IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 01394
September Term, 2012

**ENZO MARTINEZ, A MINOR,
BY AND THROUGH HIS PARENTS AND NEXT FRIENDS,
REBECCA FIELDING AND ENZO MARTINEZ, ET AL.,**

Appellants / Cross-Appellees,

v.

THE JOHNS HOPKINS HOSPITAL,

Appellee / Cross-Appellant.

Appeal from the Circuit Court for Baltimore City
(The Honorable Marcus Z. Shar)

REPLY BRIEF OF APPELLANTS / BRIEF OF CROSS-APPELLEES

Gary Wais, Esquire
Keith D. Forman, Esquire
LAW OFFICES OF WAIS, VOGELSTEIN & ARFAA
1829 Reisterstown Road, Suite 425
Pikesville, Maryland 21208-7107
(410) 998-3600

Byron L. Warnken, Esquire
James M. Nichols, Esquire
WARNKEN, LLC, ATTORNEYS-AT-LAW
300 East Joppa Road, Suite 303
Towson, Maryland 21286-3004
(443) 921-1100
James.Nichols@warnkenlaw.com

Counsel for Appellants/Cross-Appellees

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APPELLANTS' ARGUMENT IN REPLY

The Hospital contends that this Court should reject Appellants' arguments challenging the constitutionality of "the Cap"[1] because DRD Pool Serv. v. Freed, 416 Md. 46, 68 (2010), recently affirmed its constitutionality and advised that it is "embedded in the bedrock of Maryland law." See Appellee Br. at 7-8.[2] The Hospital repeatedly chides Appellants for failing to address DRD Pool and Murphy v. Edmonds, 325 Md. 342 (1992), but its reliance on those cases is severely misplaced because neither decision addressed the separation of powers argument advanced in this appeal.

Relying on *dicta* is "inherently treacherous," as oftentimes the important legal questions were "probably not even considered." Broadwater v. State, 171 Md. App. 297, 323 (2006), aff'd, 401 Md. 175 (2007). Therefore, "[o]ne must not read precedential significance into something that was never decided at all, let alone never deliberately decided as a collegiate holding." Id. Given that both DRD Pool and Murphy are completely devoid of even any *dicta* bearing directly on the issues raised by Appellants, there is simply no basis to read any "precedential significance" into those cases. Indeed, the separation of powers argument has never been raised in, or decided by, the Court of Appeals. Accordingly, the Hospital's assertion that decisions from the Court of Appeals constrain this Court's ability to address Appellants' argument is incorrect. See Br. Appellee at 11 (quoting Freed v. D.R.D. Pool Serv., 186 Md. App. 477, 481 (2009)).

The Hospital also dismisses the claim that Piselli v. 75th St. Med., P.A., 371 Md. 188 (2002), called into question the underlying rationale employed by this Court when rejecting prior separation of powers challenges because Piselli recognized Murphy as "good law." Br. Appellee at 12. The Hospital, however, largely ignores the merits of the Appellants' argument.

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[1] See MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09

[2] Despite the conclusive language employed in D.R.D. Pool, the Court recently granted certiorari to yet again address the issue. See Dixon v. Ford Motor Co., Case No. 82, Sept. Term 2012 (presenting question of whether the "different treatment of individuals with identical damages under the statutory cap on non-economic damages" is unconstitutional).

This Court's prior decisions rejecting separation of powers challenges to the Cap relied heavily on Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989), which held that "the power of the legislature to abolish the common law necessarily includes the power to set reasonable limits on recoverable damages in causes of action the legislature chooses to recognize." Id. at 1336; see Owens-Corning v. Walatka, 125 Md. App. 313, 339 (1999); Edmonds v. Murphy, 83 Md. App. 133, 149-50 (1990). Piselli, even if it did not expressly overrule this assumption, cast serious doubt as to its continued viability. While recognizing the Legislature's authority to alter the common law, Piselli found that complete obliteration of a traditional remedy runs afoul of various constitutional limitations. See Piselli, 371 Md. at 219.

Additionally, the analysis previously employed by this Court in rejecting separation of powers challenges to the Cap conflated a legally meaningful distinction between the power to alter the common law and legislation that abstractly determines the maximum permissible damages for an injury. See Murphy, 325 Md. at 380 (Chasanow, J., dissenting). Even if the former does not violate constitutional provisions ensuring access to the courts, the latter invades the traditional and exclusive powers of the judiciary. Abrogation of the common law implicates different constitutional considerations from statutes, like the Cap, that restrict the judiciary's ability to determine and review a damages award. The determination of damages is, and has been, a function entrusted to the judicial branch of Government. Thus, even if the Cap does not violate provisions ensuring access to courts, it nonetheless impermissibly usurps judicial power and stands in violation of Md. Decl. Rights Art. 8.

Notwithstanding efforts to characterize the Cap as a partial abrogation of the common law, the Cap "represents a policy judgment by the legislature that pain and suffering will be compensable in a range between zero and $350,000." Franklin, 704 F. Supp. at 1333; Murphy, 325 Md. at 370 (noting the Legislature determined that the Cap "would cover most noneconomic damage claims…"). While Maryland has permitted delegation of authority to determine "factual issues relating to damages" as an exercise of "quasi-judicial power," in such cases the judiciary has retained authority to review the

administrative decision. See Md. Aggregates Ass'n v. State, 337 Md. 658, 676 (1995). Under the Cap, however, there is no quasi-judicial fact-finding to review because the Cap sets damages at an amount determined irrespective of the facts. When an award exceeds the Cap, the judiciary is deprived all of power to review it.

It has long been the law of this State that the Legislature may not exercise power vested exclusively within the judicial branch. Sometimes reluctantly, the Court of Appeals has recognized the need for efficiency mandates greater overlap between the branches of government. See, e.g., McCulloch v. Glendening, 347 Md. 272 (1997). Nevertheless, Maryland has rejected legislative efforts to affix the measure of damages for more than century. See Harris v. Comm'rs of Allegany Cnty., 130 Md. 488 (1917); Comm'rs of Queen Anne's Cnty. v. Comm'rs of Talbot Cnty, 108 Md. 188 (1908). The Hospital dismisses these cases by footnote without significant analysis. See Br. Appellee at 14, n. 5. Both cases, however, addressed separation of powers principles similar to those at issue here and found the legislature powerless to determine damages.

The Court of Appeals recognized that a legislative determination of damages "is no legal ascertainment of what the cost actually was." Comm'rs of Queen Anne's Cnty., 108 Md. at 805. This is especially true as to the Cap, which was designed to create a "more realistic" measure of recovery than that reached by a judge and jury after careful consideration of the facts. See Murphy, 325 Md. at 369 (citing Report of the Governor's Task Force to Study Liability Insurance (Dec. 1985)). Therefore, for the most severely injured, the Cap acts as a legislative remittitur that improperly divests the judiciary of its authority to determine or review a damages award. Lebron v. Gottlieb Mem. Hosp., 930 N.E.2d 895 (Ill. 2010); Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997); Br. Appellants at 13-22.

Appellants recognize that precedent militates in favor of confirming prior holdings; however, "the rule of *stare decisis* is flexible and requires that a balance be struck between fixed and established rulings, for the sake of such rulings, and correct rulings and principles." Plein v. DOL, Licensing & Reg., 369 Md. 421, 435 (2002). Thus, it is "sometimes advisable to correct a decision or decisions wrongly made in the first

instance, if it is found that the decision is clearly wrong and contrary to other established principles." Townsend v. Bethlehem-Fairfield Shipyard, Inc., 186 Md. 406, 417 (1946).

Appellants respectfully request that this Court again consider whether the Cap violates separation of powers principles by eliminating the judiciary's power to determine, and then review, the appropriate measure of damages. The Legislature's attempt to set a "more realistic recovery" improperly usurps judicial authority and precludes judicial review of damages. This Court's prior decisions, which rest on a premise undermined by Piselli, conflate considerations of the Legislature's power to alter the common law with the separate separation of powers concerns arising from legislation that precludes judicial determination and review of damages. Accordingly, Appellants suggest that the Cap violates the separation of powers principles embodied by Art. 8 of the Md. Decl. of Rights.

CROSS-APPELLEES' ARGUMENT

QUESTIONS PRESENTED

1. Whether the Circuit Court properly exercised its discretion when denying the Hospital's New Trial Motion, which raised previously waived claims relating to the admission of testimony and argument pertaining to its failure to have offered Ms. Fielding general anesthesia in light of its relevancy to facts in dispute and cases that hold that the failure to offer treatment is properly an allegation of medical malpractice?

2. Whether the Circuit Court properly exercised its discretion when denying the Hospital's New Trial Motion, which raised unpreserved claims pertaining to the Circuit Court's preliminary ruling that correctly excluded, as irrelevant and prejudicial, evidence of the standard of care applicable to a non-party while ensuring the Hospital was able to vigorously pursue its causation defense?

3. Whether the Circuit Court correctly found the jury's award for future medical costs to be properly supported by the evidence?

4. Whether the Circuit Court properly exercised its discretion when denying the Hospital's proposed annuitization of the verdict on grounds previously recognized as valid by this Court, especially when it is not possible to comply with the governing statute?

STANDARD OF REVIEW

All of the errors alleged by the Hospital address matters committed to the Circuit Court's discretion, and as this Court has previously explained:

> The exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly. Absent an indication from the record that the trial judge misapplied or misstated the applicable legal principles, the presumption is sufficient for us to find no abuse of discretion. Additionally, a trial judge's failure to state each and every consideration or factor in a particular applicable standard does not, absent more, constitute an abuse of discretion, so long as the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion.

Cobrand v. Adventist Healthcare, Inc., 149 Md. App. 431, 445 (2003) (citations and quotations omitted). Abuse of discretion, in short, "is a highly deferential standard." U. of Maryland Med. System Corp. v. Gholston, 203 Md. App. 321, 342, cert. denied, 427 Md. 65 (2012).

The denial of a motion for new trial is reviewed for an abuse of discretion. Although nominally the same standard applies to evidentiary matters, in the context of a motion for new trial, the phrase "takes on a meaning different from its ordinary use...." Yiallouros v. Tolson, 203 Md. App. 562, 574 (2012). A motion for new trial calls upon the trial court to consider the weight of the evidence, the accumulated effect of any errors, and other matters that depend heavily "upon the unique opportunity the trial judge has to closely observe the entire trial." Id. Therefore, even if error is established, a new trial is only warranted if the party "can also persuade the trial judge, subjectively, that the error had a substantial likelihood of causing an unjust verdict." Isley v. State, 129 Md. App. 611, 619 (2000), overruled on other grounds, Merritt v. State, 367 Md. 17, 24 (2001).

Unless the results are "clearly unjust," this Court "will not find an abuse of discretion whichever way the trial court may choose to exercise [its] discretion." Edsall v. Huffaker, 159 Md. App. 337, 342 (2004). The denial of a new trial motion, therefore, "will rarely, if ever, be disturbed on appeal," as the trial court's decision is often considered, albeit somewhat too broadly, to be "effectively unreviewable." Yiallouros, 203 Md. App. at 574-75 (citing Buck v. Cam's Broadloom Rugs, 328 Md. 51, 59 (1992)).

Evidentiary rulings, similarly, will not be disturbed "absent error or a clear abuse

of discretion." Thomas v. State, 429 Md. 85, 97 (2012). When, as here, determinations of relevancy are "the ultimate issue," appellate courts "generally loath to reverse a trial court." Tyner v. State, 417 Md. 611, 616-17 (2011). "[T]he relevancy assessment is not susceptible to precise definition," and therefore the "'answer must lie in the judge's own experience, his general knowledge, and his understanding of human conduct and motivation.'" State v. Joynes, 314 Md. 113, 119 (1988) (quoting McCormick on Evidence § 185, at 544 (E. Cleary 3d ed. 1984)). For similar reasons, the trial court's consideration of prejudice or confusion of the issues "will be accorded every reasonable presumption of correctness...." Cure v. State, 421 Md. 300, 331 (2011). Thus, even if this Court would rule differently, an abuse of discretion exists only when the "decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." North v. North, 102 Md. App. 1, 14 (1994).

SUMMARY

Desperately seeking another chance to litigate this case, the Hospital seeks a new trial based upon what are essentially four rulings that were made during and after the course of a lengthy two-week trial. Most of these allegations of error are unpreserved. Moreover, in its effort to litigate clearly waived arguments, the Hospital conflates multiple allegations of error and ignores important portions of the record.

Regarding its claim that evidence of the Hospital's failure to offer general anesthesia was improperly admitted, the Hospital relies primarily on (1) two statements that were entered evidence without objection, (2) another statement that it failed to strike after a successful objection, and (3) the Appellants' concededly unobjectionable closing argument. Similarly, although the Hospital takes issue with the Circuit Court's preliminary ruling on Appellants' motion in limine that precluded standard of care testimony regarding a non-party, it neglects to cite to any portion of the record where it preserved its allegation of error by making a timely proffer at trial. Instead, the Hospital supports its request for a new trial by highlighting several objections that were sustained for unrelated reasons and advances arguments, not made at trial, that Appellants opened

the door. Indeed, even the Hospital's argument pertaining to the sufficiency of the evidence as to Enzo's future medical care includes a claim that was not included in its written New Trial Motion and which is, therefore, not properly before this Court.

To the extent the Hospital's arguments are waived, it can secure appellate relief only by demonstrating that the Circuit Court abused its discretion in denying its New Trial Motion, as the substantive issues are no longer before this Court. Brown v. Contemporary OB/GYN Assocs., 143 Md. App. 199 (2002). However, as the Circuit Court noted, the non-preservation of the Hospital's claims arose from strategic decisions made by seasoned counsel. Therefore, waiver alone provided the Circuit Court with an "unassailable reason ... to deny the New Trial Motion." Isley, 129 Md. App. at 619.

Even if properly preserved, none of the Hospital's arguments in support of its request for a new trial have merit. Testimony relating to the Hospital's failure to offer Ms. Fielding treatment was properly admitted, as the failure to offer treatment required by the standard of care gives rise to a medical malpractice action and is not, as the Hospital argues, solely relevant to issues of informed consent. McQuitty v. Spangler, 410 Md. 1, 25 (2009); Reed v. Campagnolo, 332 Md. 226, 241 (1993). Similarly, testimony pertaining to the standard of care applicable to a non-party was, as the Circuit Court found, irrelevant to the Hospital's causation defense, which it pressed vigorously throughout the trial. Such testimony, moreover, would have needlessly confused jurors and resulted in undue prejudice to Appellants. Finally, notwithstanding the Hospital's claim to the contrary, the jury was permitted to infer that Enzo would live through the age of 69 from testimony that he would live "between five and six decades." Moreover, as the Circuit Court properly found, the jury also could have permissibly concluded that Enzo will have an ordinary life expectancy, as the jury was permitted to observe him in court, heard testimony regarding his disorder and prognosis, and received, without objection, a medical record stating that there was no reason to believe his life would be short.

Accordingly, Appellants respectfully suggest that this Court affirm the jury's verdict in all respects. The majority, if not all, of the Hospital's alleged errors are unpreserved. To the extent they remain viable, they are without merit and are

unsupported by the record. Both parties were well represented and received a fair trial. The arguments raised in the instant appeal were thoroughly considered by the Circuit Court, who after reviewing hundreds of pages of memoranda and conducting a two-day hearing, determined the verdict should stand. This Court should follow suit.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN PERMITTING, OFTEN WITHOUT OBJECTION, RELEVANT TESTIMONY AND ARGUMENT PERTAINING TO THE HOSPITAL'S FAILURE TO OFFER GENERAL ANESTHESIA AND PROPERLY DENIED THE HOSPITAL'S RELATED NEW TRIAL ARGUMENT.

The Hospital claims that the Circuit Court abused its discretion by failing to grant a new trial and/or exclude testimony that it characterizes as relevant solely to unpled issues of informed consent. Br. Appellee at 15-27.[3] The Circuit Court, however, correctly found the testimony was relevant to the Appellants' claims and the Hospital's defenses. E. 817, p. 4:2-9. And, as the Hospital concedes, Appellants' related closing argument was unobjectionable commentary on the admitted evidence. Appellee Br. at 25.

In addition to lacking merit, the Hospital's evidentiary claims are not properly before this court because it failed to object to half of the errors it now raises. Brown, 143 Md. App. at 199. Instead, only the denial of the Hospital's New Trial Motion is before this Court, and it should be affirmed on principles of waiver alone. Isley, 129 Md. at 622; E. 818, p. 8:15-19.

A. By failing to object to half of the admitted testimony and all of the argument it now complains of, the Hospital waived, and rendered harmless, any allegations of error arising from the admission of testimony that it failed to offer general anesthesia.

1. Because the Hospital never objected to Dr. Stokes' statements regarding its failure to offer general anesthesia, its objections to similar testimony are waived and any error was harmless.

[3] The Hospital does not appear to argue that the Circuit Court should have excluded the testimony, even if relevant, because of the possibility of unfair prejudice. Indeed, no such argument was made below and it is therefore waived. CSX Transp., Inc. v. Miller, 159 Md. App. 123, 215 (2004) (concluding argument that evidence was unduly prejudicial was waived when, at trial, only objection was to relevancy).

Conflating several alleged errors pertaining to the admission of testimony regarding its failure to offer general anesthesia, the Hospital conceals several preservation issues fatal to its claims. Absent a timely objection, a party waives any allegation of error in the admission of testimony. Md. Rule 2-517(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered … [o]therwise, the objection is waived."); Kovacs v. Kovacs, 98 Md. App. 289, 306-07 (1993); see also Md. Rule 8-131(a). Moreover, "[c]ounsel can waive an objection that properly has been made – or make the error in overruling the objection harmless – by failing to object at other times, when similar evidence is offered." McLain, MARYLAND EVIDENCE, § 103:12 at 60 (2001); accord Berry v. State, 155 Md. App. 144, 171-72 (2004). Indeed, "[c]ases are legion … to the effect that an objection must be made to each and every question … to preserve the matter for appellate review." Fowlkes v. State, 117 Md. App. 573, 588 (1997).

In this appeal, the Hospital's request for a new trial rests largely on errors that are unpreserved. The Hospital claims that the Circuit Court improperly admitted Dr. Balducci's statement that the Hospital never offered general anesthesia. Br. Appellee at 16 (citing E. 154, p. 117:6). There is, however, no reviewable error. The Circuit Court **sustained** the Hospital's objection and no request to strike or request for a curative instruction was made. E. 154, p. 116:4-117:6; Blandon v. State, 60 Md. App. 582, 586 (1984) ("Absent a motion to strike … or a further cautionary instruction, there is nothing for us to review."), aff'd, 304 Md. 316 (1985); Ditto v. Stoneberger, 145 Md. App. 469, 499 (2002); E. 736, p. 85:17 ("It counts as a zero.").

Additionally, the Hospital's request for appellate relief also arises from its unpreserved claim that Dr. Stokes was erroneously permitted to testify that "the option [of general anesthesia] was never offered to [Ms. Fielding.]" Br. Appellee at 16 (citing E. 208). The Hospital complains that, moments later, Dr. Stokes stated that the Hospital "did not offer the option of being put to sleep, which would have gotten her baby out a whole lot sooner." Id. The Hospital's Brief fails to mention that it did not object or move to strike Dr. Stokes' testimony, which waived its allegations of error. Berry, 155 Md. App.

at 173.

Only twice did the Circuit Court permit testimony relating to the Hospital's failure to offer general anesthesia over objection and, in both instances, the testimony admitted was identical to that provided by Dr. Stokes. Compare E. 327, p. 40:12-14 (Ms. Fielding: "No. I was never given that option [of general anesthesia]"); E. 463, p. 124:8-9 (Dr. Katz: "I don't believe she was given, or should have been given [the choice of which anesthesia]"); E. 208, p. 33:18-19, 34:12-14 (Dr. Stokes: "[general anesthesia] was never offered to the patient" and "[the Hospital] did not offer the option of being put to sleep").

Dr. Stokes, Ms. Fielding, and Dr. Katz each testified to the same fact – that the Hospital never offered general anesthesia. The Hospital's "sporadic objections" were insufficient to preserve its argument for appeal. Fowlkes, 117 Md. App. at 588. By failing to object to Dr. Stokes' testimony, the Hospital waived, and rendered harmless, any objection it had regarding to the testimony of Ms. Fielding or Dr. Katz.[4] Id.; Robeson v. State, 285 Md. 498, 507 (1979) ("The law in this State is settled that where a witness later gives testimony, without objection, which is to the same effect as earlier testimony to which an objection was overruled, any error in the earlier ruling is harmless.") This Court should therefore decline to address arguments pertaining to the admissibility of testimony regarding the Hospital's failure to offer general anesthesia.

2. Although the Hospital impliedly concedes that Appellants' closing argument was proper, any objection it may have had was waived through its failure to object.

Strangely, the Hospital claims that a new trial is required because Appellants' closing argument was prejudicial while simultaneously maintaining that it had no duty to object because the argument was within the "wide latitude" afforded to counsel. Br. Appellee at 25 (citing Trimble v. State, 300 Md. 387, 405 (1984)). It is settled, however, that the failure to object during closing argument constitutes a waiver of any assignment

[4] Importantly, this "second-level form of non-preservation, whether conceptualized in terms of waiver or in terms of harmless error, would seem to be less vulnerable to a possible 'plain error' exemption from the preservation requirement than would the more normal first-level form of non-preservation." Williams v. State, 131 Md. App. 1, 28 (2000).

of error. Shelton v. State, 207 Md. App. 363, 385 (2012).

Relying exclusively on Shoemaker v. State, 228 Md. 462 (1962), the Hospital argues that it "had no reason to highlight the evidence after it had been admitted over objection by objecting to it again during closing arguments." Br. Appellee at 25. Yet, Shoemaker made clear that the defendant's objection "was promptly made and overruled." Id. at 467. Contrary to Shoemaker, the Hospital tendered not even a single objection during closing, and its claim that it could not object without "highlighting" the testimony is wrong. See Curry v. State, 54 Md. App. 250, 256 (1983) (concluding objections made after closing argument were timely in recognition of the need to avoid underscoring the remark).

While Appellants agree that the argument was proper, that does not excuse the Hospital's failure to make a timely objection. The Circuit Court had instructed that there "won't be argument about informed consent" during trial. E. 328, p. 44:24-25. Therefore, the Hospital was required to object if it believed Appellants were violating the Court's admonition, which would have allowed the Court to take remedial measures, if necessary, less drastic than ordering a new two-week long trial. See Kent Vill. v. Smith, 104 Md. App. 507, 517 (1995).

Moreover, the failure to object to Dr. Stokes' testimony is fatal to the Hospital's claims relating to Appellants' closing argument. The Hospital concedes that, if the testimony was properly admitted, Appellants' argument was proper. Br. Appellee at 25. Thus, because Dr. Stokes' testimony properly entered evidence without objection, the Hospital implicitly concedes that Appellants' closing argument fell within the "wide latitude" afforded to counsel to argue the evidence. On this basis alone, the Hospital's challenge to Appellants' closing argument fails.

3. Only the denial of the Hospital's New Trial Motion is before this Court, which should be affirmed on principles of waiver alone.

"A party who does not raise an issue at trial, and later pursues the point in a post-trial motion, is precluded from raising the substantive issue on appeal." Brown, 143 Md. App. at 248 (citing Anderson v. Litzenberg, 115 Md. App. 549, 578-79 (1997)). In its

New Trial Motion, the Hospital raised the same unpreserved arguments it now raises on appeal. The substantive issues as to the admissibility of the testimony or the propriety of Appellants' closing argument are therefore "not properly before [this Court.]" Id. at 249.

Instead, the Hospital may secure relief only if this Court concludes that the Circuit Court abused its discretion in denying the New Trial Motion. As this Court recognized, however, "non-preservation … is in and of itself an **unassailable reason** for the trial judge to deny the New Trial Motion …." Isley, 129 Md. App. at 619 (emphasis added); accord Buck, 328 Md. at 62 (waiver is a "significant factor" to be considered when ruling on a new trial motion). Consistent with Isley, the Circuit Court concluded that the Hospital's failure to object arose from strategic decisions and "exercise[ed its] discretion in not granting a new trial based on issues to which no objection was made." E. 818, p. 8:17-19. For this reason alone, the Circuit Court's denial of the Hospital's New Trial Motion should be affirmed.

B. The Circuit Court correctly determined that the Hospital's failure to offer general anesthesia was relevant and admissible to assist in addressing important factual disputes.

The Hospital seeks a new trial on the basis that unobjected-to testimony from Dr. Stokes, along with identical statements from Dr. Balducci, Ms. Fielding, and its own expert, Dr. Katz, should have been excluded because they were relevant only to an unpled theory of informed consent. Br. Appellee at 16-17 (citing E. 208, 327-28, 438, 462-63, 468). This claim is both factually and legally without merit. The testimony was relevant to rebutting express and implied claims that Ms. Fielding was to blame for any delay in delivering Enzo and that she had rejected general anesthesia. See E. 817, p. 4:2-9. Indeed, the failure to offer treatment required by the standard of care states a claim in ordinary malpractice, not informed consent. Reed, 332 Md. at 240-41.

1. The Circuit Court properly determined testimony pertaining to the Hospital's failure to offer general anesthesia assisted in challenging the Hospital's defense that Ms. Fielding was responsible for the delay.

Perhaps the single greatest dispute at trial centered on the reasons for the Hospital's nearly two hour delay in completing the "urgent" C-section ordered by its

physicians. Supported by the Hospital's own policies, Appellants claimed that an "urgent" C-Section should be completed within "20-35 minutes." E. 139, p. 57:4-7; E. 141, p. 63:25-64:2. Thus, each minute after 4:15 a.m. that the Hospital delayed delivery constituted a breach of the standard of care. E. 171, p. 185:17-25, E. 139, p. 55:4-5. As a result of the Hospital's delay, Enzo was near death and had suffered profound, permanent injuries when he was finally delivered at 5:40 a.m. E. 116, p. 159:7-8; E. 118, 167:2-168:4; E. 119-20, 173:15-175:7; E. 120-21, 178:8-179:2; E. 146, 83:17-21.

The Hospital, however, claimed that its delay was medically necessary. The Hospital stated that it needed to obtain an accurate medical history, administer antibiotics, and obtain Ms. Fielding's consent all before delivery could take place. Its physicians also determined that Ms. Fielding's C-section was to be done under a combined spinal epidural, rather than under general anesthesia. Before an epidural could be administered, however, the Hospital was first required to complete necessary blood work. E. 366, p. 41:5-11. Ordinarily, the blood work needed for an epidural takes only ten minutes; however, in this case, it took more than an hour. E. 348, p. 129:13-17, E. 474, p. 24:8-10.

The Hospital attributed its delay in completing the blood work to Ms. Fielding. Claiming Ms. Fielding did not want a C-section, E. 565-66, p. 77:18-78:7, the Hospital painted her as an uncooperative patient. See E. 70, p. 261:14-16, E. 146:20-47:6. The Hospital stated that it had difficulty obtaining her history, E. 560, p. 56:8-19, and argued treatment was made more difficult because Ms. Fielding was removing necessary medical devices. E. 563, p. 66:7-20; E. 559, p. 52:10-25. Most importantly, the Hospital stated that Ms. Fielding interfered with its ability to complete her blood work, stating that she told caregivers "don't touch me" when they attempted to draw her blood. E. 512, p. 175:19-23, E. 559, p. 52:10-25. Moreover, once nurses began to draw her blood, the Hospital claimed that Ms. Fielding refused to stay still, which prevented the nurse from obtaining a sufficient sample. E. 563, p. 67:10-69:23. The insufficient sample required a second test, which added to the delay. In short, the Hospital sought to convince the jury that its inability to move forward with the delivery arose because Ms. Fielding was "very uncooperative, combative, resisting, and making management generally more difficult."

E. 817, p. 4:2-9; see E. 68, 251:9-20; E. 70, 201:5-21.

Appellants countered that any delay relating to Ms. Fielding's conduct did not excuse the Hospital's failure to perform the "urgent" C-section in a timely manner. Although recognizing that an epidural was the preferred method of anesthesia, Appellants explained that when delays mounted it became imperative that the Hospital switch to general anesthesia. See E. 149, p. 96:11-97:7. Unlike an epidural, general anesthesia could be used without waiting for the delayed blood work. E. 149, p. 96:8-11. Even the Hospital recognized that anesthesia could not be administered without Ms. Fielding's consent. See E. 173, p. 192: 18-20. Consequently, offering Ms. Fielding general anesthesia was the necessary first step required under the standard of care. Had anesthesia been offered, none of the delay the Hospital attributed to Ms. Fielding would have occurred, as the blood tests would have been unnecessary.

As the Circuit Court found, the Hospital's failure to offer Ms. Fielding general anesthesia was relevant to rebut claims that her lack of cooperation impeded the Hospital's efforts to deliver Enzo in a timely manner. Had the Hospital offered general anesthesia, the delay allegedly caused by her lack of cooperation with efforts to collect her blood would have been entirely avoided. Thus, the evidence was relevant and admissible to rebut the Hospital's defense by explaining the delay was not caused by "anything the mother did," but instead arose from the Hospital's failure to offer appropriate treatment that would have eliminated the delay. E. 817, p. 4:5-9.

2. The failure to offer general anesthesia was relevant to rebut the Hospital's suggestion that Ms. Fielding rejected the very treatment Appellants' claimed the standard of care required.

During opening statement, the Hospital told the jury that Ms. Fielding consented to surgery after "the anesthesiologist ... explain[ed] the **anesthesia options**[5] and obtained the patient's ... consent for anesthesia." E. 71, p. 263:21-264:14 (emphasis added). Immediately thereafter, the Hospital stated why its doctors concluded general anesthesia was inappropriate. E. 71, p. 263:21-264:14. The Hospital then introduced

[5] Only two types of anesthesia are available when performing an urgent C-section: general anesthesia or a combined spinal epidural. E. 208, p. 32:25-33:9

evidence of Ms. Fielding's consent to the combined spinal epidural. E. 489, p. 84:23-85:16 (publishing consent form to the jury). Its witnesses, moreover, testified that: "Anesthesia ha[d] to [obtain] consent and **discuss all the risks** involved giving epidural anesthesia and the **different choices that she has for anesthesia**...." E. 566, p. 80:20-81:14 (emphasis added); see also, E. 483, p. 59:3-9; E. 490, p. 89:12-90:24. Indeed, throughout trial, the Hospital stressed that no procedure could be done until after Ms. Fielding consented. E. 173, p. 192; E. 240, p. 153:21-154:9; E. 627, p. 69:24-25.

The Hospital's opening and its witnesses' statements opened the door to testimony regarding the its failure to offer general anesthesia. Martin v. State, 364 Md. 692, 704-05 (2001) (holding that opening statements may "open the door"); Terry v. State, 332 Md. 329, 337 (1993). The Hospital's opening and the related testimony could have easily caused the jury to "conclude, contrary to the law and the evidence, that consent to the [anesthesia] was tantamount to consent to the injury..." Schwartz v. Johnson, 206 Md. 458, 485 (2012), reconsideration denied (Sept. 4, 2012) (quoting Hayes v. Camel, 927 A.2d 880 (Conn. 2007)). The evidence also created a false impression that Ms. Fielding refused general anesthesia after the anesthesiologist "explained her anesthesia options," E. E. 71, p. 263:21-264:14, and "discuss[ed] ... the different choices that she [had] for anesthesia." E. 566, p. 80:20-81:14. Such a finding by the jury would have been extraordinarily damaging to Appellants' case and factually incorrect.

Therefore, testimony that the Hospital never offered general anesthesia was relevant to establishing that she "did not refuse" the very treatment the standard of care required. E. 731, p. 68:7-12; E. 816, p. 4:2-9.[6]

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[6] The Hospital states that "Plaintiffs never suggested that the evidence [of the Hospital's failure to offer general anesthesia] was admissible to show that the mother did not refuse general anesthesia – even in their post-trial briefing on informed consent – because it would have contradicted their position that Ms. Fielding was calm and cooperative with caregivers at the Hospital." Br. Appellee at 20. There is, however, no contradiction between Ms. Fielding being "cooperative" and evidence tending to show that she "did not refuse general anesthesia." Moreover, Appellants *did* raise this precise argument in response to the Hospital's New Trial Motion. See R. 1699-1997 (Pl. Op. to Def. Mot. for New Trial at 7-8). Regardless, this Court can – and should – affirm on any grounds

C. Reed holds that the failure to offer treatment is properly an allegation of medical malpractice, not one of breach of informed consent.

1. The failure to offer treatment, especially when predicated on a physician's negligent misdiagnoses of the patient's condition, gives rise to a single malpractice claim encompassing both the misdiagnoses and the related failure to offer treatment.

In addition to the factual infirmities discussed above, the Hospital's argument that testimony pertaining to its failure to offer general anesthesia was irrelevant is also legally unsound. Although both informed consent and ordinary medical malpractice claims are grounded in principles of negligence, admittedly they are ordinarily separate causes of action. See McQuitty, 410 Md. at 18. Nevertheless, the Hospital's claim that testimony regarding its failure to offer general anesthesia was irrelevant because it addressed only issues of informed consent is wrong. Indeed, the failure offer necessary medical treatment "is properly an allegation of medical malpractice, not one of breach of informed consent." Id. (citing Reed, 322 Md. at 240-41).

In Reed, the plaintiff pursued an informed consent action arising from the physician's failure to offer prenatal testing that would have discovered complications pertaining to her unborn child. Id. at 229-30. On appeal, the Court considered whether the plaintiff alleged an informed consent claim, or whether the cause of action sounded only in ordinary negligence. After careful consideration, Reed concluded that the question of "whether the defendants had a duty to offer or recommend [treatment] is analyzed in relation to the professional standard of care," which "may or may not produce a result identical with the informed consent criterion...."[7] McQuitty, 410 Md. at 25 (quoting Reed, 322 Md. at 241). The failure to offer treatment, therefore, "should be analyzed under a healthcare provider's duty to provide an acceptable standard of care, not under a duty to obtain informed consent." Id.; Reed, 322 Md. at 241.

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apparent from the record. Dynacorp Ltd. v. Aramtel Ltd., 208 Md. App. 403, n.25 (2012).

[7] Although noting that Reed discussed cases implying that an informed consent claim requires evidence of battery, McQuitty was careful to point out that Reed's holding did not adopt that theory for purposes of informed consent. McQuitty, 410 Md. at 25. Accordingly, the holding of Reed remains valid even if the failure to offer treatment may sometimes also support an independent informed consent claim. See id.

It would be anomalous to impose liability under a theory of informed consent for failing to offer a treatment the physician believed was neither medically appropriate nor relevant to the patient's condition. See Reed, 322 Md. at 241. Therefore, when the failure to offer treatment required by the standard of care arises from a physician's negligent misdiagnoses of the patient's condition, the facts give rise to a single malpractice claim encompassing both the misdiagnosis and the related failure to offer the required treatment. Velasquez v. Skory, 857 N.Y.S.2d 735 (App. Div. 2008); Roukounakis v. Messer, 826 N.E.2d 777, 780 (Mass. App. Ct. 2005); Backlund v. Univ. of Wash., 975 P.2d 950 (Wash. 1999) (en banc); see Reed, 332 Md. at 240-42.

Other jurisdictions agree. For instance, in Roukounakis the court barred the plaintiff from maintaining a separate informed consent action relating to allegations his physician failed to offer treatment required by an undiagnosed condition. Roukounakis, 826 N.E.2d at 780. When the failure to offer treatment is predicated on the physician's misdiagnoses of the condition necessitating that treatment, Roukounakis explained that there can be no separate informed consent claim because "the question of informed consent cannot be separated from the question of negligence." Id. at 780.

Similarly, in Velasquez, the plaintiff alleged that the defendant failed to properly recognize "physical characteristics which should have led the defendant to diagnose her fetus as macrosomic (abnormally large for the gestation age), a condition that increases the risk of injury during vaginal delivery." 857 N.Y.S.2d. at 736. Experts explained that, had the diagnosis been properly made, "a cesarean section would have been the medically recommended means of delivery, subject to obtaining to the plaintiff's consent, because it would have avoided the risks associated with macrosomia." Id. at 736-37. The physician failed to diagnose the patient's condition, never offered a C-section, and injuries occurred as a result.

At trial, the verdict sheet asked the jury to determine whether "[it was] a deviation below the standard of acceptable obstetrical care ... for defendant ... not to have requested the consent of plaintiff ... to perform a Cesarean section to deliver her child." Id. at 736. The trial court instructed the jury as to issues of ordinary malpractice, but did

not instruct on informed consent. After the jury returned a verdict for the physician, the patient appealed the court's refusal to instruct on informed consent.

Although also finding the error waived, Velasquez concluded the failure to diagnose the fetus' condition and related failure to offer a C-section did "not constitute separate legal theories of malpractice, but [were] interrelated deviations which, when taken together, all led to the requirement to discuss a cesarean section with the plaintiff." Id. at 736-37. As in this case, the "[t]he pertinent deviation was not a failure to give plaintiff sufficient information to consent to a vaginal delivery," but instead the complete failure to offer the treatment required by the standard of care. Id.

In short, "[a] physician who misdiagnoses the patient's condition, and is therefore unaware of an appropriate category of treatments or treatment alternatives, may properly be subject to a negligence action where such misdiagnosis breaches the standard of care, but may not be subject to an action based on failure to secure informed consent." Backlund, 975 P.2d at 956. Instead, the two claims are merged because the question of the physician's negligence in failing to offer the treatment cannot be separated from the negligent failure to diagnose the condition necessitating that treatment. Therefore, as Reed held, the failure to offer treatment is properly an allegation of ordinary medical malpractice requiring consideration of the appropriate standard of care.

2. Appellants' malpractice claim encompassed the Hospital's negligent failure to diagnose Enzo's condition and its related failure to offer the treatment his condition required.

The Appellants' allegations of malpractice were predicated, in part, on the Hospital's negligent misdiagnoses of Enzo's condition and its related failure to offer general anesthesia, the method of delivery required by the standard of care. E. 149, p. 96:18-21; E. 208, p. 33:10-34:21; E. 210, p. 41:12-25; E. 240, p., 151:18-21; E. 380, p. 96:15-24. Appellants painstakingly reviewed "strips" from the fetal heart monitor and demonstrated that, by 4:00 a.m., Enzo's heartbeat had become non-reassuring. E. 211-13, p. 43:13-54:21. Additional testimony established that, throughout the delay caused by the Hospital's inability complete Ms. Fielding blood work, Enzo's condition continued to

worsen. E. 149, p. 96:11-97:7. By 5:22 a.m., 20 minutes before his delivery, it appeared a crash was imminent because Enzo had "lost all reserves[] and was showing signs of hypoxia." E. 145-46, p. 82:25-83:3. Under these circumstances, the standard of care mandated that Enzo be delivered immediately. E. 213-15, p. 54:14-60:3.

At trial, the Hospital admitted that the standard of care required converting to a "stat" C-section using general anesthesia if Enzo's heartbeat became non-reassuring. See E. 365, p. 35:11-36:4; E. 148, p. 91:4-15. The Hospital, however, steadfastly maintained that Enzo's heartbeat never became non-reassuring, and therefore claimed that there was never any reason to use general anesthesia. E. 382, p. 104:23-05:1; E. 364, p. 32:10-17; E. 365, p. 38:3-39:25; E. 443-44, p. 46:3-49:6; E. 471, p. 13:7-16. In short, the Hospital's failure to offer general anesthesia was predicated on its mistaken belief that Enzo's heartbeat remained reassuring throughout delivery.

As in Roukounakis and Velasquez, the Hospital's failure to properly diagnose Enzo's non-reassuring heartbeat, and its related failure to offer the treatment his condition required, created a single medical malpractice claim. Appellants did not argue that the Hospital should have offered Ms. Fielding general anesthesia because it was simply an alternative or faster method of anesthesia. Instead, Appellants argued that the Hospital breached the standard of care by failing to diagnose Enzo's condition and by failing to offer the treatment his condition required. The negligent failure to diagnose Enzo's non-reassuring heartbeat and the related failure to offer general anesthesia did "not constitute separate legal theories of malpractice, but [were] interrelated deviations" that, when taken together, required that the Hospital offer Ms. Fielding general anesthesia. See Velasquez, 857 N.Y.S.2d at 736-37. The failure to offer general anesthesia was, therefore, "properly an allegation of medical malpractice…." McQuitty, 410 Md. at 18 (citing Reed, 322 Md. at 240-42).

D. Testimony and argument pertaining to the Hospital's failure to offer general anesthesia, even if erroneously admitted, did not result in a verdict predicated on an unpled theory of informed consent.

To succeed in its appeal, the Hospital must establish both an error and prejudice

arising therefrom. Beahm v. Shortall, 279 Md. 321, 330 (1977); Isley, 129 Md. App. at 620 (noting party's obligation to establish "substantial likelihood" an error "caus[ed] an unjust verdict" when seeking a new trial). The Hospital suggests that it was prejudiced because the testimony and related closing argument may have led the jury to determine "the doctors were negligent for not offering Ms. Fielding a faster, alternative delivery method – even if [its] care was reasonable." Br. Appellee at 26. Its assertion of prejudice, however, is unsupported both by the cases it cites and the record.

The Hospital's claim of prejudice implies that the jury disregarded the instructions it received. The Circuit Court advised the jury that it must find in favor of the Hospital if, "under the circumstances as they then existed ... [the Hospital] exercised ... [a] reasonable degree of care and skill." E. 663, p. 20:16-20. Reasonable skill, the jury was told, "means that caution, attention or skill a reasonable health provider would use under similar circumstances." E. 663, p. 20:7-9. Nothing in the record suggests that the jury disregarded these instructions, and therefore it should be presumed that it acted in accordance with the law. Warren v. State, 205 Md. App. 93, 135 (2012).

Additionally, the cases cited by the Hospital do not support its claim that a defendant is entitled to a new trial whenever "informed consent" evidence is introduced in an ordinary malpractice action. This is not a case in which the jury was instructed on both lack of informed consent and ordinary negligence, but returned only a single general verdict. See Cobbs v. Grant, 502 P.2d 1, 7 (Cal. 1972) (en banc); Hannemann v. Boyson, 698 N.W.2d 714 (Wis. 2005). Nor is this a case addressing the sufficiency of evidence. Cleary v. Group Health Ass'n, 691 A.2d 148, 155 (D.C. 1997); Parker v. Harper, 803 So. 2d 76, 79 (La. Ct. App. 2001). These cases are simply unhelpful in addressing the pertinent legal questions raised in this appeal.

Equally unavailing is the Hospital's suggestion that Schwartz, 206 Md. App. 458, "forbids the admission of informed consent evidence when there is no informed consent claim." Br. Appellee at 22. Shearing Schwartz from its contextual roots, the Hospital ignores important distinctions between the evidence at issue and misstates Schwartz's

holding.[8] Schwartz held only that *the defendant* was properly barred from introducing evidence of that the *patient consented* to the procedure that resulted in his injury. Id. at 486. This Court, citing jury notes inquiring as to the risks discussed with the patient, concluded that evidence of the plaintiff's consent to the procedure could have been misconstrued by the jury as consent to the injury. Id. Therefore, this Court found that the trial court did not abuse its discretion in excluding evidence of the patient's consent to the procedure that resulted in his injury.

Moreover, Schwartz dealt with evidence of "consent," not testimony that the physician failed to offer medically necessary treatment. Consent is a concept that carries a colloquial significance that is often inconsistent with its legal meaning or effect. Therefore, absent instructions designed to clarify the relevance of a patient's consent, a jury may incorrectly attribute legal relevancy to the admission of such testimony, especially when the question of consent is not an issue in the case. Unlike evidence of consent, however, the challenged testimony in this case does not suggest a similar threat of prejudice.

The Hospital offers no explanation as to how a jury, upon hearing testimony regarding its failure to offer general anesthesia, could logically or rationally impose liability despite also concluding that general anesthesia was not required by the standard of care. There is no rational distinction between evidence that the Hospital did not provide treatment and the factually-related claim that it never offered the treatment it admittedly did not provide. This is especially true when, as here, there was no testimony suggesting that the Hospital was required to explain general anesthesia as an alternative treatment in order to secure Ms. Fielding's informed consent and the jury received no instructions on the unpled cause of action. In short, the Hospital suggests no reason to believe that the jury reached a verdict that would be contrary to the evidence, arguments, and instructions it received. See Warren, 205 Md. App. at 135.

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[8] The Hospital's reliance on Schwartz is shocking since it was the Hospital that introduced precisely the type of evidence this Court found to have been properly excluded. See E. 489, p. 84:23-85:16; E. 566, p. 80:20-81:14; E. 483, p. 59:3-9.

Finally, the lack of prejudice arising from Appellants' closing is self-evident from the Hospital's failure to object. Burris v. State, 206 Md. App. 89, 47 A.3d 635, 660 (Md. Ct. Spec. App. 2012), cert. granted, 54 A.3d 759 (Md. 2012). Notwithstanding the Hospital's belated claims of impropriety, Appellants' closing argument did not suggest to the jury that liability could, or should, arise simply because the Hospital did not offer an alternative method of delivery. Appellants challenged the Hospital's claim that general anesthesia was "too risky" or that it was medically necessary to await Ms. Fielding's delayed blood work. E. 702, p. 173:19-74:4. Throughout trial, and in closing argument, Appellants asked the jury to find the Hospital liable because it failed to offer the treatment required under the standard of care, not because the Hospital failed to obtain Ms. Fielding's informed consent for an epidural by neglecting to offer an alternative treatment. In arguing to the contrary, the Hospital ignores the context of the record as a whole and, instead, relies on a small number of isolated statements.

The Hospital, itself introducing evidence of Ms. Fielding's consent, made strategic decisions throughout the proceedings not to object to testimony and argument relating to its failure to offer general anesthesia. E. 818, p. 8:15-19. The Hospital's suggestion of prejudice is little more than speculation. The jury was not instructed on informed consent. There was no expert testimony establishing the material risks and alternative treatments Ms. Fielding should have been advised of when she consented to an epidural. Instead, the Hospital relies on 8 unobjected-to lines from amongst 90 pages of closing argument and two statements that entered evidence over objection. There is simply no basis to conclude that these isolated statements caused a jury to disregard its instructions and impose liability on an uninstructed theory, despite having found the Hospital acted non-negligently. Accordingly, even if testimony was erroneously admitted, this Court should find the error harmless.

II. THE CIRCUIT COURT PROPERLY EXCLUDED IRRELEVANT AND CONFUSING TESTIMONY PERTAINING TO THE NEGLIGENCE OF A NON-PARTY WHILE PRESERVING THE HOSPITAL'S ABILITY TO FULLY LITIGATE ITS SOLE PROXIMATE CAUSE DEFENSE.

A. The Hospital waived any allegation of error arising from the Circuit Court's preliminary ruling on Appellants' pretrial Motion in Limine by failing to timely proffer the excluded testimony and improperly relies on arguments not presented at trial.

1. The Hospital waived its challenge to the Circuit Court's preliminary ruling on Appellants' Motion in Limine by failing to proffer the substance of the excluded testimony at trial.

The party challenging a motion in limine has the burden of making a proffer during trial to preserve the point for appeal. Prout v. State, 311 Md. 348 (1988), explained that a party is relieved from this obligation only when "the trial judge resolves the motion[in limine] by clearly determining that the questionable evidence will *not* be admitted, **and by instructing counsel not to proffer the evidence again during trial**..." Id. at 356-57 (bolding added). Therefore, when a trial court's ruling may be amendable to change, the party wishing to raise the issue on appeal must make a timely proffer at trial. See id.

In this case, the Circuit Court's resolution of the Appellants' motion in limine relating to the standard of care applicable to Ms. Muhlhan was not "clearly intended to be the final word on the matter" and the court did not "instruct [the Hospital] ... not to proffer the evidence again during trial." Id. at 356-57. Instead, when partially granting relief, the Circuit Court explicitly stated it would reconsider if "Plaintiff's witnesses[] open the door." E. 45, p. 29:17-25. Consequently, the Circuit Court did not exclude the Hospital's midwifery experts, although the Hospital elected not to call them. See E. 45, p. 38:4-17, E. 46, p. 34:23-25.

The Hospital does not cite to any portion of the record where it proffered the testimony of its midwifery experts. Instead, the Hospital relies primarily on two instances in which it alleges the Circuit Court improperly precluded standard of care testimony.[9]

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[9] The Hospital also cites an incident relating to the Circuit Court's refusal to allow Nurse

None of the cited testimony, however, served to properly preserve the Hospital's allegations of error; therefore, this Court should find that they have been waived.

First, the Hospital notes that the Circuit Court sustained Appellants' objection to Nurse Cross' testimony that she was "shocked" by the midwife's decision to administer Pitocin intramuscularly because it was "unusual." Although the objection was sustained, the testimony was not stricken and no proffer of the excluded testimony was made. See E. 561, p. 59:15-18; Md. Rule 5-103(a)(2); S. Kaywood Cmty. Ass'n v. Long, 208 Md. App. 135, 164 (2012) ("Where the evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal.").

Second, the Hospital cites the sustained objection to a nonresponsive answer from its own expert. Br. Appellee at 33 (citing E. 449). The record reveals that the Hospital's expert was not answering the questions being asked. See E. 448, p. 66:20-22 (Court: "I don't think that was responsive. So the jury will disregard the answer."); E. 449, p. 67:5-6. In fact, after the very objection cited by the Hospital, its counsel stated: "No Doctor, we're not – I'd like to just talk about the mechanism of injury and that's all." E. 449, p. 67:17-18. Regardless of the basis for the objection, no proffer was made regarding the excluded testimony and, therefore, the point of error is now waived. Md. Rule 5-103(a)(2); S. Kaywood Cmty. Ass'n, 208 Md. App. at 164.

Neither instance cited by the Hospital was sufficient to preserve its objection to the Circuit Court's preliminary ruling on the Motion in Limine. None of the citations to the record offered by the Hospital include a sufficient proffer of the testimony it claims the Circuit Court improperly excluded. The Hospital never called Ms. Muhlhan or proffered the testimony of its experts. Absent a timely and sufficient proffer at trial, its allegations of error arising from the Circuit Court's preliminary ruling on the pretrial Motion in Limine are waived. Prout, 311 Md. at 356-57.

Cross to testify "about her experience with Pitocin." Br. Appellee at 33 (citing E. 561-62). A careful review of the record reveals that the Circuit Court sustained Appellants' objection not because the Hospital was eliciting standard of care evidence, but because the witness was unqualified to answer. See E. 561-62, p. 59:15-63:9. The Hospital does not recognize this distinction and makes no argument suggesting an error occurred.

2. The Hospital's claim that Appellants opened the door to standard of care testimony is unpreserved and without merit.

a. The Hospital failed to preserve its claim that Appellants opened the door and improperly relies on arguments not raised at trial.

The purpose of the preservation requirement is "to ensure fairness for all parties in a case and to promote the orderly administration of law .... 'by requiring counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings.'" Robinson v. State, 410 Md. 91, 103 (2009) (quoting State v. Bell, 334 Md. 178, 189 (1994)). Therefore, when the arguments raised on appeal "were not raised below, they are not preserved for appellate review." Robinson v. State, 58 A.3d 514, 2012 WL 6652755 at *12 (Md. Spec. App. 2012).

In its brief, the Hospital cites only one passing reference in which it suggested that Appellants opened the door to standard of care testimony. Br. Appellee at 36 (citing E. 246). Raising a question in passing or making an offhand remark, however, is insufficient to preserve the point for appeal. See Harmony v. State, 88 Md. App. 306, 316-17 (1991). Instead, "[a] party must bring his argument to the attention of the trial court with enough particularity that the court is aware first, that there is an issue before it, and secondly, what the parameters of the issue are." Id. at 317 (citing Medley v. State, 52 Md. App. 225, 231 (1982)).

Here, the Hospital's counsel requested a bench conference after Dr. Stokes testified, under cross-examination by the Hospital, about "the way midwives" practice. E. 246, p. 175:8-12. Upon approaching, the Hospital asked, "[w]as the door just opened for me," to which the Court responded, "You're getting close." E. 246, p. 175:16-17. The Hospital then requested that the testimony be stricken and advised that, if Dr. Stokes "doesn't keep recognizing limits, then I'm going to ask to call my expert witness." E. 246, p. 176:18-22. The Circuit Court granted the Hospital's motion to strike and instructed the jury to disregard the comment. E. 246, p. 178:7-13. This passing remark, however, was insufficient to preserve the Hospital's argument for appeal. Harmony, 88

Md. App. at 316-17.

Moreover, although prohibited from securing appellate relief on grounds not advanced at trial, the Hospital suggests that the door was also opened by Appellants' opening statement[10] and Dr. Balducci's testimony. Nowhere in its brief does the Hospital cite to any portion of the record suggesting that it raised these claims with the trial court. See CSX Transp., Inc., 159 Md. App. at 215 (holding that a party may not seek appellate relief on grounds not advanced at trial). Indeed, neither opening statements nor Dr. Balducci's testimony were even mentioned when the Hospital inquired as to whether the door had been opened by Dr. Stokes' testimony. E. 246, p. 175:14-78:16. These arguments are therefore not properly before this Court. Md. Rule 8-131.

b. Stricken testimony elicited by the Hospital cannot support a claim that Appellants opened the door.

Citing testimony from Drs. Stokes and Balducci, the Hospital argues that Appellants' opened the door to standard of care testimony. Br. Appellee at 35-36 (citing E. 164, 168, 246, 248). The Hospital, however, ignores the fact that (1) the testimony was stricken and (2) had been adduced by the Hospital during cross-examination. Both facts are fatal to the Hospital's argument.

The doctrine of "opening the door" applies only when a party should, in fairness, be permitted to respond to evidence "introduced by the opposing party." Conyers v. State, 345 Md. 525, 545-46 (1997). As Clark v. State, 332 Md. 77, 85 (1993), recognized, "'opening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'" It is therefore axiomatic that the doctrine is inapplicable when the testimony is adduced by the party

[10] The Hospital's argument also fails on the merits with respect to its claim that Appellants' opening statement opened the door. Nothing said by Appellants during opening statement was factually untrue or unsupported by evidence adduced at trial. Additionally, Appellants' claim that Pitocin is not used intramuscularly at hospitals was simply designed to "draw the sting" from the very same argument offered by the Hospital. See E. 70, p. 262:16-25 (claiming, during the Hospital's opening statement, that the Hospital was shocked by the midwife's use of Pitocin because it is "only administered intravenously in a hospital setting.").

claiming the door was opened or when the testimony is not admitted.

In this case, the testimony cited by the Hospital occurred during its cross-examination of Appellants' witnesses. E. 164, p. 154:11-15; E. 168, p. 171:5-11; E. 246, p. 175:2-10. The Hospital cites no authority to suggest that statements made by an opposing party's witness under cross-examination can open the door to previously irrelevant testimony. Moreover, the testimony was stricken after the Hospital made timely objections, and therefore there is nothing in evidence requiring a response. E. 164, p. 154:19-155:3 (instructing the jury to disregard Dr. Balducci's testimony); E. 168, p. 171:5-11 (same); E. 246, p. 178:7-11 (instructing the jury to disregard Dr. Stokes' testimony "about what midwives do or don't do."). This Court should therefore reject the Hospital's claim that Appellants opened the door on the basis of stricken testimony the Hospital itself adduced.

3. The Hospital's meritless claim that the Circuit Court "publically endorsed" Appellants' theory of the case was waived.

The Hospital alleges that the Circuit Court's instruction, which occurred after a successful objection and motion to strike, "publically endors[ed] Plaintiff's trial theme..." Br. Appellee at 37. The Hospital never objected to the instruction or asked for any relief. By depriving the Circuit Court of an opportunity to address its claim, the Hospital waived this allegation of error. Md. Rule 8-131(a).

However, even if not waived, the Hospital's assertion that the Circuit Court's instruction prejudiced its defense is without merit. The Circuit Court, in striking Dr. Stokes' statement, "It's not the way midwives do it," advised the jury to "disregard what midwives do or don't do." E. 246, p. 178:8-9. In context, it was clear that the instruction was to disregard Dr. Stokes' testimony and not, as the Hospital contends, an invitation to disregard its theory of defense.

4. Appellants' unobjected-to closing argument did not improperly address the standard of care applicable to midwives.

The Hospital also claims a new trial is required because Appellants' closing argument exploited the lack of evidence regarding the standard of care and painted an inaccurate portrait of Ms. Muhlhan's conduct. A review of Appellants' closing argument,

however, reveals that Appellants did not argue, suggest, or imply that Ms. Muhlhan's conduct was "perfectly appropriate." Br. Appellee at 37. Instead, Appellants derided the Hospital's complete failure to link its theory that Ms. Muhlhan caused Enzo's injuries to the evidence in the case. See E. 678, p. 76:16-17. Appellants' closing argument was entirely proper. Regardless, because the Hospital tendered no objection, its allegation of error was waived. Shelton, 207 Md. App. at 385.

5. **Because the Hospital failed to preserve its claims regarding the allegedly improper exclusion of standard of care testimony, the only issue properly before this Court is whether the Circuit Court abused its discretion when denying the Hospital's New Trial Motion.**

As explained above in section I(A)(3), when a party raises unpreserved errors in a motion for new trial, the substantive issues are no longer properly before this Court on appeal. Brown, 143 Md. at 248. Instead, the only question presented is whether the Circuit Court abused its discretion when denying the party's new trial motion. Id.

As with the Hospital's arguments relating to the admission of testimony regarding its failure to offer general anesthesia, its claim that the Hospital improperly excluded testimony pertaining to the standard of care applicable to Ms. Muhlhan was waived. Waiver alone provides an "unassailable reason" to affirm the denial of its New Trial Motion. See Isley, 129 Md. App. at 619. However, in addition to waiver, the Hospital's allegation that it is entitled to a new trial on the basis that it was unable to introduce standard of care testimony is undercut substantially by (1) the tremendous evidence it did introduce in support of its theory that Ms. Muhlhan caused Enzo's injuries and (2) the limited probative value, if any, that can be gleaned from testimony that she violated the standard of care. Rather than set forth this argument twice, however, Appellants incorporate by reference the arguments below and suggest, for the same reasons, this Court should affirm the Circuit Court's determination that the Hospital received a fair trial.

B. The Circuit Court properly excluded irrelevant and unduly confusing testimony pertaining to the different standard of care applicable to Ms. Muhlhan, a non-party, while allowing the Hospital to fully press its causation defense.

1. The standard of care applicable to Ms. Muhlhan was irrelevant because the Hospital's defense required the jury to decide only whether she was the sole cause of Enzo's injuries, regardless of whether or not her actions were negligent.

The Hospital argues that the Circuit Court erroneously precluded it from introducing evidence that Ms. Muhlhan, a non-party, violated the standard of care applicable to midwives and thereby prejudiced its ability to present an "empty chair" defense.[11] Recognizing a lack of authority supporting its position in Maryland, the Hospital relies heavily on cases from jurisdictions that have adopted comparative negligence. See Br. Appellee at 31-32. As Maryland remains a contributory negligence state, the Hospital's reliance on these cases serves only to obfuscate the reality that, under Maryland law, the Hospital remained fully liable to Appellants for its negligence unless Ms. Muhlhan was found to be the sole cause of Enzo's injuries. As the Circuit Court recognized, the Hospital's causation defense was not in any way contingent upon a finding that Ms. Muhlhan violated the standard of care. The question for the jury was one of proximate causation, and if Ms. Muhlhan was the sole cause of Enzo's injuries, the jury was obligated to find for the Hospital regardless of whether her conduct was negligent or completely innocent. Accordingly, the Circuit Court preliminarily decided to

[11] The Hospital has consistently sought to avoid responsibility for its strategic decision not to add Ms. Muhlhan as a third-party defendant. In its New Trial Motion, it argued that it could not sue Ms. Muhlhan unless it first conceded that it was negligent, but now claims only that the jury could have found Ms. Muhlhan liable only if it first found the Hospital liable. Br. Appellee at 27. This reasoning is legally unsound. First, the Hospital assumes that Appellants would not have filed an action directly against Ms. Muhlhan after she was added as a party. Second, a third party action does not require an admission, or even evidence of, the primary defendant's negligence. Hartford Accident & Indem Co. v. Scarlett Harbor Assoc. Ltd' P'ship, 109 Md. App. 217, 283 (1996), aff'd, 346 Md. 122 (1997). Third, "each defendant" would be "entitled to fair and separate consideration of that defendant's own defense." See Owens-Corning Fiberglas Corp. v. Garrett, 343 Md. 500, 532 (1996); MPJI-Cv 1:11.

exclude the challenged standard of care testimony because it was irrelevant, unduly prejudicial, and likely to sew unnecessary confusion. See E. 43, p. 21:15-23; E. 45, p. 29:5-30:17.

Critically, nearly all of the authority cited by the Hospital arises from jurisdictions that have, unlike Maryland, abandoned contributory negligence in favor of comparative negligence. See Br. Appellee at 30, 31-32 (citing cases applying Illinois, Missouri, Connecticut, and New Jersey law).[12] Under a system of comparative negligence, the determination of whether a non-party was negligent is relevant, if not "essential," because the jury must "determin[e] liability commensurate with the degree of total fault." Bofman v. Material Serv. Corp., 466 N.E.2d 1064, 1072 (Ill. App. Ct. 1984). In states that have adopted comparative negligence, and which permit apportioning of liability as to each tortfeasor's "proportionate share of the injury suffered," the question of a non-party's negligence and his or her breach of the appropriate duty of care is relevant to the ultimate determination of proportional liability. Archambault v. Soneco Ne., Inc., 946 A.2d 839, 854-55 (Conn. 2008) (quoting Barry v. Quality Steel Products, Inc., 820 A.2d 258, 269 (Conn. 2003)). In Maryland, however, this is not the case.

Maryland has not adopted a system of proportionate liability or comparative negligence. Instead, Maryland allows a plaintiff to secure "complete relief" from a single tortfeasor, who remains jointly and severally liable for the whole of any negligently caused injuries. See Service Transport Inc. v. Hurricane Exp., Inc., 185 Md. App. 25, 39-40, cert. denied, 409 Md. 49 (2009). "The fact that another individual also tortiously contributes to the plaintiff's injury does not alter the independent, concurring tortfeasor's responsibility for the entirety of the injury which he or she actually and proximately caused." Consumer Protection Div. v. Morgan, 387 Md. 125, 182 (2005) (quoting Woods v. Cole, 693 N.E.2d 333, 336-37 (Ill. 1998)).

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[12] Each of these jurisdictions practice comparative negligence. See Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983) (en banc); Melesko v. Riley, 339 A.2d 479 (Conn. Super. Ct. 1975); Rawson v. Lohsen, 366 A.2d 1022 (N.J. Super. Ct. Ch. Div. 1976); N.J. Stat. Ann. § 2A:15-5.2 (West).

The comparative negligence cases cited by the Hospital, moreover, recognize that the "issue of whether a defendant is entitled to argue to the jury that the nonparty physician was negligent is separate and distinct from the issue of whether a defendant is entitled to have the jury instructed on the defense of sole proximate cause." McDonnell v. McPartlin, 736 N.E.2d 1074, 1085-86 (Ill. 2000) (internal citations omitted). "[E]vidence of the nonparty's negligence is not required to justify the sole proximate cause instruction." Id. Thus, in a contributory negligence state, evidence of a non-party's adherence to the standard of care is unhelpful to the jury when the defendant wishes to argue that the non-party was solely responsible for causing the plaintiff's injury. Regardless of whether the non-party was negligent or acted blamelessly, the question for the jury is whether their actions constituted the sole proximate cause of the plaintiff's injuries.

Enzo suffered a single indivisible injury, and therefore the Hospital remained jointly and severally liable for its negligence even if Ms. Muhlhan was also negligent and contributed to Enzo's injuries. See Morgan, 387 Md. at 179-80 (discussing the "single injury rule" and joint and several liability amongst tortfeasors). Consequently, evidence relating to Ms. Muhlhan's negligence, or lack thereof, did not make it any more or less likely that the Hospital was negligent, nor did it make it any more or less likely that the Hospital caused Enzo's injuries. Indeed, Appellants accounted for the possibility that the jury may conclude that Ms. Muhlhan caused Enzo's injuries by establishing that the Hospital's negligence remained a substantial contributing factor in causing Enzo's injuries. E. 120, p. 176:1-22; E. 155, p. 119:11-16.

The appropriate inquiry for the jury was whether Ms. Muhlhan's conduct was the sole proximate cause of Enzo's injuries. E. 817, p. 3:12-4:1. The Circuit Court permitted the Hospital to pursue its causation defense and the Hospital admitted voluminous testimony in support of its argument that Ms. Muhlhan's conduct was dangerous and established both why it was dangerous and how it could have caused Enzo's injuries. However, the Circuit Court also properly understood that the Hospital's theory of defense arose independent of any claim that Ms. Muhlhan violated the standard of care and

correctly excluded such evidence because it was irrelevant.

2. Even if relevant, the Circuit Court did not abuse its discretion by precluding testimony relating to the standard of care applicable to a non-party on grounds of undue prejudice and confusion of the issues.

Even if this Court concludes that testimony regarding the standard of care applicable to Ms. Muhlhan was relevant, the Circuit Court's decision to exclude such evidence should nevertheless be affirmed because the probative value of the evidence was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, [and] waste of time...." Md. Rule 5-403.

The thrust of the Hospital's argument that standard of care testimony was admissible arises from its claim that "grossly negligent medical treatment ... is much more likely to cause injury than non-negligent treatment." Br. Appellee at 29 (citing McDonnell, 736 N.E.2d 1074). McDonnell, however, does not support the Hospital's premise. Instead, McDonnell commented only that "negligent conduct and proximate cause are distinct, albeit related, concepts" before explaining that "every injury need not proceed from a negligent cause" and that "'proximate cause' is not synonymous with 'negligent cause.'" Id. at 1085. McDonnell thus recognized, as did the Circuit Court, that the issue of whether a third party caused an injury and the issue of whether the third party violated the applicable standard of care present separate legal questions.

However, even if it is abstractly true that negligent actions are more likely to cause injury, the modicum of probative value gleaned from evidence that Ms. Muhlhan violated the standard of care was vastly outweighed by potential for unfair prejudice, confusion of the issues, and waste of time that would have been involved had the Circuit Court permitted such evidence. Inherent confusion would arise through the introduction of testimony regarding the standard of care applicable to nurse midwifes because the standard can differ substantially from that applicable to physicians. Indeed, a number of states with statutory provisions similar to MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-02(c)(2) have precluded obstetricians from offering standard of care testimony regarding

midwifery practices. See e.g., Postell v. Hankla, 728 S.E.2d 886, 889 (Ga. App. 2012); McElhaney ex rel. McElhaney v. Harper-Hutzel Hosp., 711 N.W.2d 795, 800 (Mich. App. 2006); c.f. Cox v. M.A. Primary and Urgent Care Clinic, 313 S.W.3d 240, 256 (Tenn. 2010) (discussing rationale for applying different standard of care to physician assistants than that applied to physicians). Notably, none of the cases cited by the Hospital suggest that it would be an abuse of discretion to exclude, on grounds of confusion, evidence relating to a different standard of care applicable to a non-party. The admission of a separate, distinct standard of care could easily confuse jurors, especially when the verdict sheet and instructions would make no reference to the midwife's breach of the standard of care because she was not a party and her negligence, if any, was neither a necessary nor sufficient predicate to the Hospitals' defense.

Consequently, even assuming testimony regarding the standard of care applicable to a non-party was relevant, the possibility that the evidence would confuse the jury or result in a trial beset with disputes over collateral and largely irrelevant matters substantially outweighed whatever limited probative value the evidence had. Accordingly, the Circuit Court did not abuse its discretion when excluding testimony pertaining to the standard of care applicable to a non-party, or by precluding the Hospital from characterizing her conduct as "grossly negligent," on grounds that it would have been confusing and unduly prejudicial. Md. Rule 5-403. E. 817, p. 3:12-4:1.

3. The exclusion of the standard of care evidence did not influence the verdict and the error, if any, was therefore harmless.

The Hospital states that it could not "vigorously pursue" its defense that Ms. Muhlhan caused Enzo's injuries because the Circuit Court's ruling precluded any discussion of the standard of care applicable to nurse midwifes. Br. Appellee at 38. The Hospital, however, introduced significant evidence that the sole proximate cause of Enzo's injuries was Ms. Muhlhan's use of intramuscular Pitocin and fundal pressure.[13]

[13] Although the Hospital complains that it was unable to introduce evidence that Ms. Muhlhan breached the standard of care by allowing "Ms. Fielding to attempt home delivery past 41 weeks and labor through prolonged first and second stages," it cites no testimony suggesting that such conduct contributed to causing Enzo's injuries. Instead,

Indeed, its defense failed not for lack of evidence that Ms. Muhlhan's conduct *could* have caused Enzo's injuries, but instead from the lack of evidence suggesting that the dangers associated with her conduct actually occurred in this case. As the Circuit Court noted, "if [Ms. Muhlhan] breached the standard of care [but] caused no damages, then" her conduct is "totally irrelevant" to the Hospital's defense. E. 43, p. 24:8-14. Consequently, the Hospital's claim of error arising from the exclusion of evidence that Ms. Muhlhan's conduct breached the standard of care should be deemed harmless in light of the limited probative value the evidence would have added to its otherwise factually unsupported defense.

Regarding Pitocin, the Hospital called the treating physician, Dr. Christopher Ennen, who testified that he was "surprised and shocked" by Ms. Muhlhan's use of intramuscular Pitocin during the home delivery because "[i]t's never ... used as injections in the muscle in a non-monitored situation to cause labor to progress." E. 364, p. 32:22-33:10. Instead, Dr. Ennen explained that Pitocin is administered "in the hospital through an IV ... in very carefully monitored doses...." Id.; see also E. 506, p. 153:19-22. Although scant evidence existed regarding the actual dose administered, the Hospital also advised the jury that the injection Ms. Fielding received was 1,000 fold more than what would be used at the Hospital. E. 449, p. 69: 5-8.[14]

The Hospital introduced evidence that Pitocin is only used intravenously and requires carefully monitoring because it may cause hyperstimulation of the uterus. The Hospital's experts testified, and Appellants' experts agreed, that hyperstimulation could negatively impact the blood and oxygen supply available to the fetus. E. 163-64, p. 153:23-54:11. Accordingly, the Hospital argued that the "huge dose" of Pitocin Ms.

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the Hospital's proximate causation defense centered on claims that fundal pressure and Pitocin caused Enzo's injuries. The Hospital's failure to suggest how this testimony would have been relevant to issues of causation therefore makes it difficult to respond.

[14] The Hospital states that it was erroneously precluded from introducing testimony that Ms. Muhlhan's use of Pitocin contradicted the manufacturer's recommendations. Br. Appellee at 38. The Hospital cites no place in the record where such evidence was proffered or provides any reason as to why it would not had been permitted to introduce that evidence at trial because of the Circuit Court's standard of care ruling.

Muhlhan administered caused Ms. Fielding's uterus to become hyperstimulated, which led to a decrease in available oxygen, and thereby caused Enzo's injuries. E. 449, p. 68:19-22.

Appellants' experts agreed with the majority of the Hospital's claims regarding the use of Pitocin, but maintained the Pitocin did not cause Enzo's injuries. See E. 113, p. 34:6-16, E. 133, p. 32:2-17, 34:16-35:2; E. 164, p. 155:5-56:9. Appellants admitted that Pitocin is generally administered only at hospitals intravenously, that it is not administered intramuscularly, and that there was no medical literature supporting Ms. Muhlhan's treatment. E. 164, p. 155:5-25; E. 245, p. 174:5-25. Such admissions significantly undermine the Hospital's unfounded claim that the jury may have concluded that the Hospital's "shock" arising from Ms. Muhlhan's conduct demonstrated only its ignorance of acceptable midwifery practices. See Br. Appellee at 38.

Similarly, the Hospital introduced testimony regarding the dangers of using fundal pressure. The Hospital's medical professionals were shocked by its use, and expressed incredulity that "fundal pressure is something that somebody would actually do." E. 513, p. 179:19-22. The Hospital advised the jury that the midwife applied a "great deal of fundal pressure," and that Enzo's father was so distressed by the event that he called for an ambulance. E. 478, p. 41:9-18; E. 508, p. 162:18-25, E. 480, p. 48:12-16. The Hospital then explained that the use of fundal pressure, like hyperstimulation, caused Enzo's injuries by squeezing oxygenated blood from the placenta. E. 449, p. 70:9-25.

As with the testimony relating to Pitocin, Appellants' experts largely agreed with the Hospital's claims regarding fundal pressure. Appellants' experts admitted that fundal pressure was not something they "would do" and advised the jury that it "can do more harm than good." E. 244, p. 169:8-22. Appellants' experts conceded that fundal pressure is no longer used because it can "break ribs," "rupture the uterus," or cause other significant injuries to the fetus and mother. E. 164, p. 156:10-57:1; see E. 244, p. 169:8-24. Indeed, Dr. Stokes explained that "[n]o force should be used in OB/GYN." E. 244, p. 169:24. The only important point on which the Hospital and Appellants disagreed was on whether the fundal pressure caused any injury in this case.

The Hospital's claim that it was unable to vigorously pursue its defense is simply unsupported by the record. Its defense that fundal pressure and intramuscular Pitocin caused Enzo's injuries did not fail for lack of testimony that such treatment could cause harm. As the Circuit Court found, the Hospital "present[ed] evidence that the midwife's conduct was dangerous[,]" "*why* it was dangerous," and "*how* it caused the damages." E. 817, p. 3:16-21 (emphasis added). Nevertheless, the Hospital's causation defense failed because it was unsupported by any evidence suggesting that the potential harmful effects of Pitocin or fundal pressure actually occurred in this case. There was simply no evidence to suggest that either treatment resulted in harm, and without evidence linking that the alleged potential harm to facts in evidence, questions relating to Ms. Muhlhan's negligence became largely irrelevant. See E. 43, p. 24:8-14.

Importantly, the only danger arising from Ms. Muhlhan's use of Pitocin arose not from the drug itself, but from the possibility that it would cause hyperstimulation. E. 456, p. 96:3-9; E. 531, p. 52:18-53:12. However, there was no evidence that hyperstimulation occurred while Ms. Fielding labored at the Hospital, and it was not mentioned in any of its medical records. E. 379, p. 92:4-93:15. After receiving the Pitocin, Ms. Fielding felt no change in the strength of her contractions, which remained three minutes apart until she arrived at the Hospital. E. 323, p.23:7-23. In fact, there was no reliable evidence suggesting hyperstimulation occurred at any time during labor. E. 133, p. 34:16-35:2.

The Hospital's sole basis for claiming that hyperstimulation occurred arose from an ambiguous notation that Ms. Fielding had a "hard abdomen" created by the EMT who transported her to the Hospital. E. 456, p. 97:1-25. Because the EMT never testified, there was scant evidentiary significance that could be attached to the ambiguous notation. Indeed, under cross-examination, the Hospital's expert admitted that he had no information regarding the EMT's experience with pregnant patients, did not know how long the EMT touched Ms. Fielding's abdomen, how long the condition persisted, or even whether the "hard abdomen" occurred while Ms. Fielding was suffering an ordinary contraction. See E. 456, p. 98:2-100:25. In fact, the EMT's records indicated that Ms. Fielding's contractions were three minutes apart, which was inconsistent with a finding

of hyperstimulation. E. 456: 95:21-97:1. In short, "not a shred" of evidence existed to suggest that hyperstimulation occurred or that Pitocin caused Enzo's injuries. E. 172, p. 189:5-20.[15]

The possibility that fundal pressure caused Enzo's injuries was equally unconvincing in light of the evidence. Ms. Fielding testified that fundal pressure was applied, at most, two to three times and she described it as a "quick press" that "didn't hurt at all." E. 323, p. 23:19-24:21. There were no injuries consistent with the use of fundal pressure, such as broken ribs or a ruptured uterus. E. 172, p. 189:24-190:8. And, as admitted by the Hospital's experts under cross-examination, there was no evidence to suggest how long fundal pressure had been applied, the level of force used, or the number of times it was used. E. 533, p. 60:12-61:20.

In sum, the Circuit Court was correct in rejecting the Hospital's claim that it was unable to vigorously pursue its theory that Ms. Muhlhan was the sole proximate cause of Enzo's injuries. The Hospital presented significant testimony establishing that intramuscular Pitocin and fundal pressure can cause serious injuries to mother and child. The Hospital also introduced significant testimony indicating that neither treatment is appropriate care, as even Appellants' experts admitted. The Hospital also explained to the jury how fundal pressure and Pitocin could potentially cause injury by depriving Enzo of blood and oxygen. What the Hospital failed to do, however, was provide reliable evidence demonstrating that the mechanisms of injury Pitocin and fundal pressure suggested actually occurred in this case.

Accordingly, the Hospital cannot demonstrate prejudice. It is unclear whether the Hospital could have bolstered its factually unsupported defense by arguing to the jury that Ms. Muhlhan's conduct was more likely the sole cause of Enzo's injuries because it violated the standard of care, as questions of negligence and causation are distinct.

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[15] Indeed, Dr. Noetzel testified for the Hospital that fundal pressure and Pitocin could have caused Enzo's injuries, but he had simply assumed that they had actually been harmful. Under cross-examination he was forced to admit his opinions related to "timing and not necessarily the mechanism of injury." See E. 535-36, p. 69:14-74:8.

However, even assuming it could, the *de minimus* boost its theory of defense would have received from such testimony suggests that the Hospital was not prejudiced. The jury had already learned that neither fundal pressure nor intramuscular Pitocin are used by physicians, and the added benefit of learning that it may violate the standards of care applicable to midwives would have been negligible. Accordingly, because the Hospital has failed to establish prejudice, this Court should find any error harmless and affirm the jury's verdict.

III. THE JURY'S AWARD FOR FUTURE MEDICAL COSTS WAS SUPPORTED BY COMPETENT AND ADMISSIBLE EVIDENCE.

The Hospital claims that the damages award for future medical costs was unsupported by sufficient evidence and requests a new trial. In support, the Hospital advances two arguments. First, it claims that the evidence was insufficient to support a finding that Enzo would live beyond the age of 60. This argument is neither preserved nor supported by the record. Second, the Hospital claims that the Circuit Court erred when it found sufficient evidence to support a finding that Enzo would have lived to be 76, an ordinary life expectancy. This second argument relates primarily to the significance of an unobjected-to medical record that indicated that there "was no reason to believe [Enzo's] life would be short." The Circuit Court, after reviewing all of the evidence relating to Enzo's life expectancy, properly found the evidence sufficient.

A. The Hospital's suggestion that Enzo's life expectancy was capped at 60 years is unpreserved and without merit.

1. The Hospital did not argue that Enzo's life expectancy was capped at 60 years at trial or in its written New Trial Motion and, therefore, its claim was waived.

A motion for new trial must be submitted within 10 days after the entry of judgment. Md. Rule 2-533(a). "All grounds advanced in support of the motion shall be filed in writing within the time prescribed …., and **no other grounds shall thereafter be assigned without leave of court.**" Id. at 2-533(b). Any argument not asserted in a motion for new trial filed within ten days of the entry of judgment is "not preserved for review." Patras v. Syphax, 166 Md. App. 67, 82 (2005) (citing Md. Rule 8-131(a)).

In its written New Trial Motion, the Hospital argued only that the jury's determination of damages was unsupported by the evidence because there was no testimony to support an inference that Enzo would survive until the expiration of his ordinary life expectancy of 76 years. R. 1290-1689 (Def. Mot. for New Tr. at 15-19). It was not until the hearing on its Motion that the Hospital first suggested that the evidence was also insufficient to support a claim that Enzo could have survived beyond the age of 60. See E. 797, p. 189:10-19. Therefore, although the Hospital now wishes to claim that the evidence showed Enzo would live "no more than 60 years," Br. Appellee at 41, this Court should find its argument unpreserved for review. Patras, 166 Md. App. at 82.

2. Dr. Gabriel's testimony supported an inference that Enzo would live through the age of 69 and the Hospital's claim to the contrary is without merit.

Appellants' economist testified without objection that Enzo would require $22.2 million for future medical costs if he lived to the age of 65. E. 308, p. 37:3-9. Now, however, the Hospital claims that Dr. Gabriel's testimony regarding Enzo's life expectancy failed to provide an adequate factual basis because his statement that Enzo would live "[b]etween five and six decades" supported an inference that Enzo would live only between "50 and 60 years." Br. Appellee at 41 (citing E. 185). This argument, in addition to being untimely, is inconsistent with the record and was properly rejected by the Circuit Court.

When Dr. Gabriel stated that Enzo would live between five and six decades, the parties, the judge, and the jury all understood him to mean that Enzo could survive *into his sixties*. To the extent any ambiguity existed, it was conclusively resolved when Dr. Gabriel agreed with the Hospital's characterization of his testimony as indicating that Enzo would live "somewhere between 50 and **60 something**." E. 194, p. 72:92-12 (emphasis added). Indeed, Dr. Gabriel expressly rejected efforts to limit Enzo's life expectancy to "50 to 60 years," which is precisely the interpretation the Hospital now advances. See E. 194, p. 72:3-9.[16] Thus, the Hospital's argument should be rejected.

[16] Additional support for interpreting Dr. Gabriel's testimony as including all of Enzo's

B. The Circuit Court properly determined that the evidence, when viewed in a light most favorable to Appellants, was sufficient to allow the jury to find Enzo would have lived to the age of 76.

1. Medical records, testimony regarding Enzo's prognosis, and the jury's opportunity to observe him in court combined to provide the jury with sufficient evidence to support a finding that Enzo would live to the age of 76.

A plaintiff need not present conclusive evidence of his or her life expectancy to be entitled to future damages. Hutzell v. Boyer, 252 Md. 227, 238 (1969). Evidence that "in the opinion of [a] physician [the plaintiff] will live his normal life expectancy" coupled with the jury's opportunity to view the plaintiff is sufficient to support an award for future medical care. Id. Although damages may not be based upon speculation, where such an award requires a determination of an individual's life expectancy, the jury is permitted to "consider the totality of the evidence . . . to determine" the amount of future damages. Tempel v. Murphy, 202 Md. App. 1, 19 (2011).

The jury that was tasked with determining "how long [Enzo] is likely to live...." E. 664, p. 34:4-7. The jury was the "sole judges of whether testimony should be believed." The Circuit Court advised that the jury was required to consider any expert's opinion "together with all of the other evidence," and that it was "not required to accept any expert's opinions." E 662, p. 15:14, 16:14-16. It was the jury, therefore, that was charged with the ultimate responsibility of reviewing all of the evidence and determining Enzo's life expectancy.

In this case, the jury heard testimony that his ability to sit or stand will favorably impact Enzo's life expectancy. E. 182, p. 26:20-27:5; E. 184, p. 34:2-25. The jury was told of the treatment he will receive, E. 185, p. 35:1-25, and listened as experts explained how a loving family, advances in medicine, and the availability of care will serve to

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sixth decade, i.e., the ages of 61 to 69, can be found from other testimony and, indeed, the Hospital's own words. Notably, Appellants' economist, Mr. Johnson, clarified what it means to live between five and six decades, stating the "sixth decade of life" means "into the 60s," E. 306, p. 29:7-12, and the Hospital's cross-examination of Mr. Johnson indicated that it too believed that the age of 65 "was the sixth decade of life." See E. 314, p. 60:21-61:6.

extend his life expectancy. E. 185, p. 37:17-38:13. The jury also observed Enzo in the courtroom, E. 819, p. 12:1-4, and was properly advised that an ordinary life expectancy for Enzo would be 76 years. See Fleming v. Prince George's Cnty., 277 Md. 655, 685-86 (1976) (finding the trial court committed reversible error by excluding life tables on the basis that the plaintiff was not in good health).

The jury also had before it a medical record, introduced without objection, stating that it was "important to establish a routine" for Enzo that "can be sustained for a long time." See E. 1073. Although the record stated that it was "impossible to know how long [Enzo] can survive," it went on to conclude that the presence of "reasonably good bulbar function" suggested that there was no "reason to think that [his] survival will be short." E. 1073.

The Hospital, isolating the note from the other evidence, argues that it provides an insufficient basis to suggest that Enzo would live an ordinary life expectancy. Br. Appellee at 43-46. However, when addressing the sufficiency of the evidence, such a narrow view is inappropriate. Instead, the court must "assume[] the truth of all credible evidence on the issue and all inferences fairly deducible therefrom." Impala Platinum v. Impala Sales, 283 Md. 296, 328 (1978). Then, viewing the evidence in a light most favorable to Appellants, the question is whether "there is any legally relevant and competent evidence, however slight, from which a rational mind could infer a fact in issue." Id.

As the Circuit Court found, the entirety of the record – the medical records, the testimony, and the jury's observations of Enzo – provided a sufficient basis from which the jury could conclude that Enzo would live to the age of 76. E. 819, p. 11:4-12:4. The Hospital neglects the clear implication from the medical record, which indicated that Enzo's life would not be short. The question is, "[s]hort as compared to what? And it has to be short as compared to the norm." E. 819, p. 11:10-12. The Hospital, aware that it did not object to the introduction of the relevant medical record, claims that the document provided an insufficient basis to support the jury's award. In truth, however, this is not a matter of evidentiary sufficiency – it is a question of weight.

As the Circuit Court found, the record was in evidence "by agreement of counsel" and therefore the jury "could consider [the record] and give it the weight that they felt it deserved." E. 719, p. 16:18-21. As in Hutzell, "[t]he jury heard medical testimony as to his physical condition, and that in the opinion of his physician he would live his normal life expectancy, and they saw and observed him [during trial]." 252 Md. at 239. The medical record created by Enzo's physician was introduced without objection, and it was properly part of the evidence the jury could consider when determining Enzo's life expectancy. Accordingly, this Court should affirm the Circuit Court's determination that the evidence was sufficient to support a conclusion that Enzo may live his ordinary life expectancy.[17]

2. The jury's verdict indicates that it did not find that Enzo would live until the age of 76 and is also supported by reasonable extrapolation from the data and assumptions underlying Mr. Johnson's conclusion that Enzo would require $22.2 million if he lived until 65.

CSX Transp., Inc. v. Pitts, 203 Md. App. 343, 398 (2012), reconsideration denied, (Mar. 30, 2012), cert. granted, 427 Md. 62 (2012), affirmed an award of future damages that exceeded the plaintiff's expert's testimony by 33 percent After reviewing the evidence and arguments, this Court concluded that the jury could reject the assumptions underlying the expert's calculations and, in so doing, properly determine that the plaintiff's damages exceeded the estimate provided by his own expert. Id. at 394, n. 21. Rejecting the defendant's claim that the award was beset with speculation, this Court explained that the jury's verdict was simply a rational extrapolation from the evidence. Id. at 398.

In this case, there is no reason to speculate that the jury's verdict was predicated

[17] For the same reasons, this Court should reject the Hospital's claim Appellants' experts lacked a factual basis under Md. Rule 5-702 for his claim that Enzo would require an additional $4 to $5 million dollars if he were to live until the age of 76. The admissibility of expert testimony is a matter committed to the discretion of the trial court, and to succeed on appeal the party opposing admissibility must prove that the expert's factual basis "was not even **arguably** reliable." Exxon Mobil Corp. v. Ford, 204 Md. App. 1, 28, reconsideration denied and cert. granted, 426 Md. 427 (2012) (emphasis in original).

on a belief that Enzo would live to the age of 76. The testimony at trial indicated that, if he lived until the age of 76, Enzo would require $4 to $5 million over the $22.2 million required for his medical care through the age of 65. E. 309, p. 40:22-23. The jury, however, awarded only $2.8 million more than Appellants' expert suggested would be required to sustain his care through the age of 65. This fact strongly suggests that the jury properly concluded that Enzo would have lived until the age of 69, which was within the permissible range stated by Dr. Gabriel. However, the jury's verdict is also supported by reasonable extrapolations from the underlying data supporting Enzo's damages.

Underlying Mr. Johnson's damages testimony were assumptions regarding the costs of Enzo's medical care and the appropriate rates of inflation to be applied when reducing those costs to present value. Enzo's life care plan, which formed the basis of Mr. Johnson's calculations, determined the costs for Enzo's care by "calling several providers to get a range of costs and then mak[ing] an average." E. 83, p. 28:12-13; see E. 1012-1022. Similarly, Mr. Johnson advised that he used a "conservative 5.5 percent [global] growth rate" when calculating the present value, although a rate as high as 6.4 percent would have been permissible. E. 307-08, p. 34:15-35:2.

Assuming a maximum permissible life expectancy of 60 years, the jury's award exceeds the estimate for Enzo's needs through the age of 55 by only $6 million. Therefore, without even accounting for the additional five years of life the Hospital concedes could be permissibly inferred, the jury's verdict was less than 33% higher than the amount Mr. Johnson provided to the jury. Assuming a maximum permissible life expectancy of 69 years, however, the jury's verdict provides an increase of only $2.8 million from Mr. Johnson's testimony regarding the costs required to support Enzo through his 65th year of life. Without adjusting for the possibility that the jury permissibly found Enzo will live to 69, its award presented only an 11% increase over the expert's testimony.

Accordingly, the use of average costs and conservative inflationary rates permitted the jury to reasonably extrapolate a higher measure of damages than that provided by Enzo's economist. The jury could have elected to increase its award to ensure that Enzo

could obtain the best, or most expensive care, or properly increased the damages to account for Appellants' use of conservative growth and inflationary rates. "Had the jury reached [either of] these two conclusions, [Enzo's] economic damages would correspondingly increase above what [the Hospital] contends is the acceptable amount." CSX Transp., Inc., 203 Md. App. at 398. Accordingly, the jury's award for future medical costs was fully supported by the evidence.

C. Even if this Court finds that the jury's verdict was predicated, in part, on improper testimony that Enzo could survive until the age of 76, remittitur and not a new trial is the proper remedy.

"Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984). Thus, "a jury's verdict should not be casually overturned." Buck, 328 Md. at 59-60 (quoting Boscia v. Massaro, 529 A.2d 504, 508 (Pa. Super. 1987)). A new trial based upon an excessive verdict is appropriate only where the verdict is grossly excessive or outrageously excessive. Banegura v. Taylor, 312 Md. 609, 624 (1988). "The test," therefore, "is "whether [the verdict] shocks the conscious of the Court." ACandS, Inc. v. Abate, 121 Md. App. 590, 692 (1998), rvsd on other grounds, John Crane Inc. v. Scribner, 369 Md. 369 (2000). Here, given the severity of Enzo's injuries and the significant testimony regarding his damages, the Circuit Court properly concluded that the verdict did not shock the conscious. However, should this Court find that the jury's determination of damages rested on impermissible testimony, the appropriate remedy is to remand the case to the Circuit Court for a remittitur hearing. A new trial on issues of Enzo's damages is unnecessary and would waste judicial resources.[18]

[18] To the extent the Hospital suggests that this issue requires a new trial on both liability and damages, it is wrong. The determination of liability is "fairly severable" from the determination of damages. Md. Rule 2-533(c). Therefore, if a new trial is required, it should be limited only to the issues of damages. See Schrieber v. Cherry Hill Const. Co., 105 Md. App. 462, 486-87 (1995) (remanding for a new trial as to lost wages only); Hoffman v. Stamper, 385 Md. 1, 49 (2005) (granting a new trial on issues of non-economic damages only). Indeed, the single case cited by the Hospital that ordered a new

"The use of remittitur is encouraged whenever possible to avoid the unnecessary expense and delay of a new trial." Johnson v. Scaccetti, 927 A.2d 1269, 1283 (N.J. 2007) (internal quotations omitted). The doctrine of remittur advances judicial efficiency and allows courts to "lop off" any portion of the verdict that exceeds that highest amount a rational finder of fact could have awarded. See Hebron v. Volunteer Fire Dept., Inc. v. Whitelock, 166 Md. App. 619, 635 (2006) (quoting Cashdollar v. Mercy Hosp. of Pittsburg, 595 A.2d 70 (Pa. Super. 1991)). The amount of the remittitur rests with the discretion of the trial Court. Id. at 639.

As several of the cases by the Hospital suggest, if an error occurred, remittitur is the appropriate remedy. See Br. Appellee at 44 (citing Duncan v. Kansas City S. Ry. Co., 773 So. 2d 670 (La. 2000) (remanding for remittitur in light of "more realistic" determination of plaintiff's likely life expectancy)). Indeed, a new trial on damages is required, and remittitur is inappropriate, only when the error giving rise to the excessive verdict "infected the jury's entire consideration of the plaintiff's pecuniary loss." Lin v. McDonnell Douglas Corp., 742 F.2d 45 (2d Cir. 1984). In other words, a new trial is necessary when the error requires the reviewing court to "calculate the damages from zero and build up" instead of working backward from the amount of the award to determine what portion is excessive. Id. at 51.

Here, unlike the situation in Lin, remittitur is both possible and preferable to suffering the costs and expense of a new trial. The entirety of the Hospital's argument that a new trial is required rests on the assertion that the jury improperly heard evidence that, should Enzo live until the age of 76, he would require $4 to $5 million more than the $22.2 million required for his medical costs through the age of 65. It also claims, in the

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trial on all issues is inapposite. See Br. Appellee at 41 (citing Williams v. Rene, 72 F.3d 1096, 1101-02 (3d Cir. 1995)). Williams "presented a unique circumstance" and awarded a new trial on all issues because it also concluded that the trial court had improperly dismissed a party, and "it would be inequitable to have [the dismissed party] bound by a negligence finding or damages assessment that a jury might not have rendered had it been aware that he was to be the sole, primarily-responsible defendant." Id. at 1101. Clearly, such circumstances are not present in this case.

alternative, that any award suggesting a finding that Enzo would have lived beyond the age of 60 is impermissible. Consequently, remittitur can easily be applied in this case by simply determining what the maximum permissible future medical costs would have been for Enzo at the age of 60 or 69. Given the baseline figures established by Mr. Johnson, there is every reason to believe that the Circuit Court could quickly and efficiently ensure that Enzo receives the damages he deserves while also ensuring the Hospital is not exposed to excess liability unsupported by evidence.

Accordingly, a new trial is unwarranted, as remittitur can serve to properly cure any alleged excessiveness in the jury's award for future medical costs.

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY REJECTING A PROPOSED ANNUITY THAT WAS IMPROPER AND LIKELY UNAVAILABLE AND UNWORKABLE.

The Hospital states that the trial court abused its discretion when rejecting its proposal to purchase an annuity to cover the jury's award. Br. Appellee at 47-50. The Hospital claims that annuitization of the verdict was necessary in this case, and suggests that failing to do so will result in an "unjust windfall" for Appellants. However, monetary compensation awarded for injuries like Enzo's should never be characterized as a "windfall," and the Hospital's argument is nearly identical to that rejected by this Court in Kent Villages, 104 Md. App. at 525-26.

Notably, during the hearing on the Hospital's New Trial Motion, it admitted that it was unsure as to whether its proposal was "going to work for Hopkins," and explained the plan was possible no longer viable at the time of the hearing. E. 804-05, p. 223:25-224:3, E. 810, p. 243:14-18. For those reasons alone, the Circuit Court could have properly rejected the Hospital's proposed annuity. Nevertheless, the Circuit Court considered the Hospital's proposal carefully and, after due consideration, determined that it lacked the flexibility necessary to ensure that Enzo's future medical needs will be met. However, even had the Circuit Court wanted to impose an annuity in this case, it would have been impossible because the jury reduced the verdict to present value without separately determining the gross amount of Enzo's future damages. Accordingly, this

Court should affirm the Circuit Court's denial of the Hospital's request to annuitize the jury's award.

A. The Circuit Court properly exercised its discretion in rejecting the Hospital's proposed annuity because it lacked sufficient flexibility to ensure Enzo's future needs would be met.

Like the defendant in Kent Village, the Hospital suggests that the jury's award in this case is "tailor-made" for annuitization and that rejection of its annuity would "render[] meaningless the statute and the public policy considerations [it embodies]." 104 Md. App. at 525, compare Br. Appellee at 50 ("If a trial court would not apply the annuity statute here, it is unlikely that it ever would.").

However, Kent Village quickly dispelled the notion that MD. CODE ANN., CTS. & JUD. PROC. § 11-109, mandates annuitization of the verdict in any case. Instead, the denial of a motion to annuitize a verdict is reviewable "only in terms or whether the court abused its discretion."[19] Consequently, Kent Village affirmed the Circuit Court's denial of the defendant's proposed annuity because (1) it made no provision for attorneys' fees, (2) the periodic payments were too inflexible, and (3) there was no guarantee that the source of the annuity, "however stable at present" would remain viable for 69 years into the future. Id. at 526; see Muenstermann by Muenstermann v. U.S., 787 F.Supp. 499 (D. Md. 1999).

As the Circuit Court recognized in this case, the Hospital's proposal could leave Enzo unable to afford necessary care or emergency treatment in the future. E. 818, p. 9:9-10:4. Enzo's injuries are catastrophic, and the cost of his medical care will continue to increase. The Circuit Court found that the Hospital's proposal to place $1 million in trust, "with the cost that can occur with a catastrophic type situation ... may very well not be enough." E. 818, p. 9:24-10:1. The Circuit Court was concerned, in such situations, Enzo could be forced to sell his annuity, which would be unacceptable. The inflexibility of the

[19] Although limited judicial gloss exists, Appellants suggest that the more deferential "abuse of discretion" standard applicable to decisions on motions for new trials should govern. The decision as to whether to place a jury's award in an annuity requires consideration of many facts not easily gleaned from a cold record; therefore, deferential review is appropriate. See Yaillouros, 203 Md. App. 574.

plan and its inability to accommodate Enzo's potential future needs "was certainly a proper consideration" for the Circuit Court. Kent Village, 104 Md. App. at 526.

Although the Hospital laments that it could have drafted a proposal that better addressed such concern, no firm plans were actually presented to the Circuit Court with such provisions. The Hospital's approach, which sought a ruling determining that annuitization was generally appropriate before an acceptable plan was constructed, made it impossible for the trial court to effectively balance the competing interests of the parties. There is no need to obtain a court order so that the issue of an annuity "can be explored." Parties, especially those as sophisticated as the Hospital, are equipped with resources and have ready access to the experts necessary to provide the court with firm offers rather than merely speculative possibilities.

In this case, the Circuit Court properly considered the plan presented, which was potentially unviable and possibly even unacceptable to the Hospital. After carefully considering the facts and factors, the Circuit Court exercised its discretion and denied relief.[20] The Hospital does not contend that the Circuit Court considered an improper factor, it merely contests the manner in which the Circuit Court exercised its discretion. Such an argument, however, is insufficient to overcome the deferential standard of review and, therefore, this Court should affirm.

B. Because the jury's verdict was reduced to present value, it is impossible to impose an annuity that comports with the statutory requirements

The Hospital's proposed annuity constitutes an impermissible double discount of the jury's present value award and would violate the Appellants' right to have a jury determine damages. The statute governing annuitization of malpractice verdicts permits annuitization only if the amount is "equal when paid to the amount of the future economic damages award." MD. CODE ANN., CTS. & JUD. PROC. § 11-109(c). This

[20] Additional factors also militate against imposing the Hospital's plan in this case. For instance, the use of a single annuity presents inherent risks regarding the plan's long-term viability in light of today's uncertain economic climate. Indeed, the reason an annuity can be purchased for less than a lump sum present value award is because an annuity relies on investments that are inherently riskier than those used for calculating present value. That risk, however, should not be borne by the innocent victim of the defendant's negligence.

requirement presents a clear and unavoidable obstacle, however, when the jury reduces its verdict to present value without also providing any suggestion as to its findings with respect to Enzo's gross future damages.

To avoid impermissibly discounting the jury's award, an annuity must be calculated using the plaintiff's gross future damages, not the present value of those damages as determined by the jury. See DANIEL W. HINDERT, JOSEPH J. DEHNER, & PATRICK J. HINDERT, STRUCTURED SETTLEMENTS AND PERIODIC PAYMENT JUDGMENTS, §12.04[7] (Release 38, 2005); See Holt v. Regents of the Univ. of Cal., 73 Cal. App. 4th 871, 878, 880 (1999) ("[T]he gross amount of future damages" is the "pivotal figure" when establishing an annuity schedule); Garhart v. Columbia/HealthONE, L.L.C., 168 P.3d 512 (Colo. App. 2007).

It is impossible, however, to reverse engineer the jury's findings of fact with respect to the gross future damages based only upon the known present value determination of the plaintiff's damages. Under circumstances similar to those here, a Colorado court rejected the defendant's attempt to assign error in the trial court's refusal to impose an annuity, finding it impossible to do so given the jury's failure to provide a calculation of gross future damages. Garhart, 168 P.3d. at 517-18. The Court explained:

> To determine the value of future damages from the present value of those damages presented in the jury's verdict, the trial court would have had to determine which discount rate the jury used to calculate the present value verdict from its findings of future damages. However, as noted, it is inappropriate for the trial court to delve into the process the jury used to arrive at its present value calculations.

Id. at 518.

Likewise, in this case, there is no way to ascertain the gross future value of Enzo's damages without invading the sanctity of the deliberative process. Although the Hospital claims that no "double discount" would occur under its plan because it used the pre-discounted costs contained in Enzo's life care plan and applied the discount rate suggested by Appellants' economist, it is impossible to determine whether those figures correspond with the gross future damages actually found by the jury. The jury was

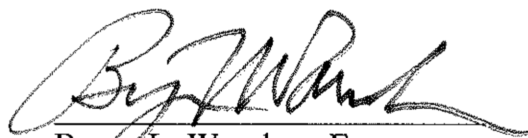
presented with multiple discount rates and provided with testimony indicating that Enzo's life care plan was prepared using average costs for treatment. Consequently, the jury may have properly determined that the gross future costs for Enzo's future medical care should be adjusted to account for the conservative approach taken in preparing his life care plan or when adjusting those costs for purposes of determining present value.

Here, as in Garhart, the Hospital seeks to fund an annuity at a substantially lower cost than the jury's award, which was already reduced to present value. When the verdict is stated in terms of present value alone, it is impossible to determine the proper discount rates or underlying assumptions found by the jury in an effort to extrapolate the gross value of Appellants' damages. To do so would invade the providence of the jury to determine the facts and impermissibly deny Appellants of rights secured by Art. 5 of the Md. Decl. of Rights. Accordingly, because it is impossible to construct an annuity that satisfies the statutory requirements, there can be no error in the denial of the Hospital's request.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court (1) declare the Cap on noneconomic damages applicable to medical malpractice actions unconstitutional as violative of Maryland Dec. Rights Art. 8 and reinstate the full award for non-economic damages and (2) affirm the verdict and judgment of the Circuit Court in all other respects.

Respectfully submitted,



Byron L. Warnken, Esq.
James M. Nichols, Esq.
WARNKEN, LLC, ATTORNEYS-AT-LAW
300 East Joppa Road, Suite 303
Towson, Maryland 21286-3004
(443) 921-1100
James.Nichols@Warnkenlaw.com

Gary Wais, Esq.
Keith D. Forman, Esq.
THE LAW OFFICES OF WAIS, VOGELSTEIN & ARFAA
1829 Reisterstown Road, Suite 425
Pikesville, Maryland 21208
(410) 998-3600

Attorneys for Appellants/Cross-Appellees

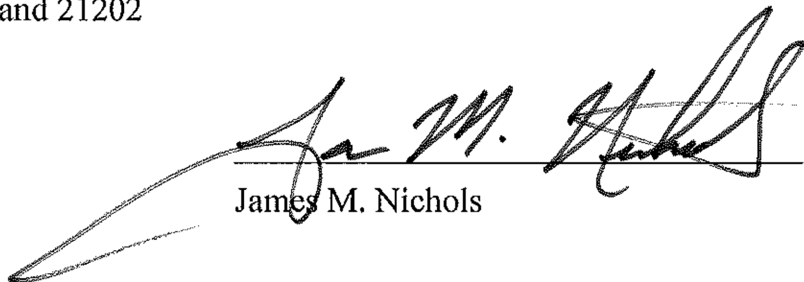
Statement as to Typeface: The proportionally spaced font used in this Reply Brief of Appellants / Brief of Cross-Appellees is Times New Roman and the type size is 13 point. Md. Rule 8-504(a)(9).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 2013, two copies of the foregoing Reply Brief of Appellants / Brief of Cross-Appellees were mailed, postage prepaid to:

Donald L. DeVries, Jr., Esquire
Janet A. Forero, Esquire
Meghan Yanacek, Esquire
Derek M. Stikeleather, Esquire
Goodell, DeVries, Leach & Dann, LLP
One South Street, 20th Floor
Baltimore, MD 21202

Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202



James M. Nichols