

returned a verdict in excess of the demand on November 14, 2012,[116] Plaintiffs filed a Motion for Pre- and Post-Judgment Interest on November 26, 2012,[117] and Dr. Shapira filed an opposition to that Motion on December 4, 2012.[118] The Trial Court heard argument on January 4, 2013, and awarded the Pre- and Post-Judgment interest on June 27, 2013.[119]

Dr. Shapira opposed Plaintiff's Motion on the grounds that the demand was not timely made per the plain language of 6 *Del.C.* §2301(d).[120] Dr. Shapira argued, in an apparent issue of first impression, that Plaintiffs' demand was made less than 30 days "prior to trial" as required by statute. Plaintiff argued in reply that the legislature "clearly intended" that demands be made 30 days prior to trial, not jury selection.[121] The court's Order[122] cited to *Raposelli v. State Farm Mut. Auto. Ins. Co.*,[123] which held, in relevant part, that the legislative intent of Section 2301(d) was "to promote *earlier* settlement of claims by encouraging parties to make fair offers sooner."[124] However, the Trial Court inexplicably held that it was

---

[116] D.I. 221. (AA 534-537)
[117] D.I. 226 (AA 538-541).
[118] D.I. 233 (AA 544-548).
[119] D.I. 261 (AA 559-580).
[120] "In any tort action … in the Superior Court … for bodily injuries, death or property damage, interest shall be added to any final judgment … provided that prior to trial the plaintiff had extended Defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered." 6 *Del.C.* §2301(d)(2013).
[121] D.I. 245 at ¶5. (AA 554-555).
[122] D.I. 261 (AA 559-580).
[123] 988 A.2d 425 (Del. 2010).
[124] *Id.* at 427 (emphasis added).

"not necessary" per Section 2301(d) to determine precisely when trial began to determine that demand was made no less than 30 days "prior to trial," because "[t]he fact of the matter is that Plaintiffs' settlement demands were valid for 30 days."[125]

The statute offers no explanation of when the 30 days "prior to trial" ends, *i.e.*, when trial begins, but interpretation of this phrase cannot lead to an unreasonable result or one that was not contemplated by the legislature.[126] Legislative intent always takes precedence over a literal interpretation of the statute; the goal of statutory construction is always to determine and give effect to legislative intent."[127] No Delaware case has interpreted Section 2301(d) on this point, but those cases which have considered pre-judgment interest have set forth that the demand must remain open for no less than 30 days,[128] albeit with no guidance as to when that 30 day period ends, *i.e.*, when trial begins. Delaware cases holding that trial "begins" with jury selection include *State v. Cooke*,[129] *Ison*

---

[125] D.I. 261 at p8 (AA 566).
[126] *Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 175 (Del. 2001).
[127] *Eliason v. Englehart,* 733 A.2d 944, 946 (Del. 1999); *Leatherbury v. Greenspun*, 939 A.2d 1284, 1289 (Del. 2007); *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932-33 (Del. 2007).
[128] *Jackson v. Madric*, 2006 WL 488621 (Del. Super. Feb 8, 2006), *Drayton v. Price*, 2010 WL 154414 (Del. Super. Apr. 19, 2010), *State Farm Mut. Auto. Ins. Co. v. Enrique*, 16 A.3d 938 at *2 (Del. 2011).
[129] 2010 WL 3734113 at *1 (Del. Super. Aug. 19, 2010) "…[R]e-trial is scheduled to start with jury selection on February 22, 2011."

v. E.I. DuPont De Nemours and Co.,[130] and *Charbonneau v. State.*[131] These cases comport with general law, *e.g.*, *Am. Jur.* 2d,[132] which states that "generally speaking," a trial begins with the commencement of the selection of the jury,[133] and the calling of the jury is a part of the trial.[134] Furthermore, since pre-judgment interest for general damages was not part of the common law in Delaware, enactment of 6 *Del. C.* § 2301(d) was done in derogation of the common law and must, therefore, be strictly construed.[135]

Most persuasive is Plaintiffs' decision not to present a demand for some 15 months and 18 days after suit was filed. There is nothing on the record to explain why they waited so long nor was there any evidence to suggest that the delay was justified; *e.g.*, all damages for a sum certain were ascertainable much earlier.[136] Public policy and statutory compliance would have been best served had Plaintiffs

---

[130] 2004 WL 2827934 at *5 (Del. Super. Apr. 29, 2004) "Trial will begin with jury selection on Tuesday, October 12, 2004."
[131] 904 A.2d 295, 302 (Del. 2006) "The case began with jury selection on March 22, 2004."
[132] Trial § 4 (2012).
[133] *Id.*, (citations omitted).
[134] *Id.*, (citations omitted). Also see *Draves v. Chua*, 642 N.Y.S.2d 1022, 1024 (Sup. Ct. Erie County 1996) ("Jury selection … is not a pretrial stage, but rather is the commencement of the jury trial itself…."); *Lewis v. U.S.*, 146 U.S. 370, 373-74 (1892)(As a matter of constitutional law, common understanding, and common sense, "trial in a criminal case includes the critical stage of jury selection"); *Schwering v. TRW Vehicle Safety Sys., Inc.*, 970 N.E 2.d 865, 868-70 (Ohio, 2012)("A plaintiff may not voluntarily dismiss a claim without prejudice … when a Trial Court declares a mistrial after the jury has been empanelled and the trial has commenced)"; *Conn. Practice Book* § 17-14 (2013)("After commencement of any civil action … seeking the recovery of money damages … the plaintiff may … not later than thirty days before the commencement of jury selection in a jury trial … file … a written offer of compromise)."
[135] *King Construction, Inc. v. Plaza Four Realty, Inc.*, 976 A.2d 145 (Del. 2009).
[136] See Houghton's June 30, 2011 letter to Defendants producing medical bills in response to Super. Ct. C. Rule 3(h). (AA 68-70)

not chosen to wait so long to present their demand. In a similar context, this Court has held that it is improper for a plaintiff to benefit by his own failure to prosecute his claim.[137]

Section 2301(d), as applied below, violated the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution by denying Defendant a forum to assess fault for the delay sought to be avoided. It was applied in such a manner as to create an uncontestable presumption that all fault for the delay in possibly settling the case rested with Defendant. Moreover, the time period in which Plaintiffs delayed in making a settlement demand could have and should have been excluded from an award of pre-judgment interest.[138] It violates the Due Process and Equal Protection Clauses of the 14th Amendment by requiring a Defendant to pay pre-judgment interest from the date of injury, *i.e.* well before it knows of the impending lawsuit. Section 2301(d) unduly inhibits Defendants' exercise of their fundamental right to resort to the courts in defense of claims made against them, creates an irrebuttable presumption that Defendants are responsible for causing delay, and unconstitutionally abridges the substantive rights of Defendants to enlarge those of Plaintiffs.

---

[137] *Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209, 211 (Del. 1978).
[138] *Maryland Cas. Co. v. Hanby*, 301 A.2d 286, 288 (Del. 1973).

V. THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY CONCERNING PROXIMATE CAUSE.

Dr. Shapira relies upon and adopts the argument set forth in CCHS' Opening Brief with respect to this argument.

CONCLUSION

For the foregoing reasons, the various decisions of the trial court, discussed herein, should be reversed and a new trial ordered.

ELZUFON AUSTIN
TARLOV & MONDELL, P.A.

/s/ John A. Elzufon
JOHN A. ELZUFON – I.D. #177
GARY W. ALDERSON – I.D. #3895
300 Delaware Avenue, Suite 1700
P.O. Box 1630
Wilmington, DE 19899-1630
(302) 428-3181
Attorney for Defendants Below, Cross Appellants
Nadiv Shapira, M.D. and
Nadiv Shapira, M.D., LLC

Dated: October 30, 2013

!! FILENAME \p G:\Docs\CLIENT\161320\22889\BRIEF\00849490.DOC

EFiled: Jun 27 2013 12:11PM EDT
Transaction ID 53035334
Case No. N11C-06-092 MJB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN HOUGHTON, and EVELYN HOUGHTON, his wife,	)	
Plaintiffs	)	C.A. No. N11C-06-092 MJB NON-ARBITRATION CASE
v.	)	
NADIV SHAPIRA, M.D., NADIV SHAPIRA, M.D., LLC, a Delaware Corporation, and CHRISTIANA CARE HEALTH SERVICES, INC., a Delaware Corporation,	)	
Defendants.	)	

Submitted: March 25, 2013
Decided: June 27, 2013

Upon Plaintiffs' Motion for Costs, **GRANTED.**
Upon Plaintiffs' Motion for Pre-judgment and Post-judgment Interest, **GRANTED.**
Upon Defendant Christiana Care Health Services' Motion to Reform the Original Verdict Sheet, **DENIED.**

OPINION AND ORDER

Randall E. Robbins, Esquire, Ashby & Geddes, Wilmington, Delaware, Attorney for Plaintiffs.

John A. Elzufon, Esquire, Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware, Attorney for Defendants Nadiv Shapira, M.D. and Nadiv Shapira, M.D., LLC.

Dennis D. Ferry, Esquire, Morris James, LLP, Wilmington, Delaware, Attorney for Defendant Christiana Care Health Services, Inc.

BRADY, J.

INTRODUCTION

The Court has before it several post-trial motions regarding this medical negligence case. On November 14, 2012, the jury returned its verdict and judgment in the amount of $4,400,000 was entered in favor of Plaintiffs John and Evelyn Houghton ("Plaintiffs") jointly and severally against Defendants Nadiv Shapira, M.D., Nadiv Shapira MD, LLC ("Dr. Shapira") and Christiana Care Health Services, Inc. ("CCHS," collectively with Dr. Shapira, "Defendants"). The post-trial motions are: (1) Plaintiff's Motion for Costs; (2) Plaintiff's Motion for Pre-judgment and Post-judgment Interest; and (3) Defendant CCHS's Motion to Reform the Original Verdict Sheet.

(1) Plaintiffs' Motion for Costs

Plaintiffs contend that because judgment was awarded in their favor against the Defendants, the Court should direct the Prothonotary to award costs pursuant to Superior Court Civil Rule 54(d)[1] and 10 Del. C. 8906.[2] Plaintiffs outline the costs they have incurred, including the following:

-Court Costs: $466
-Expert Witness Fee for Dr. Gryska: $5,400
-Expert Witness Fee for Dr. Streisand: $5,000
-Expert Witness Fee for Dr.Gudin: $6,000
-Expert Witness Fee for Dr. Paynter: $5,000
-Total: $21,866[3]

---

[1] Super. Ct. Civ. R. 54(d):
> Costs. Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs.

[2] 10 Del. C. 8906. Expert Witness:
> The fees for witnesses testifying as experts or in the capacity of professionals in cases in the Superior Court, the Court of Common Pleas and the Court of Chancery, within this State, shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are now collected and paid.

[3] Pl. Mot. for Costs, ¶ 2.

Plaintiffs state they have voluntarily reduced their expert fees and request that the following costs be taxed:

-Court Costs: $466
-Dr. Gryska: $3,000
-Dr. Streisand: $3,000
-Dr. Gudin: $3,000
-Dr. Paynter: $1,500
-Total: $10,966[4]

Plaintiffs contend that the Complaint filing fee and service of process are recoverable pursuant to Superior Court Civil Rule 54(d) and 10 Del. C. 5101,[5] and the costs of Drs. Gryska, Streisand, Gudin and Paynter's witness fees for trial are recoverable pursuant to Superior Court Civil Rule 54(d) and 10 Del. C. 8906.

Plaintiffs timely filed this Motion and it remains unopposed. The Court finds that the $466.00 of costs associated with Plaintiffs' litigation of this matter are reasonable. As such, the amount will be awarded as appropriate costs.

Plaintiffs are also entitled to recover reasonable fees associated with the testimony of their experts. Plaintiffs have reduced all of the expert fees considerably to roughly half of the original amount. Plaintiffs have submitted documentation and have highlighted each expert's role in the trial.

In a motion for costs regarding expert witness fees, "the prevailing party may only recover fees associated with the expert's time spent testifying or waiting to testify, along

---

[4] *Id.*, ¶ 3.

[5] 10 Del. C. 5101. Defendant or prevailing party in law actions:

> In a court of law, whether of original jurisdiction or of error, upon a voluntary or involuntary discontinuance or dismissal of the action, there shall be judgment for costs for the defendant. Generally a party for whom final judgment in any civil action, or on a writ of error upon a judgment is given in such action, shall recover, against the adverse party, costs of suit, to be awarded by the court.

with reasonable travel expenses."[6] "The award of costs for expert witness testimony is committed to the sound discretion of the trial court."[7] When assessing the reasonableness of medical expert fees, Delaware courts frequently rely upon rates set forth in a 1995 study conducted by the Medical Society of Delaware's Medico-Legal Affairs Committee.[8] The Court will adjust "the rates set forth in the study to reflect increases in the consumer price index for medical care."[9]

In *Miller*, this Court found $1,500 to be a reasonable rate for an expert who testified at trial from his own office.[10] Dr. Paynter was unable to testify live at trial, and instead testified by telephone. Plaintiff has reduced Dr. Paynter's fee from $5,000[11] to $1,500. Consistent with this Court's holding in *Miller*, Dr. Paynter's fee is reasonable and will be awarded.

Drs. Gryska, Streisand and Gudin's fees have been reduced to $3,000 each. Dr. Gryska traveled from Boston, Massachusetts to Wilmington and arrived the night before he testified on the second day of trial on November 1, 2012. Dr. Gryska's fee, which included travel expenses, originally was $5,400.[12] Drs. Streisand and Gudin both testified at the third day of trial on November 2, 2012 and arrived the night before their testimonies. Dr. Streisand, who traveled from Pelham, New York, charged a flat fee of $5,000 for his appearance.[13] Dr. Gudin, who traveled from Englewood, New Jersey

---

[6] *Miller v. Williams*, 2012 WL 3573336, at *2 (Del. Super. Aug. 21, 2012)(citing *Merced v. Harrison*, 2009 WL 3022134, at * 1 (Del. Super. Sept. 1, 2009).
[7] *Taveras v. Mesa*, 2008 WL 5244880, at *1 (Del. Super. Dec. 10, 2008)(citing *Donovan v. Del. Air Res. Comm'n*, 358 A.2d 717, 722-23 (Del. 1976)).
[8] *Miller*, 2012 WL 3573336, at *2; *Merced*, 2009 WL 3022134, at *1.
[9] *Miller*, 2012 WL 3573336, at *2; *Merced*, 2009 WL 3022134, at *1.
[10] *Miller*, 2012 WL 3573336, at *2.
[11] Pl.'s Mot. for Costs, Ex. D.
[12] *Id.*, Ex. A.
[13] *Id.*, Ex. B.

charged a flat fee of $6,000 for his appearance.[14] Dr. Grudin was present in the courtroom the entire day, waiting for other witnesses to testify to accommodate the schedules of two defense experts.[15]

In 2009, this Court found "the applicable range of reasonable half-day testimony fees would be $1,953.90 to $2,705.40" using the consumer price index on the Medico-Legal Study figures.[16] Using the same calculation, and taking into consideration reasonable travel expenses for each of the experts and time spent waiting to testify, the Court finds their fees of $3,000 to be reasonable.[17] The Court also notes that Plaintiff has voluntarily reduced the fees and Defendants have not opposed this Motion.

For the foregoing reasons, Plaintiffs' Motion for Costs is **GRANTED**. Plaintiffs are entitled to recover **$10,966.00** in costs. The Prothonotary is directed to award costs to Plaintiff in the amount of $10,966.00 pursuant to Superior Court Civil Rule 54(d) and 10 Del. C. 8906.

(2) Plaintiffs' Motion for Pre-judgment and Post-judgment Interest

PARTIES' CONTENTIONS

Plaintiffs, on September 26, 2012, extended identical written settlement demands to Dr. Shapira and to CCHS which were valid for a minimum of 30 days.[18] The settlement demands were for the amount of $1.45 million, less than the $4.4 million judgment entered against the Defendants jointly and severally. Plaintiffs contend that

---

[14] *Id.*, Ex. C.
[15] Pl.'s Mot. for Costs, ¶ 2(d).
[16] *Payne v. Home Depot*, 2009 WL 659073, at *7 (Del. Super. Mar. 12, 2009).
[17] The Court reached this finding by utilizing the inflation calculator provided by the Bureau of Labor Statistics. Using the CPI Inflation Calculator, the 2009 figure of $2,705.40 has risen to $2,932.31 in 2013. *See* Bureau of Labor Statistics, http://www.bls.gov/data/# calculators (last visited May 21, 2013).
[18] Pl.'s Mot. for Pre-judgment and Post-judgment Interest, ¶ 1-2.

pursuant to 6 Del. C. 2301(d),[19] they "are entitled to pre-judgment interest commencing from the date of the injury on December 10, 2009 to the date of entry of judgment on November 14, 2012."[20]

The Defendants do not dispute that Plaintiffs made their demand on September 26, 2012, nor do they dispute that the settlement was rejected. However, Defendants contend that Plaintiffs did not timely file their demand in conformity with the 30-day requirement of 6 Del. C. 2301(d). Defendants contend that trial commenced on October 24, 2012, when jury selection began, making Plaintiffs' demand two days too late.[21] Defendants acknowledge that the definition of when trial begins for the 30-day computation of Section 2301(d) is not set forth in the statute nor is there any Delaware caselaw interpreting the statute on that point. Defendants have cited to Delaware cases discussing the beginning of trial as well as cases from other jurisdictions, based upon which, Defendants contend, trial begins at the jury selection stage.

Defendants also contend that 6 Del. C. 2301 violates the Due Process and Equal Protection Clauses of the Delaware and United States Constitutions by denying a defendant a forum to assess fault for the delay sought to be avoided and by requiring a defendant to pay pre-judgment interest from the date of injury, before a defendant knows

---

[19] 6 Del. C. 2301. Legal rate; loans insured by Federal Housing Administration:

> (d) In any tort action for compensatory damages in the Superior Court or the Court of Common Pleas seeking monetary relief for bodily injuries, death or property damage, interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered.

[20] Pl.'s Mot. for Pre-judgment Interest, ¶ 2.

[21] Def. Shapira's Opp'n to Pl.'s Mot. for Pre-judgment Interest, ¶ 1-2; Def. CCHS's Notice of Joinder in Def. Shapira's Opp'n to Pl.'s Mot. for Pre-judgment Interest. Defendants contend that jury selection was known to Plaintiffs since the Scheduling Order was entered on October 26, 2011.

of the impending lawsuit. Defendants further contend that Section 2301 is unconstitutional:

> (1) since it unduly inhibits defendants from exercising their fundamental right to resort to the courts in defense of claims made against them; (2) since the difference in treatment of plaintiffs and defendants bears no reasonable relationship to any legitimate objective of the rule; (3) since it creates an irrebuttable presumption that defendants are responsible for causing delay; and (4) since it abridges the substantive rights of defendants and enlarges those of plaintiffs.[22]

Plaintiffs counter by contending, first, that the trial started the day testimony began, and, further, that the language of the statute states the demand must be made "prior to *trial*," not "prior to jury selection," which evinces the General Assembly's intent that demand be made before a trial begins. Plaintiffs further contend that statutes are presumed to be constitutional and a party asserting to the contrary bears the burden of proving that assertion, which Defendants have failed to do.[23]

DISCUSSION

"Prior to Trial" Language in § 2301(d)

Section 2301(d) was enacted by the General Assembly "to promote earlier settlement of claims by encouraging parties to make fair offers sooner, with the effect of reducing court congestion."[24] "The plain language of § 2301(d) requires that prejudgment interest be awarded when the settlement demand was less than the amount of damages upon which the judgment was entered, regardless of how the jury apportioned

---

[22] Def. Shapira's Opp'n to Pl.'s Mot. for Pre-judgment Interest, ¶ 9.
[23] Pl.'s Mot. for Pre-judgment Interest, ¶ 11(citing *Wilm. Med. Ctr. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978)).
[24] *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010).

fault among the joint tortfeasors for purposes of contribution."[25] In order to qualify for pre-judgment interest under Section 2301(d), certain requirements must be met: (1) the action must be a tort action; (2) the claimant must have made and held open a demand for settlement for 30 days; and (3) the damages determined at trial must exceed the amount plaintiff agreed to accept for settlement.[26]

The Court believes it is not necessary to make a distinction as to precisely when trial began for the purposes of its "prior to trial" analysis under Section 2301(d). Whether trial began at jury selection on October 24, 2012, as Defendants assert, or on October 31, 2012, as Plaintiffs assert, is irrelevant. The fact of the matter is that Plaintiffs settlement demands were valid for 30 days and during that 30-day period, the Defendants rejected the settlement demands. It is also important to note that the Trial Scheduling Order lists Jury Selection for October 24, 2012 and separately lists Trial for October 29, 2012.[27] Section 2301(d) was enacted to promote settlement, which is exactly what Plaintiffs attempted to accomplish with their demands of $1.45 million per Defendant. After trial, the jury returned a verdict in the amount of $4.4 million jointly and severally against the Defendants. Thus Section 2301 applies and Defendants are required to pay prejudgment interest.

---

[25] *Christiana Care Health Servs., Inc. v. Crist*, 956 A.2d 622, 630 (Del. 2008). "If the settlement demand on a defendant is less than the amount of damages awarded by the jury against that defendant, the plaintiffs can recover prejudgment interest." *Id.*, at 628.

[26] *State Farm Mut. Auto. Ins. Co. v. Enrique*, 16 A.3d 938, *2 (Del. Mar. 22, 2011)(TABLE)(citing 6 Del. C. 2301(d)).

[27] Trial Scheduling Order,Transaction ID 43836051 (Apr. 23, 2012).

Constitutional and Other Issues

In Delaware, "there is a strong presumption that a legislative enactment is constitutional."[28] A legislative enactment "will not be declared unconstitutional unless it clearly and convincingly violates the Constitution."[29] The party challenging the constitutionality of a legislative enactment bears the burden of overcoming its presumption of validity.[30] In *Bullock*, this Court held that "Section 2301(d) establishes that the Court calculates prejudgment interest from the date of the injury" and that the defendant "must pay prejudgment interest from the date of the injury because [d]efendant stands in the shoes of the tortfeasor."[31]

The Delaware Supreme Court has interpreted Section 2301(d) many times without raising any concerns about its constitutionality,[32] and this Court has recently rejected an argument that the statute is unconstitutional.[33] Defendants here raise similar arguments to the defendants in *Bullock*. Defendants' main point of contention is that Section 2301(d) raises an irrebuttable presumption that defendants are to blame for delays in settling cases. The Court is not persuaded by this argument. In support of its position, the Court points to Superior Court Civil Rule 68 which provides, "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after making the offer."[34] The Court finds Defendants irrebuttable presumption argument

---

[28] *Bullock v. State Farm*, 2012 WL 1980806, at *7 (Del. Super. May 18, 2012)(quoting *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1258 (Del. 2011)(quoting *Wien v. State*, 882 A.2d 183, 186 (Del. 2005)).
[29] *Lacy v. Green*, 428 A.2d 1171, 1174-75 (Del. Super. 1981).
[30] *Id.* at 1176(citations omitted).
[31] *Bullock*, 2012 WL 1980806, at *7.
[32] *See Enrique*, 16 A.3d 938 (TABLE); *Rapposelli,,* 988 A.2d 425 (Del. 2010); *Crist*, 956 A.2d 622 (Del. 2008).
[33] *See Bullock*, 2012 WL 1980806, at *7 (Del. Super.).
[34] Super. Ct. Civ. R. 68(*emphasis added*).

to lack merit. The only things Section 2301(d) and Rule 68 do show is Delaware's strong policy favoring the settlement of claims.

Like the *Bullock* defendants, Defendants have not overcome the strong presumption of validity. Because they stand in the shoes of the tortfeasor, they must pay prejudgment interest from the date of the injury.

Finally, a dispute arose over prejudgment interest on Mrs. Houghton's loss of consortium claim. Plaintiffs contend they are entitled to prejudgment interest on the loss of consortium claim. Plaintiffs submit there is no Delaware authority to support Dr. Shapira's proposition that the loss of consortium claim does not fall within the purview of a "bodily injury, death or property damage" required by Section 2301(d). Plaintiffs cite to the *Crist*[35] case, in which the plaintiffs were awarded prejudgment interest, pursuant to Section 2301(d), on claims for medical negligence survival, loss of consortium, and wrongful death.[36] In *Crist*, both defendants rejected plaintiffs' identical settlement demands to settle all of their claims for $1,250,000 each, and the jury found joint and several liability and awarded plaintiffs $2 million.[37] Although the Supreme Court was not presented with the argument that a loss of consortium claim is excluded from the statute, in its interpretation and analysis of Section 2301(d), the Court included the loss of consortium claim. Because the Supreme Court has not held otherwise, this Court will not accept the Defendants' argument claims for loss of consortium are outside the scope of Section 2301(d). Plaintiffs are entitled to prejudgment interest on Mrs. Houghton's loss of consortium claim.

---

[35] 956 A.2d 622.
[36] *Id.*, at 625.
[37] *Id.*, at 629-30.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Pre-judgment and Post-judgment Interest is **GRANTED**.

Calculating Interest

Plaintiffs contend that on December 10, 2009, the date of the injury, the Federal Reserve Discount rate was 0.5. Therefore, the legal rate of pre-judgment interest was 5.5%. Calculating 5.5% interest of $4,400,000 yields pre-judgment interest in the amount of $242,000 per year with a daily rate of interest of $663.01. Total pre-judgment interest due through November 13, 2012, the day before the verdict is $709,424.66.[38]

Plaintiff contends that on November 14, 2012, the date of the judgment, the Federal Reserve discount rate was 0.75, therefore the legal rate at the time of judgment is 5.75%. From November 14, 2012 forward, interest is paid at the legal rate as of the time of the judgment. Post-judgment interest is accruing at a daily rate of $693.15.[39]

Because 6 Del. C. 2301(d) does not distinguish between pre-judgment and post-judgment interest, the same interest rate will apply to both calculations.[40] The rate of interest is 5% over the Federal Reserve discount rate as of the date of commencement of interest liability.[41] The interest is "a continuing liability which merely accumulates with the passage of time," it is not "recalculated on the day final judgment is entered to determine a different post-judgment rate."[42] The interest rate remains fixed.[43]

---

[38] Pl.'s Mot. for Pre-judgment Interest, ¶ 3.
[39] *Id.*, ¶ 4.
[40] *TranSched Sys. Ltd. v. Versyss Transit Solutions, LLC*, 2012 WL 1415466, *6 (Del. Super. Mar. 29, 2012)(citing *Rollins Envtl. Servs., Inc. v. WSMW Indus., Inc.*, 426 A.2d 1363, 1367-68 (Del. Super. 1980).
[41] *Id.*
[42] *TranSched Sys. Ltd.*, 2012 WL 1415466 at *6; *Rollins*, 426 A.2d at 1367.
[43] *TranSched Sys. Ltd.*, 2012 WL 1415466 at *6; *Rollins*, 426 A.2d at 1367.

The Court will apply the same 5.5% rate to both the pre-judgment and post-judgment interest. As a result, Plaintiffs are entitled to pre-judgment interest in the amount of **$709,424.66** and post-judgment interest in the amount of **$663.01** per diem calculated from November 14, 2012, the date judgment was entered.

(3) Defendant CCHS's Motion to Reform the Original Verdict Sheet

INTRODUCTION

On November 14, 2012, the jury returned a verdict in this case in the amount of $3,750,000.00 for Mr. Houghton and $650,000.00 for Mrs. Houghton and apportioned liability 65% to Dr. Shapira and 35% to CCHS.[44] CCHS requested the Court to submit to the jury a supplemental verdict sheet to determine how much of the 35% liability assessed to CCHS should be apportioned to Dr. Castellano (CCHS's director) and how much should be apportioned to Dr. Shapira. The jury apportioned 75% (of the 35%) to Dr. Shapira and 25% (of the 35%) to Dr. Castellano.[45] The Court explicitly told the parties that the jury would not disturb the 65/35 original apportionment and that the Court would make that "clear" to the jury.[46]

PARTIES' CONTENTIONS

CCHS contends that because of the jury's findings in the supplemental verdict sheet, the original verdict sheet should be amended and reformed to reflect that question 8 read:

---

[44] Def. CCHS's Mot. to Reform the Original Verdict Sheet, Ex. A. [hereinafter, "Verdict Sheet"].
[45] Def. CCHS's Mot. to Reform the Original Verdict Sheet, Ex. B. [hereinafter, "Supplemental Verdict Sheet"].
[46] Def. CCHS's Reply to Def. Shapira's Opp'n to the Mot. to Reform the Original Verdict Sheet, Ex. A, Nov. 14, 2012 Trial Transcript. [hereinafter, "Nov. 14, 2012 Tr."]. "No. They're not going to touch the 65/35, and I'll make that clear to them." *Id.*, 24:8-9.

Percentage attributable to Dr. Shapira 91.25%
Percentage attributable to [CCHS] 8.75%
Total: 100%.[47]

CCHS contends that the issues of joint and several liability may have been confusing to the jury and its request to reform the verdict sheet is because the jury should have been instructed that the *only* way they could find CCHS liable on the independent claim was through the conduct of Dr. Castellano.[48]

Dr. Shapira opposes CCHS' motion "on the grounds that there is no legal bas[is] to justify why the Court should reform the jury's original verdict to bring about the substantive change requested."[49] Dr. Shapira contends that once the jury returned the verdict assessing 35% to CCHS, "nothing further should have been done" because "[t]he original verdict was clear and consistent with the instructions given before deliberation."[50]

Plaintiffs take no position on the Supplemental Verdict Sheet or CCHS's Motion to Reform. However, Plaintiffs do contend that the Supplemental Verdict Sheet confirms the validity of the original verdict in their favor. Plaintiffs contend that in the original verdict sheet, the jury found CCHS liable for damages because of its own negligence and vicariously liable for the negligence of Dr. Shapira, and in the Supplemental Verdict Sheet the jury "found CCHS was both independently negligent (through the actions of its employee, Dr. Castellano), *and* vicariously liable for Dr. Shapira's negligence."[51] Plaintiffs conclude that this shows that "the award of damages was properly assessed

---

[47] Def. CCHS's Mot. to Reform the Original Verdict Sheet, ¶ 3.
[48] Def. CCHS's Reply to Def. Shapira's Opp'n to the Mot. to Reform the Original Verdict Sheet, ¶ 7.
[49] Def. Shapira's Opp'n to Def. CCHS's Mot. to Reform Original Verdict Sheet, ¶ 1.
[50] *Id.* ¶ 3.
[51] Pl.'s Resp. to CCHS's Mot. to Reform the Original Verdict Sheet, ¶ 9. "[T]he 'Supplemental Verdict Sheet' again reveals that the Jury intended to assess damages against CCHS for the conduct of Dr. Castellano *and* for the conduct of Dr. Shapira. *Id.*

against CCHS as a consequence of wrong perpetrated both by CCHS *and* by its agent, apparent agent or employee, Dr. Shapira."[52]

DISCUSSION

The Jury Instructions

The Court gave the following jury instructions:

> **ACTS OF CORPORATE DEFENDANT**
>
> Christiana Care Health Services, Inc. and Nadiv Shapira MD, LLC are professional corporations. Dr. Castellano was an employee of Christiana Care Health Services, Inc. and its Institutional Review Board Corporate Director. Dr. Shapira was an employee of Nadiv Shapira MD LLC. A corporation is not a living thing and can only act through its respective employees. The acts or omissions of an employee are therefore the acts or omissions of the corporation. Whatever your finding eventually is as to Dr. Castellano automatically pertains to Christiana Care Health Services, Inc., and whatever your finding eventually is as to Dr. Shapira automatically pertains to Nadiv Shapira MD LLC.
>
> **APPARENT AGENCY**
>
> A physician who is an independent contractor, may, nonetheless be an agent of the hospital if the hospital held out or represented that the physician was its employee or agent in diagnosing or treating a patient, and in doing so caused the patient justifiably to rely upon the care or skill of that physician. The hospital's conduct must be such conduct that would lead a reasonable person to believe an agency relationship existed. In such circumstances, the hospital is liable to the patient for harm caused by any breach in the standard of care by that physician just as if the physician were the hospital's employee. Accordingly, if you should find that Christiana Care Health Services, Inc. held out or represented that Dr. Shapira was an employee or agent in treating Mr. Houghton, and if Christiana Care Health Services, Inc. thereby caused Mr. Houghton to justifiably rely upon the care or skill of Dr. Shapira, then Christiana Care Health Services, Inc. is liable to Mr. Houghton for harm caused by any breach in the standard of care by Dr. Shapira.

[52] *Id.*

AGENT'S NEGLIGENCE IMPUTED TO PRINCIPAL

> An agent is one who acts for another, known as a principal, on the principal's behalf and subject to the principal's control and consent.
>
> Plaintiffs contend that Dr. Shapira was an employee or agent of Christiana Care Health Services, Inc. at the time of alleged medical negligence. Dr. Shapira and Christiana Care Health Services, Inc. deny this and contend that Dr. Shapira was not an employee or agent, but rather an independent contractor, who was not subject to Christiana Care Health Services, Inc.'s control or consent.
>
> If you decide that Mr. Houghton's injuries were the result of a negligent act committed by Dr. Shapira, then you must also decide whether or not Dr. Shapira was an employee or agent of Christiana Care Health Services, Inc. acting within the scope of his employment or agency at the time the negligent harm to Mr. Houghton occurred.
>
> If you find that Mr. Houghton's injuries were the result of a negligent act committed by Dr. Shapira, and that at the time of the negligent act Dr. Shapira was an employee or agent of Christiana Care Health Services, Inc. acting within the scope of his employment or agency, then that negligence is the legal responsibility of both Christiana Care Health Services, Inc. and Dr. Shapira.[53]

The Verdict Sheets

In the original Verdict Sheet, the jury was asked to answer eight questions. In their answers to the first five questions, they jury determined that:

> (1) Dr. Shapira was negligent;
> (2) Dr. Shapira's negligence proximately caused injury and damages to Mr. Houghton;
> (3) Dr. Shapira was an agent, apparent agent or employee of CCHS;
> (4) CCHS was negligent; and
> (5) CCHS's negligence proximately caused injury and damages to Mr. Houghton.[54]

Question Eight required the jury to apportion liability between Dr. Shapira and CCHS which they did, 65% to Dr. Shapira and 35% to CCHS.[55]

---

[53] Jury Instructions, Nov. 13, 2012, p. 5-7.
[54] Verdict Sheet, p. 1-2.

In the Supplemental Verdict Sheet, the jury was asked to answer one question:

> As to your finding of 35% liability for [CCHS], please specify what percentage, if any, you attribute *to [CCHS]* through Dr. Castellano's conduct, and what percentage, if any, you *attribute to [CCHS]* through their agency, apparent agency or employer relationship with Dr. Shapira.[56]

The jury apportioned 25% to Dr. Castellano and 75% to Dr. Shapira.[57]

November 14, 2012 Sidebar

The Court allowed this supplemental question to go forward because it was under the impression, based upon representations from CCHS's counsel, that there was an issue pertaining to CCHS's position as an excess insurance carrier. Specifically, CCHS's counsel stated "It [the supplemental question to the jury] does have an effect. It does, because [CCHS] put [Dr. Shapira] on notice that we were in a position of an excess carrier, and they should settle the case. . . . That 35% becomes ours exclusively, and so if there's a lawsuit later on, we would need to know whether this was 35% independent or [attributable to CCHS's agency relationship with Dr. Shapira]."[58] Later on during the sidebar, CCHS's counsel stated that the purpose of the supplemental question was to "save or clarify litigation later on."[59]

---

[55] *Id.* at 2-3.
[56] Supplemental Verdict Sheet(*emphasis added*).
[57] *Id.*
[58] Nov. 14, 2012 Tr. 14:19-22, 15:1-10:

> Mr. Ferri: -- it does have an effect. It does, because we put his client on notice that we were in a position of an excess carrier, and they should settle the case. Now –
> Mr. Elzufon: That 35% --
> Mr. Ferri: That 35% becomes ours exclusively, and so if there's a lawsuit later on, we would need to know whether this was 35% independent or –
> The Court: You need them to define – what you're saying is, "I need them to define what percentage of that 35% was attributable to Dr. Castellano and what percentage was attributable to our agent relationship with Dr. Shapira."
> Mr. Ferri: If they did at all

[59] *Id.*, 20:6-7.

At the beginning of the sidebar, the Court noted that the jury "made an independent finding that Christiana Care was negligent"[60] as to 35% of the direct and total negligence towards Plaintiffs. The Court also noted that no one on the jury seemed confused throughout the entire trial.[61] The Court decided it was best to err on the side of caution and allow the supplemental question because it could be undone.[62] During the sidebar, counsel for Dr. Shapira specifically asked if the 35/65 apportionment would be changed and the Court told him it would not.[63] The Court stated that it would "make it clear" to the jury that they were "not going to touch the 65/35" and that they were only addressing the 35%.[64]

In its instructions to the jury regarding the Supplemental Verdict Sheet, the Court stated "we're not going to change those percentages [the 65%/35%], but as to that 35%, can you specify, please what percentage of that [CCHS] liability is based upon the conduct of Dr. Castellano, and what percentage of that is based upon their relationship with Dr. Shapira."[65] The Court again told the jury, "you won't change the 65/35, that is your verdict."[66]

January 4, 2013 Hearing

At the January 4, 2013 hearing on the post-trial motions, CCHS argued that the Original Verdict Sheet should be reformed to reflect the jury's findings in the Supplemental Verdict Sheet. Specifically, that because 75% of CCHS's liability (35%) was attributable to Dr. Shapira's conduct, Dr. Shapira's liability should be modified to

---

[60] *Id.*, 8:4-5.
[61] *Id.*, 20:11-14.
[62] *Id.*, 22:8-10.
[63] *Id.*, 23:7-14
[64] *Id.*, 24:8-9.
[65] *Id.*, 25:9-14.
[66] *Id.*, 25:19-20.

91.25% and CCHS's liability should be modified to 8.75%. The Court emphasized that the jury was not asked to "determine whether any portion of the hospital's responsibility was not the hospital's responsibility."[67] The Court went on to say to CCHS's counsel, "In other words, [the jury] attributed a certain percentage of responsibility to the hospital. And . . . you didn't ask me to ask [the jury], what percentage of what you awarded the hospital should you have awarded against Dr. Shapira."[68] During the hearing, the Court also emphasized that CCHS "had the opportunity to explain to the jury what liabilities the hospital faced on what basis."[69]

The Court discussed the impact CCHS's counsel's statement that CCHS was in the position of an excess insurance carrier had on its decision to allow the supplemental question:

> Because you mentioned that you really were acting as an excess insurer. And I thought you asked for that distinction because there would be a difference in how the hospital would or would not be required to pay some portion of their judgment because you mentioned at sidebar that you were acting as an excess insurer for Dr. Shapira.[70]
>
> . . . And I decided to give the instruction because I thought it meant that it may change how the insurance money – company moneys were distributed.[71]

CCHS's counsel acknowledged that he "did not appreciate that at the time."[72]

The Court expressed its dissatisfaction with CCHS's true purpose in requesting the supplemental instruction:

> [I]f I had appreciated at the time that I gave the supplemental instruction that the purpose of that was to see if the jury really

[67] Jan. 4, 2013 Hearing Tr. 26:18-20. [hereinafter "Jan. 4, 2013 Tr."].
[68] *Id.*, 26:20- 27:1.
[69] *Id.*, 28:18-20.
[70] *Id.*, 31:4-10.
[71] *Id.*, 31:12-14.
[72] *Id.*, 31:23-32:1.

> meant what the jury said, I would not have given it because I was satisfied that I had done what needed to be done to properly instruct the jury with the initial instructions and interrogatory sheet as to how to allocate responsibility and the bases upon which define liability. And had I realized at that point in time that the reason you wanted me to give the supplemental instruction was to make sure the jury really meant what they said in the initial verdict sheet, I would not have done it.[73]

The Court articulated that its "inclination, given my confidence in the initial instructions and the initial verdict sheet is, if that was the purpose, to disregard and strike the supplemental verdict sheet for purposes of the trial court's responsibilities."[74] The Court also stated that it thought "there was an insurance issue" and CCHS "needed the clarification for that purpose," and "it was a mistake to ask it if I had known the real reason."[75]

Analysis

In Delaware, a "jury's verdict is presumed to be correct and just and is afforded great deference by the Court."[76] In *Lavin v. Silver,*[77] in which this Court denied a plaintiff's motion to reform the verdict sheet, this Court distinguished reforming a verdict to "correct a clerical error" from changing "the substance of the Verdict Sheet."[78] In *Lavin*, this Court noted that the plaintiff had failed to cite any authority "that would allow this Court to substantively change a Verdict Sheet after the jury returned its verdict."[79] Finally, this Court held "it does not appear to be sound policy to amend a Verdict Sheet

---

[73] *Id.*, 32:16-33:5.
[74] *Id.*, 33:16-20.
[75] *Id.*, 34:15-20.
[76] *Glover v. Schwing*, 2011 WL 1102877 (Del. Super. Mar. 17, 2011), *aff'd*, 31 A.3d 76 (Del. Oct. 27, 2011)(TABLE)(citing *Mills v. Telenczak*, 345 A.2d 424, 426 (Del. 1975).
[77] 2003 WL 21481006 (Del. Super. June 10, 2003).
[78] *Id.* at *3.
[79] *Id.*

subsequent to the jury making its award. Therefore, this portion of the Plaintiffs' Motion to Amend the Verdict Sheet is denied."[80]

CCHS's contention that the jury should have been instructed that the only way they could find CCHS liable was through the actions of Dr. Castellano lacks merit. The jury was properly instructed that Dr. Castellano was an employee of CCHS and the jury's finding as to Dr. Castellano automatically pertained to CCHS, and that Dr. Shapira was an employee of Nadiv Shapira, MD, LLC and the jury's finding as to Dr. Shapira automatically pertained to Nadiv Shapira, MD, LLC.[81] The Court then instructed the jury that if they found CCHS:

> [H]eld out or represented that Dr. Shapira was an employee or agent in treating Mr. Houghton, and if [CCHS] thereby caused Mr. Houghton to justifiably rely upon the care or skill of Dr. Shapira, then [CCHS] is liable to Mr. Houghton for harm caused by any breach in the standard of care by Dr. Shapira.[82]

The Court is satisfied today, as it was on November 14, 2012, that this was the correct instruction to give. The verdict clearly indicates the jury's finding of independent negligence on the part of CCHS. The Supplemental Verdict Sheet merely clarified that 25% (of the 35%) was attributable to CCHS through Dr. Castellano's actions and 75% (of the 35%) was attributable to CCHS by virtue of Dr. Shapira's agency, apparent agency or employee relationship with CCHS.

Based on the representations of CCHS's counsel regarding CCHS's position as an excess insurer, the Court reluctantly issued the supplemental instruction. CCHS makes no arguments regarding insurance in its Motion to Reform. CCHS is trying to accomplish something the Court explicitly told them they were not permitted to do, i.e.,

---

[80] *Id.*
[81] November 14, 2012 Tr. 147:1-16.
[82] *Id.*, 148:8-16.

alter the 65%/35% apportionment of liability in the Original Verdict Sheet. CCHS's contentions are insufficient to rebut the presumption that a jury's verdict is correct and just. Much like the plaintiffs in *Lavin*, CCHS seeks to substantively change a verdict sheet and has cited no authority in support of its motion. The Court is not persuaded by the arguments CCHS has made. The Court has stated several times that the jury made a finding that CCHS was independently liable to Plaintiffs and it would not disturb that finding.

The Court will not allow the Supplemental Verdict to be used in any way to change the percentage of liability each party has to Mr. and Mrs. Houghton. However, the Court has determined it will not strike the Supplemental Verdict. Should CCHS have a valid legal reason to utilize the jury's apportionment of their liability as between the two doctors, it is there for them to use.

CONCLUSION

For the foregoing reasons, Defendant CCHS's Motion to Reform the Original Verdict Sheet is **DENIED.**

SUMMATION

Plaintiffs' Motion for Costs is **GRANTED.** Plaintiffs are entitled to recover **$10,966.00** in costs. The Prothonotary is hereby directed to award costs to Plaintiff in the amount of $10,966.00 pursuant to Superior Court Civil Rule 54(d) and 10 Del. C. 8906.

Plaintiffs' Motion for Pre-judgment and Post-judgment Interest is **GRANTED.** Plaintiffs are entitled to pre-judgment interest in the amount of **$709,424.66** and post-

judgment interest in the amount of **$663.01** per diem calculated from November 14, 2012, the date judgment was entered.

Defendant CCHS's Motion to Reform the Original Verdict Sheet is **DENIED**.

IT IS SO ORDERED.

M. Jane Brady
Superior Court Judge

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN HOUGHTON, and EVELYN HOUGHTON, his wife,	)	CONSOLIDATED
Plaintiffs,	)	C.A. No. N11C-06-092 MJB
v.	)	JURY TRIAL DEMANDED
NADIV SHAPIRA, M.D., NADIV SHAPIRA MD LLC, a Delaware Corporation, and CHRISTIANA CARE HEALTH SERVICES, INC., a Delaware corporation,	)	
Defendants.	)	

ORDER

It is **HEREBY ORDERED** this __ day of _____, 2012, that Plaintiffs' Motion *in Limine* to Limit Number of Defense Expert Witnesses at Trial to testify that the On-Q system was not "experimental" in 2009 for use in treatment of rib fracture pain is GRANTED. Defendants shall be permitted to call no more than four witnesses on this issue.

_____
Judge

This document constitutes a ruling of the court and should be treated as such.

Court Authorizer Comments:

SO ORDERED THIS 28TH DAY OF SEPTEMBER, 2012, BY BRADY, J.

So Ordered
/s/ Brady, M Jane Oct 02 2012 09:31AM

EFiled: Oct 02 2012 09:32AM EDT
Transaction ID 46746871
Case No. N11C-06-092 MJB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN HOUGHTON, and EVELYN HOUGHTON, his wife, Plaintiffs, v. NADIV SHAPIRA, M.D., NADIV SHAPIRA MD LLC, a Delaware Corporation, and CHRISTIANA CARE HEALTH SERVICES, INC., a Delaware corporation, Defendants.	)	CONSOLIDATED C.A. No. N11C-06-092 MJB JURY TRIAL DEMANDED

ORDER

AND NOW, this _____ day of _____, 2012, upon consideration of Defendants' Motion *in Limine* to Bar Testimony that Dr. Shapira's Data Collection is Evidence that the On-Q Use by Him for Rib Fracture Pain Management Was Experimental, and Plaintiffs' Opposition thereto,

IT IS HEREBY ORDERED that the Motion is DENIED.

_____
The Honorable M. Jane Brady

This document constitutes a ruling of the court and should be treated as such.

Court Authorizer Comments:

SO ORDERED THIS 28TH DAY OF SEPTEMBER, 2012, BY BRADY, J.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN HOUGHTON, and EVELYN HOUGHTON, his wife, Plaintiffs, v. NADIV SHAPIRA, M.D., NADIV SHAPIRA MD LLC, a Delaware Corporation, and CHRISTIANA CARE HEALTH SERVICES, INC., a Delaware corporation, Defendants.	)	CONSOLIDATED C.A. No. N11C-06-092 MJB JURY TRIAL DEMANDED

ORDER

AND NOW, this _____ day of _____, 2012, upon consideration of Defendants' Motion *in Limine* to Bar Any Testimony Regarding Dr. Shapira's Desire to Conduct a Randomized Trial, and Plaintiffs' Opposition thereto,

IT IS HEREBY ORDERED that the Motion is DENIED.

_____
The Honorable M. Jane Brady

This document constitutes a ruling of the court and should be treated as such.

Court Authorizer Comments:

SO ORDERED THIS 28TH DAY OF SEPTEMBER, 2012, BY BRADY, J.

EFiled: Oct 02 2012 03:41PM EDT
Transaction ID 46761051
Case No. N11C-06-092 MJB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN HOUGHTON, and EVELYN HOUGHTON, his wife,	)	CONSOLIDATED
Plaintiffs,	)	C.A. No. N11C-06-092 MJB
v.	)	JURY TRIAL DEMANDED
NADIV SHAPIRA, M.D., NADIV SHAPIRA MD LLC, a Delaware Corporation, and CHRISTIANA CARE HEALTH SERVICES, INC., a Delaware corporation,	)	
Defendants.	)	

ORDER

It is **HEREBY ORDERED** this 28th day of Sept., 2012, that Plaintiffs' Motion *in Limine* to Exclude Expert Testimony of Dr. Gross is GRANTED in part and DENIED in part. Dr. Gross shall be ~~prohibited from~~ permitted to offer expert opinion testimony at trial that the use of the On-Q catheter for the treatment of rib fracture pain was not experimental and was the standard of care in December 2009 if the proper foundation is laid. Dr. Gross shall also be prohibited at trial from referring to any articles or studies published after December 10, 2009.

Defendants are instructed to inform all witnesses they intend to call at trial of this Order, until further Order of the Court.

M Jane Brady
Judge

EFiled: Oct 08 2012 02:14PM EDT
Transaction ID 46848887
EFiled: Aug 17 2012 04:55PM EDT
Transaction ID 45970855
Case No. N11C-06-092 MJB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN HOUGHTON, and
EVELYN HOUGHTON, his wife,

Plaintiffs,

v.

NADIV SHAPIRA, M.D., NADIV SHAPIRA MD LLC, a Delaware Corporation, and CHRISTIANA CARE HEALTH SERVICES, INC., a Delaware corporation,

Defendants.

CONSOLIDATED

C.A. No. N11C-06-092 MJB

JURY TRIAL DEMANDED

ORDER

It is **HEREBY ORDERED** this 28th day of September, 2012, that Plaintiffs' Motion *in Limine* to Exclude Any Reference at Trial to Statistical Evidence Offered as Evidence of Adherence to the Standard of Care is GRANTED. ~~Defendants may not introduce evidence that Defendant Dr. Shapira had a purportedly low complication rate and/or did not have an unusual outcome in the other procedures he performed to create an inference that the proper standard of care was exercised in his care of Plaintiff Mr. Houghton or that the complication in this case falls within an accepted complication rate. Defendants may also not suggest or argue that all surgeries have a risk of a complication, and therefore the complication in this case is acceptable.~~ The question is ~~whether~~ Defendants met the standard of care in their treatment of ~~Plaintiff Mr. Houghton~~. Defendants are instructed to inform all witnesses that they intend to call at trial of this Order to avoid a witness volunteering an opinion inconsistent with this Order.

and shall only be offered upon further Order of the Court. Such information may be admissible as relevant to the issue related to informed consent.

M. Jane Brady
Judge

{00660695;v1 }

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHN HOUGHTON, and EVELYN HOUGHTON, his wife, Plaintiffs, v. NADIV SHAPIRA, M.D., NADIV SHAPIRA MD LLC, a Delaware Corporation, and CHRISTIANA CARE HEALTH SERVICES, INC., a Delaware corporation, Defendants.	)	CONSOLIDATED C.A. No. N11C-06-092 MJB JURY TRIAL DEMANDED

ORDER

AND NOW, this _____ day of _____, 2012, upon consideration of Defendants' Motion *in Limine* to Bar Testimony that the Use of the On-Q Catheter for Pain Relief in a Rib Fracture Patient Such as John Houghton Was Experimental, and Plaintiffs' Opposition thereto,

IT IS HEREBY ORDERED that the Motion is DENIED.

_____
The Honorable M. Jane Brady

This document constitutes a ruling of the court and should be treated as such.

Court Authorizer Comments:

SO ORDERED THIS 28TH DAY OF SEPTEMBER, 2012, BY BRADY, J.