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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT/CROSS-APPELLEE CHRISTIANA CARE HEALTH SERVICES, INC.'S CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This is a case that arises out of a surgical procedure performed by defendant Nadiv Shapira, M.D. ("Dr. Shapira"). As a result of that procedure, the plaintiff John Houghton ("Mr. Houghton") sustained injuries including multiple surgeries, the removal of his spleen, kidney and gall bladder failure, an incisional hernia, spent fifty nights in the hospital and incurred medical expenses of approximately $335,000. His wife brought a claim for loss of consortium. The defendants are Dr. Shapira, Nadiv Shapira, M.D., LLC, and Christiana Care Health Services, Inc. ("CCHS"). Plaintiffs' claims against Dr. Shapira were as follows:

a. That he breached the standard of care in not disclosing the following to Mr. Houghton:

1. That he was conducting a Rib Fracture Study;

2. That he had a business relationship with, and was under contract with, I-Flow (the manufacturer of a catheter device used in the rib fracture procedure);

3. That he was on I-Flow's Speaker's Bureau; and

4. That he was being paid by I-Flow to promote, *inter alia,* a new use for the I-Flow On-Q catheter.

b. That he breached the standard of care for failing to disclose the risks of the procedure; and

c. That he breached the standard of care during the insertion of the On-Q catheters.

Dr. Shapira was alleged to be an agent of CCHS either actual or apparent.

The direct claims against CCHS were as follows:

a. That it breached the standard of care in managing the Rib Fracture Study;

b. That it failed to require Dr. Shapira to inform patients of the fact the Rib Fracture Study was a study of an alternative treatment to the standard of care; and

c. That it failed to require disclosure of Dr. Shapira's business and financial relationship with I-Flow. (See Complaints[1] at A-74-78, 79-83.)

At the conclusion of a lengthy trial, the jury returned a verdict in favor of the plaintiff Mr. Houghton in the amount of $3,750,000.00 and in favor of his wife in the amount of $650,000.00. The verdict apportioned liability 65% to Dr. Shapira and 35% to CCHS. The jury was requested to return a supplemental verdict apportioning the 35% liability attributed to CCHS between Dr. Shapira and Dr. Jerry Castellano, the corporate director of the CCHS Institutional Review Board.

[1] Plaintiffs' claims were originally filed as two separate cases. The case filed against Defendant CCHS was C.A. No. N11C-12-094 MJB. The case filed against the Shapira Defendants was N11C-06-092 MJB. The two cases were consolidated in January, 2012 under the C.A. No. N11C-06-092 MJB.

The jury apportioned liability 75% to Dr. Shapira and 25% to Dr. Castellano. (Verdict Sheet at A-123-126.)

CCHS has appealed multiple rulings of the Superior Court specifically set forth in the Notice of Appeal filed on July 23, 2013. CCHS submits that those ruling made by the trial court, either singularly or in combination, constitute reversible error requiring a new trial. This is CCHS's Opening Brief.

SUMMARY OF ARGUMENT

1. The trial judge erred when she found that the informed consent given by Dr. Shapira was required to contain the fact that he served on the Speaker's Bureau of the company that manufactured the medical device that he used in treating Mr. Houghton's injuries.

2. The trial judge made several erroneous and prejudicial erroneous rulings, the net effect of which was that that Dr. Shapira and CCHS were precluded from presenting a critical defense to Mr. Houghton's allegations that Dr. Shapira's treatment violated the standard of care because allegedly it was "experimental."

3. The trial judge erred when she found that the verdict should not be reformed to reflect the jury's supplemental finding that as to the 35% liability assessed to CCHS, 75% was assessed to Dr. Shapira and 25% to Dr. Castellano would result in the ultimate apportionment of liability of 91.25% to Dr. Shapira and 8.75% to CCHS.

4. The trial judge erred when she awarded Plaintiffs prejudgment interest because their demand did not meet the requirements of 6 *Del. C.* § 2301 (d) because it was not filed within thirty (30) days prior to the selection of the jury.

5. The jury instructions concerning proximate cause contained an error of law.

STATEMENT OF FACTS

On December 7, 2009, 72 year old Mr. Houghton fell from a ladder sustaining small intracranial hemorrhages, multiple non-displaced rib fractures and a fracture of his pelvis. (A-488-489, 534-535.) He was taken by ambulance to Christiana Hospital where he was admitted for monitoring and pain control. On December 8, 2009, Dr. Shapira was consulted for consideration of placement of continuous intercostal nerve blocks ("On-Q") to the rib fracture area. (A-533.) During the consult, Dr. Shapira determined that Mr. Houghton was complaining of severe chest wall pain despite receiving pain medication and was unable to breathe deeply, cough or move around. (A-536-538.) Thus, Dr. Shapira recommended insertion of the On-Q continuous catheters. The procedure and its aims, risks and alternatives were discussed with Mr. Houghton. (A-538-543.)

At 2:09 p.m. on December 8, 2009, Dr. Shapira inserted two On-Q continuous catheters to deliver local anesthesia to the rib fracture area in an effort to provide adequate pain control. (A-487.) On December 9, 2009, the catheters were inadvertently pulled out by Mr. Houghton. (A-545-546.) The following day, Dr. Shapira reinserted the On-Q catheters. (A-547-548.) After the catheters were reinserted on December 10, 2009, Mr. Houghton began to complain of increased pain and abdominal distention. An x-ray was performed and free air was noted under the diaphragm. (A-443 at p.9.) Accordingly, on December 12, 2009, Mr. Houghton was

taken to the OR for exploratory surgery by Dr. Mark Cipolle. During the surgery, it was found that one of the On-Q catheters had entered the splenic flexure and exited through the mid-transverse colon. (A-455 at p.34.) Dr. Cipolle then removed the catheter and sutured the perforations. (A-444 at p.13-14.) The following day, December 13, 2009, Mr. Houghton's condition worsened and he was emergently returned to the OR, where Dr. Steven Johnson found massive hemoperitoneum, grade V ruptured spleen, a breakdown of the prior splenic flexure colotomy repair and a moderate amount of soilage surrounding the colonic repair. (A-444-446 at p.16-24.) Mr. Houghton underwent two additional abdominal surgeries, one on December 16, 2009 and the other on December 18, 2009. (A-447 at p.30-32, 448 at p.33-34.) Mr. Houghton remained in the hospital until January 19, 2010. (A-449 at p.41-42.)

Dr. Shapira is the only doctor in Delaware to insert the On-Q for rib fracture pain. (A-491.) He has been performing this procedure since 2005. (A-492.) It appeared to him to be a way to solve the issue of pain control with rib fractures. (A-518-519.) Medication causes sedation and can suppress breathing. (A-519.) Epidurals, considered the gold standard of treatment for rib fracture pain, are good but are contraindicated 60% of the time and carry other risks and limitations even when not contraindicated. (A-490, 519-520.) However, with the On-Q, there are none of the risks or side effects of narcotics or an epidural, and it can be used continuously for several weeks. (A-521, 522-523.) In any event, the On-Q is never used as a first line

of treatment. It is always used after other modalities have failed to adequately control the pain. (A-522.) Dr. Shapira's patient involvement begins when he is called, usually by the trauma service, as a consultant for evaluation of the use of the On-Q. (A-540.) He does not insert the catheters in every patient that he evaluates. (A-524.) He makes an assessment to determine if the patient is eligible for insertion and generally rejects five to eight percent of patients. (A-524-526.)

Beginning in 2007 and prior to his involvement with Mr. Houghton, Dr. Shapira was a member of the I-Flow Corporation's speaker's bureau. He was paid $224 per hour, with a maximum of $1750 per day. (A-528.) The payment was for lecturing to groups of colleagues about the use of the On-Q procedure for rib fracture pain. (*Id.*) This payment was to cover his time and expenses. (*Id.*) In 2007 or early 2008, he started a database of On-Q patients. (A-441 at p.13-14, A-551-553.) It was originally started as a registry, but after approximately 15-20 patients, he set up the database. (A-441 at p.14, A-527.) Dr. Shapira was not paid by I-Flow to establish the database. (A-529.) The data was collected in a retrospective manner. (A-555.) On April 25, 2008, Dr. Shapira submitted an application for the approval of the On-Q post-cardiac surgery pain study. (A-459 at p.46, A-465.) This post-cardiac surgery pain study was a national, multi-hospital study of which Christiana Care was one of approximately thirty hospitals participating. (A-556.) It was a study involving an on-label use of the On-Q and was approved by the full Institutional Review Board ("IRB"). (A-459 at

p.47, A-465.) However, at the time of the application, Dr. Castellano was not aware that Dr. Shapira had a conflict of interest as Dr. Shapira indicated on the application that there were no conflicts of interest. (A-466.) Additionally, Dr. Castellano had no knowledge that Shapira was on the speaker's bureau for I-Flow from 2007-2009 until after the commencement of litigation. (A-467-468, 482-483.) Dr. Castellano was, and currently is, the corporate director of the IRB. (A-461.) The IRB is responsible for all research that transpires at Christiana Care. (A-480.) The IRB is comprised of approximately twenty eight members and two committees. (A-462-463.) The IRB is concerned about study design, study structure, overall perspective of the study and its conduct, as well as any conflict of interest issues. (A-464.)

Two days prior to the April, 2008 application for the post-cardiac surgery pain study, Dr. Shapira stated in an email to the Chief of Surgery that he wanted to get funding for the study of the On-Q to see how it works on rib fracture patients, an off-label use. (A-459 at p.46-47, A-478.) Off-label uses are acceptable and do not require IRB review or approval. (A-481.) As Dr. Shapira reviewed the information in the rib fracture database, he found a few thing that were worth focusing on and eventually publishing, so he contacted the IRB in September, 2009 to get its approval. (A-486, 554-555.)

On October 1, 2009, Christiana Care instituted a conflict of interest policy. (A-469.) The IRB would expect notification of any conflict of interest if it developed

after the new policy was instituted. (A-469-470.) This expectation would include Dr. Shapira reporting if he received more than $10,000 from a manufacturer such as I-Flow. (A-472-473.) However, any conflict of interest would not be made to the IRB, but to the Office of Sponsored Programs which is responsible for managing conflicts of interest. (A-470.) That office would then review the conflict disclosed and make a determination if it was significant enough to influence the research and develop a management plan. (A-471.)

With regard to the Dr. Shapira's study of On-Q for use in rib fracture patients, the study started out as a quality or performance improvement database project. (A-474-475, 479.) At the time Dr. Shapira decided he wanted to analyze the data and extract certain information from the data, he then needed IRB approval. (A-475.) Dr. Shapira did request an expedited IRB review on September 22, 2009 for the rib fracture study. (A-475-476.) At that time, the application did not ask if there were any conflicts of interest. (A-477.) In this application, Dr. Shapira stated that he had previously disseminated the data from his quality improvement study. (A-476.) Dr. Castellano gave Dr. Shapira expedited approval. (A-477.)

Dr. Shapira did not inform Mr. Houghton that he had a relationship with I-Flow or that he was paid by I-Flow. (A-485, 541, 544.) Nor did he advise the IRB of this information. (A-531.) However, in 2008 around the time that Dr. Shapira joined the cardiac surgery group, he did advise Dr. Banbury, Chief of Cardiac Surgery, of his

arrangement with I-Flow. (A-530-531.) Dr. Banbury advised him that if he did the I-Flow work on his own free time, then the money did not have to be turned over to Christiana Care. (A-531.) Based on this conversation, Dr. Shapira felt there was no conflict of interest and thus no need to report it. (A-531-532.)

Dr. Mark Cipolle is a trauma surgeon and Chief of the Trauma Department. (A-450 at p.4, A454 at p.22.) He has been with Christiana Care since November, 2007. (A-451 at p.7.) He frequently sees patients with rib fractures. Rib fracture patients generally do not take deep breaths and expand their lungs, so the main tenant in their treatment is to control the pain so they can breathe deeply, thus preventing pneumonia. (A-451 at p.8.) In that effort, Dr. Cipolle consults Dr. Shapira for advice as to whether the On-Q would be beneficial to the patient, and if so, whether to insert it. (A-451 at p.7.) Dr. Cipolle has been consulting Dr. Shapira for the use of the On-Q since shortly after he arrived at CCHS and has probably personally consulted him 30-50 times and department-wide well over a couple of hundred times. (A-452 at p.15, A-453 at p.17.) Prior to his arrival at CCHS, Dr. Cipolle was at Lehigh Hospital. (A-450 at p.4.) Lehigh did not use the On-Q for rib fractures but did use it for surgical incisional pain. (A-457 at p.57.) Cipolle has found the use of the On-Q to be very effective for rib fracture pain. (A-452 at p.15, 16.) As Chief of the Trauma Department, Dr. Cipolle is made aware of any complications that occur with the trauma patients. (A-454 at p.22.) Prior to Mr. Houghton's injury, no other On-Q

patient had suffered his type of complication. (*Id.*) He has known Dr. Shapira for two years prior to Mr. Houghton and had found Dr. Shapira to be exceedingly competent. (A-456 at p.53.)

Dr. Fred Giberson is also a trauma surgeon. (A-558.) He has been part of CCHS's trauma team since 1997. (A-559.) Dr. Giberson began consulting Dr. Shapira for the use of the On-Q for rib fracture pain in 2003 or 2004. (A-560.) At that time they were finding that, in general, it was providing pain relief and was generally safe. (A-560, 562-563.) It did have complications associated with it, just like any other form of treatment. (*Id.*) Prior to Mr. Houghton's case, Dr. Giberson was aware of one or two patients who had complications. One involved a mild overdose of medication due to a failure to metabolize the medication and another involved an infection. (A-561.) Dr. Giberson was not aware of any organ injuries as a result of the On-Q. (*Id.*)

Dr. Kevin Bradley wrote the order to consult Dr. Shapira for evaluation and consideration of On-Q placement in Mr. Houghton. (A-505-506.) He is another trauma surgeon at CCHS. He arrived to CCHS in July, 2009. (A-494.) Prior to that, Dr. Bradley was a trauma surgeon at Temple University Hospital for five years. (A-495.) Dr. Bradley became familiar with the use of the On-Q for post-op wound pain in 2004 when he used it for his gallbladder or wound hernia cases. (A-496-497.) Around the same time, he had read it was being used for rib fracture pain. (A-497, 499.) This testimony was different than Dr. Bradley's deposition testimony where he

said he learned of the On-Q use for rib fracture pain in 2009. (A-498.) Dr. Bradley clarified during voir dire, that he learned of the On-Q being used at Christiana specifically, when he arrived at Christiana in 2009, but in fact, he had read about the On-Q use for rib fracture pain and discussed it in 2004 while at Temple and even as early as during his fellowship at Maryland Shock Trauma prior to Temple. (A-498, 499-500.) After lengthy discussion with counsel and further voir dire of Dr. Bradley, the Court ruled to exclude his testimony regarding any knowledge of the On-Q use for rib fracture pain prior to 2009. (A-501-502.) The Court further ruled that Dr. Bradley could not give an opinion about the safety and effectiveness of the procedure nor could he use the words "experimental" or "non-experimental". (A-503-505.)

Dr. Glen Tinkoff is the Associate Vice Chair of Surgery at CCHS. (A-508.) He has been with CCHS since 1992. (A-509.) Dr. Tinkoff began consulting Dr. Shapira for the use of On-Q sometime in 2008 or 2009 when Dr. Shapira approached him (he was the associate trauma medical director at the time) to discuss the On-Q's use for rib fracture pain. (A-510-511.) At that time, they felt the use of epidurals had significant risks and did not feel epidurals were nearly as effective as the On-Q. (A-511-512.) The On-Q was utilized for rib fracture pain for several years prior to 2009. (A-513, 515.) Dr. Tinkoff thought then and still thinks now that the On-Q is a very effective treatment in the management of rib fracture pain. (A-512, 515-516.) In fact,

he has found it to be effective, from a pure pain relief aspect, eighty percent of the time. (A-514.)

Dr. Gerald Fulda has been the Director of the Surgical Critical Care Section of the Department of Surgery since 1990. He has been employed by CCHS since 1989. (A-569.) At some point in time, he began consulting Dr. Shapira for use of the On-Q for rib fracture pain. (A-570.) It is believed this was going back to around 2005. (A-573.) Sometime in 2007 or 2008, Dr. Fulda did a review of the cases in which the On-Q had been used for rib fractures and concluded that this use of the On-Q was safe and effective. (A-571-572, 574.)

All of the CCHS trauma surgeons were prepared to testify that the use of the On-Q was not experimental.

ARGUMENT

I. THE TRIAL COURT MADE SEVERAL ERRONEOUS AND PREJUDICIAL EVIDENTIARY RULINGS, THE NET EFFECT OF WHICH WAS THAT DR. SHAPIRA AND CCHS WERE PRECLUDED FROM PRESENTING A CRITICAL DEFENSE TO MR. HOUGHTON'S ALLEGATIONS THAT DR. SHAPIRA'S TREATMENT VIOLATED THE STANDARD OF CARE BECAUSE ALLEGEDLY IT WAS "EXPERIMENTAL."

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

II. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE INFORMED CONSENT GIVEN BY DR. SHAPIRA WAS REQUIRED TO CONTAIN THE FACT THAT HE SERVED ON THE SPEAKER'S BUREAU OF THE COMPANY THAT MANUFACTURED THE MEDICAL DEVICE THAT HE USED IN TREATING MR. HOUGHTON'S INJURIES.

A. Question Presented

Did the Superior Court err when it found that the informed consent given by Dr. Shapira was required to contain the fact that he served on the Speaker's Bureau of the company that manufactured the medical device that he used in treating Mr. Houghton's injuries? (A-84-92, 370-408.)

B. Scope of Review

"Questions of statutory interpretation are questions of law that this Court reviews de novo." *Dishmon v. Fucci*, 32 A.3d 338, 341-42 (Del. 2011). This Court must determine whether the Superior Court erred as a matter of law in formulating or applying the legal principles of informed consent under 18 *Del. C.* § 6852 ("§ 6852") and 18 *Del. C.* § 6801 (6) ("§ 6801 (6)").

C. Merits of Argument

Plaintiffs allege Dr. Shapira failed to properly provide informed consent to Mr. Houghton prior to surgery. As set forth in more detail in the Statement of Facts, Dr. Shapira was a member of the Speaker's Bureau of I-Flow, which is the company who manufactures the On-Q medical device that Dr. Shapira implanted into Mr. Houghton to treat his rib injuries. Dr. Shapira was compensated for his duties on I-Flow's

Speaker's Bureau. Prior to trial, the parties disputed whether Dr. Shapira's role as a member of I-Flow's Speaker's Bureau was required to be disclosed to Mr. Houghton under the law concerning informed consent.

At the pretrial conference on October 23, 2012, the trial judge found that Dr. Shapira was required to inform Mr. Houghton of his financial relationship with I-Flow in his informed consent discussion. The trial judge relied upon *Barriocanal v. Gibbs,* 697 A.2d 1169 (Del. 1997) in making her decision. (A-373-408.)

The trial judge's decision was an error of law. The Medical Malpractice Act clearly defines informed consent in § 6801 (6), as follows:

> "Informed consent" means the consent of a patient to the performance of health care services by a health care provider given after the health care provider has informed the patient, to an extent reasonably comprehensible to general lay understanding, of the nature of the proposed procedure or treatment and of the risks and alternatives to treatment or diagnosis which a reasonable patient would consider material to the decision whether or not to undergo the treatment or diagnosis.

Section 6852 describes the circumstances under which an informed consent claim may be proved:

> (a) No recovery of damages based upon a lack of informed consent shall be allowed in any action for medical negligence unless:
>
> (1) The injury alleged involved a nonemergency treatment, procedure or surgery; and
>
> (2) The injured party proved by a preponderance of evidence that the health care provider did not supply information regarding such treatment, procedure or surgery to the extent customarily given to patients, or other persons authorized to

give consent for patients by other licensed health care providers in the same or similar field of medicine as the defendant.

(b) In any action for medical negligence, in addition to other defenses provided by law, it shall be a defense to any allegation that such health care provider treated, examined or otherwise rendered professional care to an injured party without his or her informed consent that:

(1) A person of ordinary intelligence and awareness in a position similar to that of the injured party could reasonably be expected to appreciate and comprehend hazards inherent in such treatment;

(2) The injured party assured the health care provider he or she would undergo the treatment regardless of the risk involved or that he or she did not want to be given the information or any part thereof to which he or she could otherwise be entitled; or

(3) It was reasonable for the health care provider to limit the extent of his or her disclosures of the risks of the treatment, procedure or surgery to the injured party because further disclosure could be expected to affect, adversely and substantially, the injured party's condition, or the outcome of the treatment, procedure or surgery.

The informed consent statutes cited above are not reasonably susceptible to different conclusions or interpretations; therefore, the courts must apply the words as written, unless the result of such a literal application could not have been intended by the legislature. *Leatherbury v. Greenspun*, 939 A.2d 1284, 1289 (Del. 2007) (where the Court held that the statute of limitations provision of the Medical Malpractice Act was unambiguous and should be strictly construed) (*citing Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000)). In *Leatherbury* this Court previously described

its role: "[this Court does not] sit as a super legislature to eviscerate proper legislative enactments. If the policy or wisdom of a particular law is questioned as unreasonable or unjust, then only the elected representatives of the people may amend or repeal it. Judges must take the law as they find it, and their personal predilections as to what the law should be have no place in efforts to override properly stated legislative will." *Id.* at 1292; *see also Himes v. Gabriel*, 972 A.2d 312, 2009 WL1090061, at *2 (Del. Apr. 23, 2009) (TABLE) (internal quotations omitted) (where the Court held that for a claim regarding informed consent, "Delaware law limits a physician's duty by requiring an injured party to prove that the health care provider did not supply information regarding such treatment, procedure or surgery to the extent customarily given to patients, or other persons authorized to give consent for patients by other licensed health care providers in the same or similar field of medicine as the defendant.") This Court has held that the informed consent statute and the overall statutory scheme of title 18, chapter 68 of the Delaware code was meant to restrict, not expand, a patient's ability to recover damages for malpractice. *Spencer v. Goodill*, 17 A.3d 552, 555-56 (Del. 2011).

In *Rowe v. Kim*, the plaintiff argued that informed consent must be provided by a physician in writing to a patient. 824 A.2d 19, 23 (Del. Super. 2003), *aff'd*, 832 A.2d 1252 (Del. 2003) (TABLE). The Court held that the statutory language of § 6852 is not ambiguous; therefore, the Court must interpret the plain meaning of the

language in the statute. *Id* at 23-24. Nowhere in the statute is there a requirement that the information be provided in written form; therefore, the Court declined to impose such a requirement. *Id.*

Sections §6801 (6) and 6852 (b) (3) specifically delineate the medical information that a physician is required to provide to a patient about the about the treatment, surgery or procedure. There is no mention of disclosing real or potential financial conflicts of interest or financial information in § 6801, § 6852, or any other provision in the Medical Malpractice Act. The informed consent statutes are unambiguous, and a requirement that a physician must disclose real or potential conflicts of interest should not be read into the statute. If the General Assembly wanted to include such a requirement, it would have included it in the statute.

Furthermore, if the Court were to require that informed consent must include any real or potential financial conflicts of interest by a physician or hospital that would greatly expand the definition of "informed consent" created by the General Assembly and would lead to significantly impractical results. For example, if the statute were expanded to require a physician to provide financial information to patients, a physician might have to disclose to the patient whether or not he owns any stock in a medical company that produces any medical products or supplies that he may use for treating patients. Individuals often do not know what stocks they own or for what period of time they own them. The physician would have to continually

check with the manager of his retirement account to determine who makes what products or who produces various medications. The physician might have to inform a patient of his compensation plan with his employer, whether that employer is a hospital or professional group including any financial incentives that may be part of his compensation package. This is the type of disclosure that could result in extended conversations and requests for additional information. Treatments would be delayed or not provided at all. These are not the types of disclosures that should be created by the Court. It is something that is better addressed by the General Assembly after a full consideration of all of the factors involved.

The trial judge relied upon this Court's holding in *Barriocanal v. Gibbs,* 697 A.2d 1169 (Del. 1997). In *Barriocanal*, this Court held that trial court improperly excluded the plaintiffs' proffered expert testimony that the defendant-surgeon breached standard of care required to obtain informed consent by failing to inform the patient of his lack of recent aneurysm surgery, of the difference in hospital staffing on a holiday, and of the option to transfer the hospital to a teaching institution. *Barriocanal*, however, is distinguishable from the present case. The evidence in *Barriocanal* related to *medical* information to be provided to the patient regarding his treatment and surgery, not personal *financial* information of the surgeon as in this case.

Courts from other jurisdictions have excluded a physician's financial information in medical malpractice cases.[2] In *Bearden v. Hamby*, the plaintiff contended that the defendant physician breached the standard of care in failing to transport him to a major university hospital. 608 N.E. 2d 282 (Ill. App. Ct. 1992). The theory was that the physician's financial arrangement with the hospital created an improper financial incentive to keep patients in the hospital when it was not medically appropriate. The plaintiff sought the physician's income tax returns concerning his financial arrangement with the hospital. The Court denied production of physicians' tax returns because the physician's economic motive in not transferring the patient to a major university hospital was not relevant to whether or not he deviated from the standard of care. The Court further held that financial interest evidence is not admissible in a medical malpractice case.

In *Brannon v. Northwest Permanents, P.C.*, the Court denied production of employment compensation contract of a physician holding that financial incentives are not relevant on the issue of standard of care. 2006 WL 2794881 (W.D. Wash. Sept. 27, 2006).

In *Otis-Wisher v. Fletcher Allen Health Care, Inc*, the plaintiff brought a lack of informed consent claim regarding the financial and developmental relationship

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[2] There are also cases to the contrary, including *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990). However, to the best of our knowledge, there is no informed consent statute related to medical malpractice actions in California similar to Delaware's statute.

between her surgeon and Medtronic, the manufacturer of her spinal medical device that allegedly caused her injuries. 2013 WL 3214714 (D. Vt. June 25, 2013). According to Vermont law, lack of informed consent is defined as the failure "to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved" in the professional treatment. The Court held that the plaintiff's claim regarding the relationship between her doctor and Medtronic failed to state a viable claim for lack of informed consent because it does not concern alternatives, risks or benefits of the treatment, and dismissed the claim. *Id.* at *8. (internal quotations omitted).

Similarly, in *Wright v. Jeckle*, the patients alleged that the physician (Dr. Jeckle) engaged in improper entrepreneurial activities that were motivated by financial gain, i.e., advertising, marketing, and sale of prescription diet drugs. 16 P. 3d 1268, 1271 (Wash. Ct. App. 2001) The Court held that evidence of Dr. Jeckle's entrepreneurial activities was insufficient to state claim of lack of informed consent because Washington's statute concerning informed consent refers to "health care." The Court held that entrepreneurial activities do not fall within the realm of health care because they do not involve "the process in which [a physician is] utilizing the skills which he [or she] had been taught in examining, diagnosing, treating or caring for the plaintiff as his [or her] patient." *Id.* at 1270 (internal quotations and citations omitted).

In the present case, the trial judge erred when she found that Dr. Shapira was required to disclose his financial relationship with I-Flow to Mr. Houghton as a part of the informed consent process. Dr. Shapira was not required to disclose his financial relationship with I-Flow pursuant to § 6801 (6) and § 6852. The statutes are clear and unambiguous. Such an additional requirement should not be read into the statutes. The expansion of informed consent is a question to be addressed by General Assembly.

III. THE TRIAL COURT ERRED BY AWARDING PLAINTIFFS PREJUDGMENT INTEREST BECAUSE ITS DECISION THAT THE TRIAL BEGAN ON OCTOBER 31, 2012, NOT OCTOBER 24, 2012, WAS CONTRARY TO 6 *DEL. C.* § 2301.

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

IV. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE VERDICT SHOULD NOT BE REFORMED TO REFLECT THE JURY'S SUPPLEMENTAL FINDING THAT AS TO THE 35% LIABILITY ASSESSED TO CCHS, 75% WAS ASSESSED TO DR. SHAPIRA AND 25% TO DR. CASTELLANO WOULD RESULT IN THE ULTIMATE APPORTIONMENT OF LIABILITY OF 91.25% TO DR. SHAPIRA AND 8.75% TO CCHS.

A. Question Presented

Did the Superior Court err when it found that the verdict should not be reformed to reflect the jury's supplemental finding as to the liability of CCHS? (A-348-369.)

B. Scope of Review

"When determining the propriety of a jury instruction, the question is whether the instruction 'undermined the jury's ability to intelligently perform its duty in returning a verdict....'" *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 71 (Del. 1993) (*quoting Haas v. United Technologies Corp.*, 450 A.2d 1173, 1179 (Del. 1982)).

C. Merits of Argument

On November 14, 2012, the jury returned a verdict in the amount of $3,750,000.00 for Mr. Houghton and $650,000.00 for Evelyn Houghton. In addition, the jury apportioned liability 65% to Dr. Shapira and Nadiv Shapira, MD, LLC, and 35% to CCHS. (A-123-125.)

Upon the request of CCHS's counsel, a supplemental verdict sheet was submitted to the jury, and the trial judge instructed the jury in detail regarding the liability of CCHS. (A-583-600.) There were no objections to the accuracy of the instructions or the accuracy of the supplemental verdict sheet.

The jury deliberated for approximately 30 minutes and returned a unanimous verdict apportioning 25% of the 35% assigned to CCHS to Dr. Castellano and 75% to Dr. Shapira as a result of the agency relationship Dr. Shapira had with CCHS. (A-126.)

CCHS filed a motion to reform the jury's original verdict sheet to reflect the following for question no. 8:

> Percentage attributable to Dr. Shapira - 91.25%
>
> Percentage attributable to CCHS - 8.75%
>
> TOTAL: 100%

The trial judge denied CCHS' motion. (A-348-369.)

The issue had been brought to the trial judge's attention prior to the delivery of the jury's verdict. On November 9, 2013, prior to the trial judge's reading of the jury instructions, counsel for CCHS requested that jury interrogatory numbers 4, 5 and 8[3] specifically refer to Dr. Castellano in a way to make sure that the jury would not be confused on the issues of the independent liability of CCHS and the liability of CCHS for the conduct of Dr. Shapira because of agency. (A-566-567.) The trial judge ruled

---

[3] Question No. 4: "Was Christiana Care Health Services, Inc. negligent?

Question No. 5: "Did Christiana Care Health Services, Inc.'s negligence proximately cause injury and damages to John Houghton?"

Question No. 8: "If you found both Dr. Shapira and Christiana Care Health Services, Inc. liable for proximately causing injury to the Plaintiff (that is, you answered "yes" to both Question 2 and Question 5), then it is necessary for you to apportion the liability for damages among the Defendants. The assigned percentages must total 100%."

that a reference to Dr. Castellano was not necessary because one of the jury instructions referred to Dr. Castellano. (A-575-576.) That instruction, however, did not convey to the jury that the "only" way that CCHS could be held liable on the independent claim was through Dr. Castellano.

This action included claims against Dr. Shapira individually, claims against Dr. Shapira as an agent of CCHS (actual and/or apparent), and claims against CCHS independently. The trial judge instructed the jury with regard to agency, apparent agency and employee/employer relationship. (A-576-578.) Thus, the jury received instructions that the jury could find CCHS responsible if it found Dr. Castellano negligent, or if it found Dr. Shapira negligent and that Dr. Shapira was either an employee, agent or apparent agent of CCHS. CCHS' counsel requested that the jury interrogatories reflect Dr. Castellano's name in questions 4, 5 and 8. It is very likely, however, that the jury did not understand that by finding Dr. Shapira negligent and finding Dr. Shapira an agent or employee of CCHS, it would make CCHS vicariously liable for any negligent actions of Dr. Shapira and responsible for the damages awarded. The insertion of Dr. Castellano's name in questions 4, 5 and 8 would have focused the jury on Dr. Castellano's negligence as the only way in which CCHS could be found independently negligent and would have avoided any confusion.

"Where it is alleged that the answers by the jury to the special interrogatories are inconsistent, this Court must determine whether there is any rational basis on

which to maintain the jury verdict." *Citisteel USA, Inc. v. Connell Ltd. P'ship,* 712 A.2d 475, 1998 WL 309801, at *4 (Del. May 18, 1998) (TABLE). "This Court must try to reconcile any apparent inconsistencies in a jury's verdict. The jury's verdict will stand as long as the Court finds one possible method of construing the jury's answers as consistent with one another and with the general verdict." *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 664 (Del. Super. 1992) (citations omitted); *see also Connell Limited P'ship*, 1998 WL 309801, at *4 (where the Court reversed the judgment and granted a new trial because there was "no rational basis upon which the jury verdict [could] be reconciled with its diametrically opposed answers to the two special interrogatories.") "The Court is required to, in a sense, speculate as to what exactly [the jurors] decided and come up with a logical scenario to support the verdict." *Id.* The trial judge is not "precluded from attempting to resolve technical defects in the jury's verdict. Indeed, it is the duty of the trial judge to do so, so long as he does not usurp the jury's fact-finding function or prevent the intended result." *Tilden v. State*, 513 A.2d 1302, 1304 (Del. 1986).

The trial judge erred in denying CCHS' motion to amend/reform the verdict sheet to reflect the jury's supplemental finding as to CCHS's liability. The trial judge was required to do this in order to reconcile the apparent inconsistencies in the jury's verdict. In light of the jury's clarification of its apportionment, there was no rational basis to maintain the original jury verdict; it needed to be modified. The trial judge

was unable to come up with a logical scenario to support the verdict and resolve any technical defects in the jury's verdict. By not doing so, the trial judge would be usurping the jury's factfinding function and preventing the intended result.

This was not a situation where the trial judge was being asked to amend a verdict sheet without further deliberation by the jury. The situation in this case is entirely different in that the jury deliberated after receiving separate instructions and a separate verdict sheet simply to clarify an apportionment of liability that could have been based upon confusion between the general jury instructions and the jury interrogatories. The jurors could have returned it very quickly with a finding of 100% to Dr. Castellano and 0% to Dr. Shapira had that been their initial intention at the time they returned the original verdict. The jurors were clearly confused by the multiple legal principles in this case.

In its motion to reform/amend the verdict original verdict sheet, CCHS did not request that the trial judge make any kind of substantive change to the findings made by the jury. CCHS simply requested that the original verdict sheet be amended to reflect the appropriate percentages with regard to apportionment of liability decided by the jury after appropriate deliberation. This case involves nothing more than clerical reformation by the Court and is not at all similar to the situation in *Lavin v. Silver*, 2003 WL 21481006 (Del. Super. June 10, 2003), which was relied upon by the trial judge in her decision.

CCHS had a logical basis for requesting a subsequent deliberation by the jury that was proven by the answers on the supplemental verdict sheet. There was a legitimate concern in this case that the legal issues of joint and several liability, vicarious liability, and agency were confusing to the jury. The clarification provided by the jury after additional deliberations eliminated any appeal on the basis of confusion between the general jury instructions and the jury interrogatories. The reformation of the verdict sheet would advance the cause of justice among the parties and judicial economy.

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

A. Question Presented

Did the Superior Court improperly instruct the jury concerning proximate cause? (A-127, 182-202, 581.)

B. Scope of Review

"When an instruction to a jury is challenged on appeal, this Court must determine 'not ... whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty.'" *Russell v. K-Mart Corp.*, 761 A.2d 1, 4 (Del. 2000) (*quoting Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000)).

C. Merits of the argument

The jury instruction read to the jury by the trial judge did not correctly state the law; therefore, the jury was unable to perform its duty.

During the prayer conference on November 9, 2012, CCHS's counsel contended that the pattern jury instruction concerning proximate cause should be modified to reflect the Court's holding in *Spicer v. Osunkoya*. (A-565.) At the request of the trial judge, CCHS submitted the following jury instruction concerning proximate cause to the Court:

> A party's negligence, by itself, is not enough to impose legal responsibility on that party. Something more is needed: the party's negligence must be shown by a preponderance of the evidence to be a proximate cause of the plaintiff's injuries.

A proximate cause is one which in natural and continuance sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. There may be more than one proximate cause of an injury.

On the other hand, a prior and remote cause is not sufficient to impose legal responsibility on a party.

A prior and remote cause is a cause that does nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury even though such injury would not have happened but for such condition or occasion.

It is up to you the jury to determine whether or not a party's negligence, if any, is a proximate cause of the plaintiff's injury or if it is a prior and remote cause.

(A-182-202, 581.) (emphasis added).

The following is the jury instruction concerning proximate cause (consistent with the pattern instruction) read by the trial judge:

A party's negligence, in itself, is not enough to impose legal liability on that party. Something more is needed. The party's negligence must be shown by a preponderance of the evidence to be a proximate cause of the plaintiff's injuries.

Proximate cause is a cause that directly produces the harm, and but for which the harm would not have occurred. A proximate cause brings about, **or helps to bring about**, the plaintiff's injuries, and it must have been necessary to the result. There may be more than one proximate cause of an injury.

On the one hand – on the other hand, a prior and remote cause is not sufficient to impose legal responsibility. A prior and remote cause is a cause that does nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened

> between such prior or remote cause and the injury, a distinct, unrelated and efficient cause of the injury.
>
> It is for the jury to determine whether or not a party's negligence is a proximate cause of the plaintiff's injuries, or if it is a prior and remote cause.

(A-579-580.) (emphasis added)).

The underlined portions of the two different instructions above indicate the focus of CCHS's position.

The underlined sections in in CCHS's proposed instruction is taken from *Spicer v. Osunkoya*, 32 A.3d 347 (Del. 2011). In *Spicer*, this Court reiterated the legal standard for proximate cause in Delaware:

> Delaware courts follow the "but for" definition of proximate cause. "[A] proximate cause is one which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred." A remote cause cannot form the basis of liability, even if the plaintiff would not have been injured "but for" that negligence:
>
> A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury even though such injury would not have happened but for such condition or occasion.

Id. at 351 (internal citations and quotations omitted) (emphasis added); see also *Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 829 (Del. 1995). The definitions of "remote cause" and "proximate cause" in the jury instruction were inconsistent with the Court's holding in *Spicer*; therefore, it was not legally accurate.

The trial judge's instruction included the phrase "or helps to bring about" which is an error of law. This phrase is inconsistent with the "but for" causation standard that the Delaware Courts have adopted. "A party is entitled to an instruction that is legally accurate . . . ." *Russell,* 761 A.2d at 4. Here, the Court's proximate cause jury instruction was not legally accurate. The jury instruction in *Russell* was as follows:

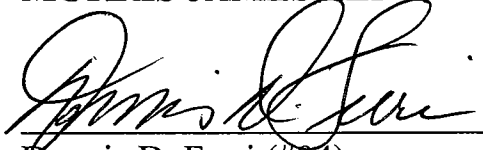
> [N]egligence alone is not enough to hold a party liable. The party's negligence must also be a cause of the claimed injuries or harm. Whenever I use the term "cause," I mean "proximate cause." Proximate cause is a legal term meaning a cause which brings about a result and without which the result would not have followed. Negligence is considered a proximate cause of an injury when the injury would not have happened but for the negligence. The "but for" test is your guide in determining proximate cause. Even if you believe a party acted negligently, unless you are convinced by a preponderance of the evidence that such negligence was a proximate cause of the claimed injury, that party cannot be held responsible. Now there may be more than one proximate cause to an accident and/or injury.

Id. There is no inclusion of the words "or helps to bring about" in that instruction, which was approved by this Court. The use of those words "or helps to bring about" in the context of this case was prejudicial to CCHS, and CCHS is entitled to the strict "but for" wording that is clear Delaware law.

CONCLUSION

For the reasons set forth above, the Superior Court's decision should be reversed, and a new trial should be granted.

MORRIS JAMES LLP



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Dated: October 30, 2013

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Court:	DE Supreme Court
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Case Type:	Appeal - Superior
Case Number:	392,2013
Case Name:	Christiana Care Health Services Inc vs John Houghton & Evelyn Houghton

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Appellant Cross-Appellee Christiana Care Health Services, Inc's Opening Brief

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Served Parties:
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Nadiv Shapira MD LLC
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EXHIBIT 1

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/s/ Brady, M Jane Oct 02 2012 09:24AM

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Transaction ID 46746683
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 __ 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.

EXHIBIT 2

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,	CONSOLIDATED
v.	C.A. No. N11C-06-092 MJB
NADIV SHAPIRA, M.D., NADIV SHAPIRA MD LLC, a Delaware Corporation, and CHRISTIANA CARE HEALTH SERVICES, INC., a Delaware corporation, Defendants.	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.

EXHIBIT 3

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/s/ Brady, M Jane Oct 02 2012 10:01AM

EFiled: Oct 02 2012 10:02AM EDT
Transaction ID 46747298
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,	)	CONSOLIDATED
	)	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

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.

EXHIBIT 4

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 offering~~ 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

{00664348;v1 }

EXHIBIT 5

EFiled: Oct 08 2012 02:14PM EDT
Transaction ID 46848887
~~Filed: Aug 17 2012 04:55PM~~
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 Bradley
Judge

{00660695;v1 }

EXHIBIT 6

So Ordered
/s/ Brady, M Jane Oct 02 2012 09:33AM

EFiled: Oct 19 2012 03:22PM EDT
Transaction ID 46746890
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,	CONSOLIDATED
	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

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.

EXHIBIT 7

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]

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[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

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[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

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[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

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[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

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[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

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[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.

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[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

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[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.

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[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]

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[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:

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[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

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[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]

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[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]

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[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

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[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

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[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.,

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[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