EDDIE PARKS, Plaintiff, v. TEMPLE UNIVERSITY HOSPITAL, INC. *et al.*, Defendant.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY No. 190605457 Control No. 23054189

ORDER ON DEFENDANTS' MOTION FOR POST-TRIAL RELIEF

AND NOW, this 25th day of August, 2023, upon consideration of the Motion of Defendants Temple University Hospital and Matthew Lorei, M.D. for Post-Trial Relief in the form of a Remittitur of the Verdict or an Order Granting a New Trial, and Plaintiff's Response thereto and following oral argument by the parties, it is hereby ORDERED and DECREED that Defendants' Motion is DENIED for the reasons set forth in the court's 50-page opinion attached hereto and filed herewith.

BY THE COURT:

Crumlish, III, J.

EDDIE PARKS, Plaintiff, v. TEMPLE UNIVERSITY HOSPITAL, INC. *et al.*, Defendant.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY No. 190605457 Control No. 23054189

OPINION ON DEFENDANTS' MOTION FOR POST-TRIAL RELIEF

I. Introduction

This case, which was assigned to the court for a jury trial, was and is about the case of Plaintiff, Eddie Parks. The claim arose out of a leg injury that Plaintiff suffered that took him to Defendant Temple University Hospital, Inc. ("TUH") on December 30th, 2018 and relates to the care that he received from TUH and Defendant Matthew Lorei, M.D. who was in charge of his treatment. Plaintiff asserts that, over the succeeding 35 days, he endured at least six painful, interventional open wound surgeries which finally cumulated in the surgical amputation of his leg. Plaintiff further claimed that after the surgeries, he continued to endure pain and suffering, humiliation, and the loss of life's pleasures. Plaintiff also claimed damages for future economic loss related to the care and treatment of his amputation leg and related complications for the remainder of his anticipated life span of 44 to 46 years.

After over five years of substantial litigation, the matter was called for trial before twelve jurors on May 4, 2023. On the beginning of the first day of trial, TUH and Dr. Lorei unconditionally stipulated to malpractice liability for Plaintiff's injuries, leaving as contested the extent of damages for trial before the jury. The jury received the case for deliberation after trial

and hearing the jointly agreed upon (and wholly unobjected to) points for charge under Pennsylvania law and obtaining the parties' jointly prepared and agreed upon verdict slip. The jury returned a unanimous verdict for the Plaintiff.

This case now comes before the court on Defendants' Motion for Post-Trial Relief seeking a remittitur of jury's award of damages for non-economic loss in the case following the trial resulting in a substantial monetary award. In the alternative, Defendants seek a new trial on the grounds (according to the evidence TUH presents, which is, in its moving pleading, stridently presented in the light most favorable to TUH) that the non-economic damages award is against the weight of the evidence. Defendants' motion further challenges the court's admission of specific exhibits into evidence that Defendants mischaracterize as "merely" demonstrative and the admission of which allegedly warrants a new trial. Finally, post hoc at the oral argument on the Defendants' Post-Trial Motion, Defendants contended that the unobjected to closing of Plaintiff's counsel improperly referred to TUH as a corporate entity and must have (despite the uncontested charge to the jury) led to an improper and emotional appeal to the jury that resulted in an unfairly punitive outcome.

Defendants make a two-pronged argument on remittitur. First, they argue that, under the traditional "shocks the conscience" standard, in their view, the verdict was excessive. Additionally, Defendants advance an argument under the MCARE Act. 40 P.S. §1303.501, *et seq.*, and in particular section 515 of that law, which, upon TUH's self-serving and opaque supporting declaration, purportedly requires the court to remit the award upon TUH's representation that it would have an impact on its ability to provide healthcare in the community. To support their contentions, Defendants present a lengthy (Defendants' Motion ¶¶6-24) recitation of Plaintiff's asserted (effectively miraculous) rebound from the unchallenged and, at

trial, conceded liability of Defendant Dr. Lorei in failing to diagnose and treat Plaintiff's leg injury, leading to successive surgeries during which the open wound on his leg was repeatedly debrided to incrementally remove rotting tissue until, ultimately, Plaintiff was forced to endure the resulting amputation of his dead and dying leg when Dr. Lorei cut off the lower portion by cutting through the knee.

Based upon Defendants' skewed view of the facts, the record overwhelmingly reveals an injury albeit of a permanent nature that, in a short period of time following the incident, Plaintiff had almost completely overcome, evidenced by his not using prescription pain medications, not (allegedly) needing rehabilitation or pain management services, alleged ability to ambulate freely, alleged lack of problems with balance or falls, ability to engage in daily activities such as driving and exercising, high level of independence, and taking of multiple vacations. Defendants ignore, trivialize, or entirely overlook any evidence (undisputed or otherwise) that credits Plaintiff's claim of past, present and future pain and suggest that Plaintiff now manages it post-amputation without the need for prescription medications by using cannabis. Based on this argument, which TUH purports to represent a balanced view of the record, Defendants (apparently stubbornly ignoring the well settled Pennsylvania jurisprudence that the record must be viewed in the light most favorable to the verdict winner) appear to suggest that Defendants' version of their version of the "best evidence" can be solely weighed when considering the excessiveness of a verdict.

As to the MCARE Act, Defendants posit several inscrutably projected disruptions to TUH's operations, understating TUH's own responsibility and control of its fiscal condition, miscalculations as to the risk assessment of this case that they claim require the court to substitute Defendants' view of "excessive and unreasonable" for the jury's thoughtful

assessment of the evidence,[1] allegedly derailed, after counsel's closing, by an excess of sympathy for the plaintiff. Relying upon the declaration of its former CFO, TUH hitches its wagon to the "medically fragile and economically challenged" patient population (Motion, ¶36) of its surrounding North Philadelphia community, without regard to its admitted much larger regional presence (Transcript of oral argument on Defendants' Motion for Post Trial Relief, p. 28, lines 7-10) and ongoing expansion into Chestnut Hill and the suburbs. Presumably, because the location of the flagship hospital is in a "federally designated Medically Underserved Area," (Motion, ¶43), TUH appears to suggest that any undefined large verdict triggers a presumption that the verdict will impact "availability or access to health care in the community." In Defendants' view, the MCARE Act requires a wholly separate inquiry for the court focused on an institution's alleged inability to pay the verdict (defined as having to take funds from operating expenses) and entitlement to alleged special consideration due to purported impediments in accessing to its services.

In its Post Trial Motion seeking an Evidentiary Hearing, in its brief in support of its MCARE argument and at oral argument, TUH contends that, once any healthcare provider raises an argument that a verdict is excessive, the law REQUIRES the court to conduct an extensive exhaustive evidentiary hearing. Defendants do not point to any language in the statute that expressly requires any specific type of unilateral construct of the record or process of consideration, much less a hearing. However, at the oral argument when TUH was unable to provide substantive support and fundamental details as to TUH's generalized arguments and assertions of an impact or to rely upon its own employee's carefully parsed "Declaration"

[1] Confoundingly, Defendants make this argument after a trial in which they stipulated to liability on the first day, presumably competently, thoughtfully accessing the risks on any adverse verdict on the specific known facts of the case and taking the necessary steps to reserve for the outcome.

(presumptively aided by counsel) or expand upon the substantively contended facts or even the wealth of public records for the contents of the declaration, counsel repeatedly referenced the self-fulfilling mantra "that's why an evidentiary hearing is necessary." Defendants do not suggest that their post-trial submissions satisfy any threshold, but rely upon the purposefully vague and generalized nature of their spin asserted facts to propel the parties on a court-conducted frolic and detour with innumerable expert and fact witnesses (presumably made previously available for discovery depositions to the Plaintiff and resulting obligatory pre hearing motion practice in order to ensure sufficient due process), credibility assessments and also obligatory and extensive factual and legal analysis, as if the entirety of the burden to prevent a medical malpractice crisis falls upon the shoulders of this court and the victim of their admitted catastrophic malpractice.

Furthermore, Defendants claim that the outcome of the trial was impacted by the admission into evidence of four previously admitted trial exhibits, which the court also provided to the jury in response to its written request to have the specifically enumerated exhibits provided to aid in their deliberations. Defendants objected to the submission during deliberations of the exhibits that were identified during the testimony of Plaintiff's experts, displayed to the jury in conjunction with the experts' testimony, and subject to vigorous cross examination by defense counsel. Defense counsel mischaracterized them as mere "aids," documents of "persuasion," setting forth testimonial foundations for the conclusions of Plaintiff's experts, contrasting their contents with "substantive exhibits." The court, in its discretion, admitted the documents into evidence. During the charging conference , the Defendants adamantly requested that the court adopt a verdict slip containing 44 lines, one for each year of life expectancy, requiring the jury to calculate an amount for future medical expenses for each year of Plaintiff's 44-46 year life

expectancy, asserting that it was "what MCARE requires" (N.T. 5/8/23, pp. 153-156) and would enable TUH to purchase an annuity. The court expressed concern with the request and informed Defendants' counsel that if Defendants insisted on that form a verdict slip, the court was likely to allow the jury to have the chart created by Plaintiff's expert, Mr. Verzilli, that calculated the expenses on an annualized basis. (*Id.*).

Defendants offered in evidence only medical records, the CVs of their experts, a smiling photograph of the Plaintiff, and a life expectancy table as exhibits the admission of which was secured at the close of Defendants' case.[2] Defendants' attorney made notes during his closing that purported to challenge the calculations of Plaintiffs' experts. However, defense counsel never developed or used notes during the testimony of any defense experts or offered the promised economist expert witness or had documentation as to medical costs or inflation figures identified or adopted by any defense witness (and chose to mark and move into the record). Defense counsel demeaningly called the calculations of Plaintiff's experts "exhibits of persuasion" (as opposed to admitted "evidence") and claimed that he made the "strategic decision" not to produce such documentation, a decision he claimed should not be a basis to "penalize" his client by making the Plaintiff's evidence available to the jury (allegedly creating a one-sided view of the case, that lacked the details from counsel's cross-examination). (N.T. 5/9/23, pp. 6-7). Nevertheless, defense counsel requested that his hand scribbled notes and mathematically swirling cyphering counsel concocted at a lunch break the jury did not request be included with Plaintiff's exhibits that the jury had requested in order to provide some

[2] Importantly, despite having sought and obtained the court's approval for these documents to be admitted into evidence, Defendants have not entered them into the record in accordance with the court's requirements that any trial exhibits be uploaded to the court's docket. As these documents are not in the court's record, they presumably cannot form a basis for any arguments as to the evidence that Defendants are making herein.

counterbalance to the Plaintiff's evidence (despite that the notes were not in evidence and not the result of any recognized expertise[3]). Defendants take the position that the documents presented the jury with a one-sided view of the case and thereby prejudiced the Defendants and unfairly emphasized the Plaintiff's claims for damages.[4]

Finally, for the first time at post trial oral argument, Defendants complained that the (un objected to) remarks of Plaintiff's counsel during closing improperly prejudiced the jury insofar as counsel identified Temple as a large corporation and suggested that it was not easy for a "little guy" like Mr. Parks to go up against Temple and also asked the jury to tell Defendants that "they are not above the law" (N.T. 5/8/23, p. 208, lines 22-23) and to provide Mr. Parks with a full and thorough accounting for everything he had been through. Plaintiff's closing also criticized the defense for hyper focusing on various aspects of future medical costs, characterizing the strategy as "nickel and diming" and reminded the jury that those costs were "just the tip of the iceberg," in light of the lengthy hospitalization with multiple surgeries and the extent the evidence of pain and suffering of the Plaintiff, discounting that by a photograph of him smiling on social media or him taking a vacation to the shore or Las Vegas was evidence that he was recovered.[5] No single sentence of the closing was the subject of an objection at trial during the closing or at its

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[3] The court queried counsel as to the basis for admitting counsel's notations, asking whether it was "within a reasonable degree of attorney certainty?" (N.T. 5/9/23, p. 15, lines 2-8).

[4] It would be hard not to emphasize Plaintiff's claims for damages since it was a damage only case.

[5] It is clear to the court based upon the pre-trial motions in limine, the objections at trial and the arguments in the post-trial motions that Defendants, in conceding the entire liability portion of the case (liability and causation) presumed that strategy would become a means to prevent the Plaintiff from showing photographs of his injuries or talking about the course of his treatment, such that the version of the story available to the jury was a sanitized one. However, the court rejected the objections to "injury evidence" insofar as it was highly relevant to the level of pain and suffering of this Plaintiff, i.e. the main part of the iceberg, as described by Plaintiff's counsel.

conclusion. Defendants attempt an end-run fog around the failure to timely object by attempting to link the arguments of counsel to an allegedly inflated, excessive and unfair verdict, encompassed by their remittitur argument.

In light of these arguments, which primarily implicate the court's discretion and its assessment of the sufficiency of all the evidence introduced at trial, any consideration of Defendants' arguments must start with a thorough review of the evidence presented to the jury at trial and a consideration of the weight to be given the evidence—specifically, is the court assessing the trial record in accordance with how Defendants' present it in their submissions (and, more importantly, do Defendants present this evidence fairly and not in a manner that one-sidedly favors their position as the verdict loser)?

In this damages-only case, the evidence presented to the jury was laser-focused on the extent of harm to the plaintiff, with the Defendants admitting 100% negligence as the cause of his harm. The parties had and offered to the jury evidence diametrically opposed their views of the future impact of the admitted malpractice on the Plaintiff's need for future medical care and non-economic losses. The decision for the jury required a strong yes or no and necessarily implicated an absolute rejection of one side's presentation. Thus, the court looks first to the trial record to determine whether, without regard to sympathy or emotion, it supports the jury's verdict.

II. The Trial[6]

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[6] The court deems it necessary to review the trial record in detail since Defendants' myopic motion cites at length ONLY to evidence favorable to Defendants' position and contends that, based upon that "favorable to the defense evidence," the verdict was shocking and against the weight of the evidence. Such a position ignores the requirement that, after a jury verdict, the court must consider the evidence in the light most favorable to the verdict winner (unless there is no evidence to support the prevailing party's claims). Defendants appear to proceed on the notion that as healthcare providers invoking the MCARE Act, declaring the verdict excessive

The court cannot assess Defendants' arguments without delineating the evidence presented at trial and evaluating its impact on the jury. The court notes at the outset that Defendants elected to proceed to trial after conceding liability for Dr. Lorei's negligence as a principal of TUH. From the moment the openings began, Plaintiff had a fact based story to tell the jury – a story about the person that Mr. Parks was before the malpractice – young, energetic, hard-working, with dreams of turning his cooking hobby into a profession and a business[7] and the life he was left with after his amputation. Counsel described in detail Mr. Parks' life, the recent news of his girlfriend's pregnancy and his hopes for starting a family. The jury also learned about his lengthy stay at TUH, during which his leg was left in a cut-open state in an effort to allow the tissue to heal and how he endured six surgeries to remove damaged tissue affected by the Defendant's failure to timely diagnose his condition.[8]

In contrast, Defendants elected to confine their opening to more recent history, informing the jury of all that Mr. Parks had overcome and suggesting that his efforts should minimize his recovery. Defendants essentially had "no story" or depended on the erasure of Plaintiff's evidence and the stipulation as to lability to tell the jury. Their introduction focused on after-the-

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and asserting a hardship to the provision of services in having to satisfy the verdict, they are exempt from traditional post-trial legal standards and can denigrate the Plaintiff's case to the point of shifting the weight of the evidence entirely in their favor.

[7] Defendants may suggest (and counsel did object during the opening) that employment prospects and work income were not in issue in the case because Plaintiff was not making a claim for lost income. However, in this court's view, Mr. Parks' work history and his aspirations for his future employment were relevant to his mental pain and suffering, loss of life pleasures in terms of the person Plaintiff had been and the new reality that he had to grapple with after the amputation. Again, the court was not willing to sanitize the case to prevent the jury from hearing about the full measure of loss that Plaintiff had suffered.

[8] Again, Defendants may suggest that the details of the malpractice were not in issue in the case due to Defendants' concession to liability. While Defendants may have made the strategic decision not to contest liability to shield the jury from these details, they were clearly an important foundation to Plaintiff's claim for past pain and suffering based upon the course of his treatment at TUH.

fact experts whose paid opinions were intended to undermine what the jury would see and hear from the Plaintiff and his family members. Defendants' only thematic arguments were to ask the jury to limit its consideration to what constituted fair and adequate compensation for the Plaintiff's injury, inferring that their experts had the more dispassionate and convincing conclusions because they had based their conclusions on a review of Mr. Parks' treating physiatrist from Penn, Dr. Bradley Tucker, who had been managing his care for several years and who had allegedly rated him as highly functional.

Right out of the gate, the jury was presented with a highly compelling story on the Plaintiff's side and a hyper-technical medical critique from the Defendants, with no one witness from TUH providing a face to the defense.

Plaintiff initially introduced Eddie Parks' story through the testimony of his father, who related his observations of his son over the days and weeks of his hospital stay, detailing the suffering he endured from numerous procedures and the change that came over Mr. Parks as he went from a care-free, energetic young person to a melancholy, dejected loner, who withdrew from his family, testimony that Defendants did not challenge. (N.T. 5/4/23, pp.42-56). The jury saw a compelling picture of a close-knit family, a son who grew up with two hands-on parents, who followed in his mother's footsteps as a healthcare worker. The jury heard firsthand what the father observed of his son's treatment and suffering at the hospital. The jury could assess the extent of the impact upon the Plaintiff from one of his closest family members and determine from his demeanor and the evidence surrounding the treatment whether the witness' observations were fair and credible.

Next, the jury heard the testimony of Plaintiff's expert physiatrist, Dr. Mary Ann Micknevich, a physician who had been working with amputees since her residency back in the

1980's, a doctor who is an amputee clinic chief for the Pennsylvania Department of Vocational Medicine, who, in the clinic, treats approximately 150 amputees a month, many of whom are injured war veterans. (N.T. 5/4/23, pp. 64-65). Dr. Micknevich both examined Mr. Parks and reviewed his extensive medical records. (*Id.*, p. 73, lines 16-25). Dr. Micknevich extensively reviewed for the jury the course of Mr. Parks' medical treatment during his hospitalization. Using a photograph to illustrate his condition, the doctor described the infected tissue and the multiple surgeries to remove the tissue in an attempt to save Plaintiff's leg (*Id.*, pp. 85-86) and the other medical aspects of his care, including the necessity of high levels of pain medications he needed and the fevers, confusion, agitation and delusions that the infection in his leg was causing him, to the point where he needed to be restrained in the hospital bed. (*Id.*, pp. 86-87). Dr. Micknevich also described for the jury the type of amputation procedure that he underwent, involving cutting through Mr. Parks' knee, using medical illustrations. (*Id.*, pp. 88-91). Finally, the doctor reviewed, and the jury saw photographic evidence of, the details of the final condition of Plaintiff's amputation (*Id.*, pp. 91-93) and heard about the difficulty and mechanics of a prosthetic replacement for that type of amputation and the disfigurement inherent in the location of the amputation and how the prosthesis can be formed. (*Id.*, pp. 93-94).

In addition to describing the procedures Plaintiff underwent during his hospitalization, Dr. Micknevich went on to testify about the conditions that he continues to suffer from, such as phantom leg pain, sleep disorder, complications resulting from the amputation, gait dysfunction, socket issues, limited endurance, falls and heterotropic dysfunction (N.T., 5/4/23, pp. 93-100, 122-132, 132-136, 137-140, 141-142, 143-144). She explained how these conditions related to the amputation and how they manifested in Plaintiff's daily life. She opined that Mr. Parks had been dealing with these issues since the amputation and would continue to deal with them going

forward AND that they would become more significant as he aged and his skeletal parts wear down and he loses strength. (*Id.*, pp. 144-145).

Finally, Dr. Michnevich's testimony concluded with her reviewing the future medical care that she believed Mr. Parks would require. (N.T. 5/4/23, pp. 148-162). This testimony included her describing in detail the use of a prosthesis, the type of device used by Plaintiff, how the device is constructed and needs updating or replacement (and the costs), and the maintenance required on the device and its component parts. (*Id.*, pp. 163-181). At one point during her testimony, Plaintiff went behind a screen to remove his prosthesis, and Dr. Micknevich used his device to explain its parts and how the device functions to the jury. While the jury did not directly observe the removal and replacement, it was able to appreciate how long the process took for Plaintiff. Dr. Michknevich also had Plaintiff ambulate for the jury so that she could explain the issues with gait dysfunction and how the device is not an ideal replacement for the amputated limb.

Defendants had the full opportunity for aggressive and pointed cross-examination. (N.T. 5/4/23, pp. 203-240; N.T. 5/5/23, pp. 3-17). Counsel challenged Dr. Micknevich's direct testimony with notations contained in the medical records of treating doctors and other professionals involved in his care, notations purporting to suggest that his condition was not as painful or as bad as the doctor had portrayed and establishing that Mr. Parks was a "highly functioning" amputee because he had on occasion gone to the gym, ridden a stationary bike, taken a vacation or been able to drive a car. In fact, it is these purported inroads from the cross examination that Defendants largely cite in their post-trial motion as if they represented the undisputed facts derived from the trial. However, on redirect examination, Dr. Micknevich explained that the matters pointed out on cross examination by defense counsel did not change

her expert opinion or assessment of Mr. Parks' condition, ongoing challenges, or the medical care she opined would be necessary in the future. (N.T. 5/5/23, p. 18, lines 4-6)[9].

Plaintiff also presented a Life Care Planner, Alex Karras, and an economic expert, Andrew Verzilli, to explain to the jury the extent and cost of care that Mr. Parks would need in the future, based on the recommendations in the opinion and testimony of Dr. Micknevich. Mr. Karras took the doctor's recommendations as to necessary future medical treatment and calculated what that would cost in current dollars. Mr. Verzilli then took those numbers and, since the costs needed to be projected into the future over Plaintiff's lengthy life expectancy, calculated the inflationary factors that would affect the cost of that care into the future and presented the costs in a chart with the numbers calculated on an annualized basis. (N.T. 5/5/23, p. 84, lines 10-20).

Defendants at trail sought to undermine the testimony of these two experts based upon a substantial disagreement with the Plaintiff's claim that he would need ongoing medical care. Specifically, Defendants focused on the immediate 2-3 years following the amputation (including years during the pandemic), looking at the number of doctor visitors, the absence of physical therapy treatments and the claimed stability provided by the prescribed prosthesis to make the argument that this narrow window of an example of Plaintiff's care fully determined

[9] Many of Defendants' cross-examination points—presumed admissions obtained from Dr. Micknevich that Plaintiff had only limited visits to his doctors and for physical therapy, did not take pain medications and was considered a highly functioning amputee—appear in Defendants' moving papers as (seemingly uncontroverted) "facts" that conclusively demonstrate that the verdict was against the weight of the evidence. This position ignores that the jury heard other testimony from Dr. Micknevich explaining the course of his treatment and recovery, testimony it clearly found more compelling than a few cross-examination admissions, particularly when it had available to it the lay testimony of Plaintiff, the mother of his child, his mother, and his father, describing his life, and it observed their demeanor and Mr. Parks' physical appearance and movements.

his future needs and established a very reduced amount for future medical costs. To bolster that position and raise doubts as to the credibility of Plaintiff's expert's conclusions initially challenged on cross-examination, Defendants called as their principal witness at the trial and their medical expert, Frank Sarlo, M.D., who is a board-certified physiatrist and specialist in physical medicine and rehabilitation (the same specialty as Dr. Micknevich). However, Dr. Sarlo testified that he has been employed full time at a center specializing in spine care since 1997 (with occasional treatment of amputees). (N.T. 5/8/23, pp. 8-10). Dr. Sarlo testified that Plaintiff had become "fully functional" and could live independently after obtaining his first prosthesis and that his functionality had achieved a high level upon obtaining the microprocessor prosthesis. On cross-examination, Plaintiff's counsel explored the parameters of what Dr. Sarlo's conclusion entailed, which led to the witness testifying that, in his mind, Plaintiff could return to work and perform the duties of a **fireman, a police officer, a bike messenger or a bartender, all full-time jobs requiring almost constant physical agility, athleticism and, at times, intense physical activity**. (N.T. 5/8/23, pp. 44-45). This assessment was the foundation of Dr. Sarlo's opinion that Plaintiff's future medical needs were a fraction of the amount set forth in the opinions of Plaintiff's experts and his conclusion that Plaintiff was "highly functional." Furthermore, this conclusion hobbled the opinion of Defendants' life care expert, who, relying upon fallacious, non-credible, if not preposterous assumptions of Dr. Sarlo, concluded that Plaintiff's future medical needs, in Defendants' estimation, were a fraction of those put forth by Plaintiff's experts, at $1,288,544 in present dollars (*Id.*, p. 136, lines 13-17). Defendants did not produce an economic expert or otherwise challenge the conclusions, methodology and scientific calculations of the numbers by Mr. Verzilli.

The entirety of Defendants' myopic trial evidence and arguments to the jury was constrained within the testimony of these two expert witnesses, who focused their primary consideration of Plaintiff's damages to essentially a two-year period—the two years immediately after the amputation, and waxed poetic about the great strides Plaintiff had made in his recovery and about the lack of medical care he had utilized to make those strides. Parenthetically, the Defendants had retained and promised the jury a trial witness an defense economic expert and who had produced an expert report from this witness but inexplicably elected not to call the witness at trial. As a further basis for assessing the Defendants' case, the jury also observed, throughout the trial, the demeanor of Dr. Lorei, who sat with defense counsel and whose repeatedly animated gestures and facial expressions of disapproval conveyed a considerable non-verbal impression on the jury.

While Plaintiff's counsel had informed the jury at the outset that medical expenses were "only the tip of the iceberg," Defendants hyper-focused on the "tip," strategically did not even cross-examine three of the Plaintiff's key fact witnesses on the impact of his pain and suffering and of the amputation on his life that they had witnessed, and only indirectly addressed his non-economic losses through questions about pain medications and the functionality of his prosthesis, imploring the jury to disregard the Plaintiff's horrific injuries and clear evidence of pain and suffering—all resulting from the admitted medical malpractice of TUH. Defendants designed their approach to misdirect the evidence about their negligence and the events of the hospitalization, surgeries, and devastating impact on Plaintiff that liability evidence would entail, leaving a sterilized fiction of post-hospital doctor visits and dollars and cents for medical devices as the only basis for the jury to determine damages.

III. Deliberations and Verdict

The court sent the case to the jury after holding a charging conference and conferring with the parties on the contents of the verdict slip, followed by closing arguments and the rendering of the charge. During the court's conference, the parties reached agreement on the content of the charge, to reflect the previous stipulation to liability for negligence on the part of Dr. Lorei and liability as a principal of TUH. However, in the course of the conference, Defendants raised an objection to the Plaintiff's proposed query on the verdict slip for future medical expenses: specifically, Plaintiff had proposed that the jury return a single number representing such damages. Defendants requested that the court adopt a verdict slip that required the jury to provide a number as to the medical costs for every year of the 44-46 years in Plaintiff's life expectancy. Defendants claimed that such a format was a requirement of the MCARE Act (without citation to any authority). The court expressed serious reservations as to Defendants' proposal insofar as it would require the jury to guess or speculate to supply the annualized amounts and opined that the court would consider allowing the jury access to the chart prepared by Mr. Verzilli, which had been admitted into evidence and contained the information in that format. (N.T. 5/8/23, pp. 154-156, 192-199).

Not surprisingly, after the jury began deliberating, they notified the court, in writing, of several questions, including a request for documentation related to future medical costs, including the chart from Mr. Verzilli's report that the court mentioned in the colloquy with counsel over the 44 lines in the verdict slip. The jury requested that it be allowed to bring specific exhibits into their deliberations. Defendants objected to allowing the jury such access. However, the necessity for assistance was precipitated by Defendants' insistence on a verdict slip that required annual numbers in 44 increments for future medical costs. Defendants' life care expert did not calculate the expenses over any time on *any annual basis* for the Plaintiff's life

expectancy and did not create any documentation that could be admitted as an exhibit that provided calculations from the Defendants' perspective for future medical costs, nor was an expert proffered by Defendants to quantify the projected future economic costs mathematically or scientifically for Plaintiff's care. While TUH's defense characterized this lack of admitted evidence as a "strategic decision," the court determined that matter arose as a purposeful decision of the Defendants' to compel or frustrate the jury into agreeing with the defense to find no or little, if any, (or force erroneous calculation of) future economic damages.

Ultimately, the jury returned an articulate verdict in which it provided a number for future medical expenses on each of the 44 lines on the verdict slip clearly based upon the evidence they accepted as credible during the trial. The jury also determined that Plaintiff had suffered an $11.2 million past non-economic loss and had a future non-economic loss of $8.8 million. It is the amount of the non-economic loss that Defendants challenge in their remittitur motion.

IV. The Weight of the Evidence

Defendants argue at the outset of their motion for post-trial relief that the verdict is against the weight of the evidence. Having set forth the trial record in detail, the court cannot eschew the inescapable conclusion that the evidence at trial weighs heavily in favor of the Plaintiff. Having observed all of the witnesses and considering the foundation for the Defendants' theory of the case (i.e. that the two years immediately following the amputation contained everything the jury needed to know about what the future medical costs would be, wherein, according to Dr. Salvo, Mr. Parks was fully recovered and able to hold down the same challenging occupations such as firefighter as an able-bodied person), the court must conclude that Defendants' theory and strategy were not convincing to the jury and did not provide any

effective counterbalance to Plaintiff's evidence or to the catastrophic impact the malpractice had of the future of Eddie Parks. The jury's determination and assessment of credibility of the evidence was overwhelmingly supported by extensive evidence from the Plaintiff's case, and whether the court considered the large award for pain and suffering an amount that the court would have awarded under the same circumstances is not the question here.

Contrary to the prismatic picture painted in Defendants' post-trial motion, the evidence was not credibly or overwhelmingly supportive of their self-serving aperture of a miraculous recovery and pain-free and "good as new" future for the Plaintiff. The jury was free to and did fully consider the testimony of Dr. Micknevich that Mr. Parks would suffer from complications of the amputation throughout his life and those problems would worsen with age. Additionally, the jury also clearly credited the evidence and determine that the injuries, surgeries, and amputation resulting the malpractice that happened to Mr. Parks during his hospital stay were painful, horrific, and so extreme that the substantial part of the non-economic award was reasonable and justified to compensate him for the over month-long multiple surgeries and the amputation of his leg. The award for future non-economic loss, as compensation for the ongoing effects over a 44-year lifespan is equally, substantially if not overwhelmingly supported by the evidence, in line with the jury's determination of the extent of the injury to Plaintiff's physical and mental well-being, his humiliation and the disfigurement affecting his lengthy life expectancy.

Having assessed the evidence at the trial, the court must, nevertheless, consider whether there is any evidence to support Defendants' claim of excessiveness under either the traditional standard for remittitur or under the MCARE Act.

V. Remittitur

Defendants proceed from the proposition that a verdict for non-economic damages of this magnitude is essentially, by definition, excessive. Defendants proceed to review several points that counsel sought to make on cross-examination that purport to establish all of the activities that Mr. Parks could allegedly perform, taking bits and pieces of references in medical records of instances of a rehabilitative stationary bike ride, a vacation, a stated ability to randomly engage in a minimum daily activity and convert those instances into permanent routine. This evidence allegedly shows "physical ability, lack of significant pain and ability to independently enjoy many aspects of his life." (Defendants' Brief at p. 6). The jury certainly had the option to consider those points and determine whether the balance weighed for or against the Plaintiff, particularly when considered with the other evidence in the case and in particular with the testimony of Plaintiff and his witnesses about his challenges and limitations, the jury's observations in the courtroom and their common sense about how a severe amputation such as the one in question would impact a person's life. However, Defendants only present evidence favoring their minimization of the Plaintiff's case, a palpable, calculated strategy and attitude toward the Plaintiff that the jury was free to accept, but clearly declined. On that basis, Defendants label the jury's award of damages for non-economic loss "not within reasonable bounds" and "obviously reflect[ive of] 'sympathy for the plight of the plaintiff.'" (Defendants' Brief at p. 6).

Defendants do not contend that there was insufficient credible evidence from which the jury could decide as to whether the Plaintiff experienced pain and suffering from this catastrophic injury. Rather, the Defendants ask the court to consider <u>their</u> view of the evidence and from that perspective evaluate the amount of the recovery, substituting Defendants' sel interested judgment for that of the jury. Defendants compare the amount of the for noneconomic

loss to the purchase price for TUH's latest acquisition, Chestnut Hill Hospital, suggesting that the Plaintiff's life without half a leg cannot equate with purchase price for a hospital and its assets (a somewhat tone-deaf and incongruous argument). Defendants also invite the court to consider a remittitur considering the reduction of damages to a gun shot victim in *Haines v. Raven Arms*, 640 A.2d 367, 370 (Pa. 1994), where the 14-year-old victim saw an $8 million award reduced to $5 million for the major memory loss, loss of cognitive ability and physical deficiencies (trouble walking and using her arms) that she suffered.

The court declines to frame the issue based upon the comparators (cost of a hospital business expansion venture and the specific evidence considered by the court and the jury and defenses in a 1994 gunshot wound case) that the Defendants advance. Rather, the question for the court is whether, **on this record and its specific facts**, where the Defendants' principal expert, Dr. Salvo, made dubious and offensive prognostications about Mr. Parks' theoretical future recovery and occupational prospects (with one leg and a prosthesis, he could fight fires, climb fire ladders and run into a burning building and rescue victims, or perform all the duties and survive the myriad risks and physical tasks of police officers and chase criminals through the streets, or sufficiently manage as a messenger bicyclist in city traffic, or carry kegs up a ladder), Defendants have made the requisite showing to overturn the jury's award. The court examines the entirety of the record in this case of admitted liability to identify the credible, counterbalancing evidence that would suggest a rogue jury.

Our courts have provided clear precedential guidance in this regard. In *Tindall v. Friedman*, 970 A.2d 1159, 1177 (Pa. Super. 2009), the court, quoting from the decision in *Gbur v. Golio*, 932 A.2d 203, 212 (Pa. Super. 2007) stated: "We begin with the premise that large verdicts are not necessarily excessive verdicts. Each case is unique and dependent on its own

special circumstances and a court should apply only those factors which it finds to be relevant in determining whether or not the verdict is excessive."

In *Tong-Summerford v. Abington Mem. Hosp.*, 190 A.3d 631 (Pa. Super. 2018), a case where the Defendants directly inflicted the injury to their patient, Defendants sought to demean and minimize the Plaintiff and the degree of harm suffered in support of an argument for remittitur, as in the instant case. They criticized the family members and argued that the Plaintiff's age (88) and other medical conditions devalued any basis for a substantial non-economic award. Defendants/Appellants characterized the family's case (the court quoting from Defendants' brief) as follows:

> In this case, [Appellee] did not submit evidence of economic loss at all. The jury's award was based solely upon a noneconomic award. [Mr. Summerford] was 88 years old at the time of the alleged injury, had suffered multiple comorbidities including dementia, syncope, hypertension, pulmonary insufficiency, congestive heart failure, coronary artery disease, and other maladies prior to his admission to Abington Hospital, and importantly[ ] [h]e suffered a [c]ode the day prior to the alleged injury which was not related to the alleged injury, which reduced significantly his chances of mortality. ...
>
> [And further argued]
>
> A careful review of [Appellee's] testimony reveals that [Appellee] produced very little evidence of the value of loss value of the decedent's life to the family by reason of the death of Mr. Summerford. Mr. Summerford lived in a nursing home in Pennsylvania. [Appellee] lived in California or Georgia for most of her adult life, while her father lived in Norristown, PA. She visited her father whenever she could get to Pennsylvania. She testified that she spoke to him on the telephone several times each week; however, there are notes in Mr. Summerford's nursing home records, asked about at trial, about the lack of family involvement and interest in his care. This is hardly the type of evidence to substantiate such a plainly excessive and exhorbitant [sic] award to [Appellee]....

190 A.3d at 649-50. Despite this argued lack of evidence underpinning the substantial award for non-economic loss, the Superior Court upheld the trial court's denial of remittitur, noting that:

"judicial reduction of a jury award is appropriate only when the award is plainly excessive and exorbitant. The question is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption." 190 A.3d at 650, *citing Renna v. Schadt*, 54 A.3d 658, 671 (Pa. Super. 2012); *Tillery v. Children's Hosp. of Philadelphia*, 156 A.3d 1233, 1246-47 (Pa. Super. 2017). The decision was within the sound discretion of the trial court.

Pennsylvania courts have consistently concluded that the determination of the amount of non-economic damages that a person is to be awarded, including for past and future pain and suffering, is primarily a jury question. *Gunn v. Grossman*, 748 A.2d 1235, 1240 (Pa. Super. 2000). The Superior Court has expressed the remittitur standard in a medical malpractice practice case generally as follows:

> The Court is not warranted in setting aside, reducing, or modifying verdicts for personal injuries unless unfairness, mistake, partiality, prejudice, or corruption is shown, or the damages appear to be grossly exorbitant. The verdict must be clearly and immoderately excessive to justify the granting of a new trial. The amount must not only be greater than that which the court would have awarded, but so excessive as to offend the conscience and judgment of the Court. *Goldberg ex rel. Goldberg v. Isdaner*, 780 A.2d 654, 662, (Pa.Super.2001) (citation omitted).

Vogelsberger v. Magee-Women's Hosp. of UPMC Health System, 903 A.2d 540, 552 (Pa. Super. 2006).

The court is reluctant to engage in comparisons with other cases or all the fact specific bases in which the losing party sought a remittitur. However, it is worth nothing that the verdict in this case for non-economic loss is not an "outlier" when compared to other verdicts in this jurisdiction. *See Tate v. University of Penn. Hospital*, No. 130901595 ($44 million award, with

$17 million for pain and suffering); *Hennessey v. Robertson* (2012 Verdict, Phila. Co., lower leg amputation: $15 million for pain and suffering); *Jones v. Lion* (2008 Verdict, Phila. Co, lower leg amputation: $26.25 Million total).

Having listened to all the evidence adduced before the jury at trial and having observed the reaction of the jury to the fulsome expert testimony and compelling testimony of Plaintiff's father, mother, girlfriend, and that of Plaintiff, having fully considered the strategically constrained and narrow evidence presentation of the defense and the troubling nonverbal conduct by Dr. Lorei in the presence of the jury and the court, along with the paucity of exculpatory evidence for the defense, this court cannot say that the verdict was the product of unfairness, mistake, partiality, prejudice, or corruption. To the contrary, the jury, in its attentiveness during the trial and its poignant questions during deliberations and in the diligence with which it completed the verdict slip, demonstrated a sober deliberation of all the facts and demonstrable desire for accuracy that was exemplary. Moreover, and importantly, the unobjected to court's jury charge and completion of the agreed upon verdict slip demonstrate, contrary to the defense arguments, that the jury followed the court's instructions under the law to faithfully, fully, and honorably discharge its duties and oath.

The court cannot say the result was the product of sympathy or a desire to punish. Accordingly, under the governing law and the overwhelming evidence presented at trial, the award here lies within the uncertain limits of fair and reasonable compensation and was well within the jury's proper discretion. The denial of the Defendants' motion for remittitur under the general standard for remittitur in these circumstances is well within this court's proper discretion.

VI. Remittitur under the MCARE Law

The court must next consider what the legislature intended and expressly directed when it included a remittitur provision in the MCARE Act, 40 Pa. C.S.A. §1303.515. This section of the statute provides:

> **(a) General rule.--**In any case in which a defendant health care provider challenges a verdict on grounds of excessiveness, the trial court shall, in deciding a motion for remittitur, consider evidence of the impact, if any, upon availability or access to health care in the community if the defendant health care provider is required to satisfy the verdict rendered by the jury.
> **(b) Factors and evidence.--**A trial court denying a motion for remittitur shall specifically set forth the factors and evidence it considered with respect to the impact of the verdict upon availability or access to health care in the community.
> **(c) Abuse of discretion.--**An appellate court reviewing a lower court's denial of remittitur may find an abuse of discretion if evidence of the impact of paying the verdict upon availability and access to health care in the community has not been adequately considered by the lower court.

TUH invokes these provisions to claim an additional basis for its right to a remittitur in the jury's award for non-economic loss damages, suggesting that the court is required to reduce this award upon TUH's (or for that matter *any healthcare provider's*) mere assertion that the award is excessive and based upon its unchallenged claim of an impact upon its services. TUH summarizes the issue before the court as follows:

> This excessive verdict is an unsustainable economic hit to TUH's ability to provide quality care to the population—in an area where medical care is desperately needed. Without hyperbole, TUH's absence and impairment from delivering medical care to its medically fragile and economically challenged patient population will have significant ramifications in Philadelphia. This is undisputed.

(Defendants' Motion for Post-Trial Relief ¶¶35, 36. Defendant's Brief in Support of the Motion for Post-Trial Relief, p. 6). This "argument" makes a series of quasi-factual claims, without reference to documentation or declarations (and despite the unrestrained opportunity to include

these facts in the declaration of its former CFO or to supplement the record prior to the oral argument), the foundation for which is dubious and the relevance of which is questionable.

First, TUH begins its argument with the assertion that the record supports the purportedly self-evident conclusion that the verdict is excessive. Defendants suggest throughout their motion that a large verdict, if against a healthcare provider, is, of necessity, excessive (presumably because of the importance to the community of healthcare access). As the court has previously considered in detail, such a presumption is not a foregone conclusion in this case where, at the trial, Defendants stipulated to liability and strategically did not present sufficient credible evidence to address the Plaintiff's case on pain and suffering. Their case focused primarily on future medical expenses[10], and their expert witness' opinion as to Plaintiff's alleged "recovery" and vocational abilities to engage in firefighting, policing, etc. were so extreme and lacking in credibility that the jury was justified in completely disregarding the testimony, which is appears to have done.

A. TUH's Alleged "Insurance Coverage" Representations

Next, the statement implicates rhetorical overbreadth when Defendants claim an "unsustainable economic hit to TUH's ability to provide quality care to the population," the meaning of which is not readily apparent. At the outset, calling the verdict an unsustainable

[10] Defense counsel's opening was entirely devoted to a discussion of Mr. Parks' present condition and the claim for future medical expenses. He did not address his treatment in the hospital or allude to pain and suffering, except to implore the jury to look at the matter dispassionately, repeatedly invoking the term "fair and adequate compensation." Defendants did not cross-examine any of the Plaintiff's fact witnesses, except, briefly, the Plaintiff himself and appeared to abandon defending against the claim for non-economic loss, as if, by ignoring it, it would be "out of sight, out of mind" of the jury, or, its absence in the record of the defense would support an "against the weight of the evidence" argument. To the contrary, the tactic signaled to the jury, almost from the outset, that Defendants did not take this portion of the case with the degree of seriousness that it perhaps merited.

economic hit raises a serious question concerning the conduct and representations of TUH in this action. Specifically, on the eve of trial, TUH offered to admit liability, provided a comprehensive outline of Defendants' "insurance coverage" (and an explicit threat of the punitive appeal of any verdict), and requested that Plaintiff drop his claims against other defendants, including the emergency room defendants, **representing** as follows:

> As you can see, **Dr. Lorei has $85,000,000 of insurance to cover any verdict in this case**. The amount of insurance available to satisfy any verdict will not, in any way, be related to the number of defendants that you are able to hold liable in this case. If you decide to proceed against the emergency room defendants, they will, of course, point to Dr. Lorei and the orthopedic service of the basis that, as of 10:03 p.m., they were deferring to their [Dr. Lorei and the orthopedic service] judgment with regard to lower extremity management. ...Assuming this defense is unpersuasive and you manage to hold one or more of the ER providers liable, that will not, in any way, enhance your ability to collect on the judgment[11] and could delay payment since there are always appealable issues with regard to the liability portion of a medical malpractice case.

(emphasis added). Letter from Defendants' trial counsel, E. Chandler Hosmer, III, to Plaintiff's counsel Jordan Strokovsky, dated April 24, 2023, attached to this opinion as Exhibit A.

While the court agrees that any admitted liability is likely to impact a defendant's fiscal status in some way, either as a consideration in a prospective insurance renewal or to the extent that it exceeds or is payable from the insured's own funds and thus represents an "economic hit," it cannot conclude from this record, in light of the aforesaid communication that such an

[11] This is not a fair representation since, under the MCARE Act that Defendants are now using to seek a reduction in their liability, every provider is required to have a primary layer of coverage of $500,000 and has an MCARE layer of $500,000. So, for each defendant that TUH requested be dismissed, Plaintiff was giving up $1,000,000 in insurance coverage that would not be encompassed by the MCARE remittitur argument that Defendants are making here. The veiled threat to tie up the case in appeals if the ER physicians were not dismissed, coupled with a representation that the Defendant doctor had $85,000,000 of insurance coverage strikes this court as troubling and disingenuous in light of the current claim of inability to pay (seemingly arising out of inconvenience or adjustment of spending priorities).

outcome is either "unsustainable" or would undermine TUH's ongoing operations or impair its assets. The suggestion that the court should sacrifice the recovery of a catastrophically injured plaintiff on the basis of vaguely asserted and largely undefined future service to the community is seriously concerning, particularly in light of TUH's pretrial representations in the referenced letter.

Further, as to commercial insurance coverage, TUH does not claim or acknowledge that its own malpractice history of claims and risk factors is a factor causing it higher renewal costs or whether it is other healthcare providers in the region driving market increases in insurance. It is also unclear what role THU's own misjudgment might play in risk assessment or accounting reserve practices including the "self-insured" portion of the coverage (called a "buffer") rendering the "insurance" representation illusory as any liability however small would apparently imperil TUH's "operating budget." TUH offers to present the testimony of its Director of Risk Services to offer elucidation on the role "outsize" verdicts (apparently against other providers prior to the instant case) has played on the difficulty of obtaining excess insurance coverage.

Defendants' position on the global impact of large verdicts attempts to implore the court to accept its arguments based upon policy concerns. At oral argument, Defendants expressed concern "about the tort system," pointing out the recent number of "articles and concern … about high verdicts, verdicts that seem to go beyond fair compensation in tort cases." Defendants argued that "if this continues, apart from the issue raised in the MCARE statute, … there are going to be further calls for legislative action, possible constitutional amendments." (N.T. 8/9/23, p. 13, lines 7-16). Defendants suggested that "this is where the judiciary has a role to play in preserving this system." (*Id.*, lines 15-16).

Luring a court whose only concern is the weight of the evidence and the integrity of the jury's verdict into a debate about the tort system and legislative policy does not strike the court as a worthwhile use of the court's expertise or proper role. In fact, the court questioned whether counsel was "suggesting that I'm a substitute for the legislature." (N.T. 8/9/23, p. 13, lines 17-19). The court rejects these arguments and the suggestion that it is uniquely positioned to rescue the tort system or to fulfill the legislature's undisclosed objective of remittitur on the ability of TUH to secure affordable insurance coverage, or what constitutes affordability under the circumstances. The issue here is the consideration of the verdict in light of the evidence and whether TUH has met what appears to be the legislature's high bar to show an impact on access to healthcare, something TUH could articulate only in a jargonistic explosion of speculative possibilities.

This additional and speculative representation in Defendants' Motion for Post-Trial Relief bears close examination and analysis: Defendants assert that: "TUH's absence and impairment from delivering medical care to its medically fragile and economically challenged patient population will have significant ramifications in Philadelphia." Are Defendants suggesting that the verdict will render TUH "absent … from delivering medical care"? Defendants contend "this is undisputed," leaving the court to wonder what "this" is—is it the ramification of TUH boarding up its facilities? Is TUH identifying medical care that it will no longer be delivering? And how does this square with a representation to Plaintiff that the Defendants, who admit liability for the malpractice that cost Mr. Parks his leg, have "insurance to cover <u>any</u> verdict in this case." (emphasis added). Or, is it TUH's position that merely because it alleges that it delivers medical care to a "medically fragile and economically

challenged patient population," it is excused from presenting concrete evidence of an actual impact that arises from this verdict?

At the very outset of this application, the court had a concern arising out of the factual representations of TUH as to full available insurance coverage of $85 million. TUH never really addressed the matter head on, either in written submissions or at oral argument. The court can either credit TUH's representations in its letter to Plaintiff's counsel as true and a binding representation as to full coverage in the matter (and as an inducement to drop additional defendants and avoid the threat of punitive appeals) or consider it purposefully mendacious. Defendants post-trial now have appeared to renege on the assurance that TUH had coverage of up to $85 million. Defendants make opaque reference to a "buffer layer" as "operating expenses," but their sophistry does not resolve for the court the important inconsistency between their explicit representations of "coverage" and the position Defendants now take with respect to MCARE remittitur—they appear to be saying that there is more than sufficient coverage unless they, post hoc, find the verdict unacceptable, however less the recovery is than the identified $85 million in coverage. Defendants' post-trial claim of unavailable or excessively priced malpractice coverage as a basis to relieve them from the verdict despite these earlier representations seems to suggest that any verdict beyond the first million in coverage makes the remaining $84 million of insurance coverage as illusory and renders TUH's representations of "coverage" not asserted in good faith. It is regrettable that TUH's threat of appellate litigation in the letter now portends that it was not a threat but rather a chosen strategic component of TUH's defense.

C. MCARE Remittitur Standard

The statutory language presents an opportunity for a provider to avoid serious financial burden directly resulting from what it considers an excessive verdict. Defendants assert that statute represents a "legislative standard for remittitur." However, the language does not delineate "standards." It does, however, express a policy that lays the question of excess within the confines of judicial determination and potentially within historic remittitur jurisprudence, with the requirement that any disposition address a provider's claimed adverse impact. The procedure for addressing the matter and the weight to give the factors presented appear to be left to the courts. The statute does not even infer, as Defendants insisted, that the court conduct an evidentiary hearing. It gives no hint as to the degree of impact that is legislatively necessary to warrant the court's intervention (outside the traditional standards of remittitur) in the outcome of a jury determination.

Initially, after the adoption of MCARE, the Pennsylvania Supreme Court adopted a number of rules in order to effectuate the legislative intent which, as expressed in the Preliminary Provisions and as stated in *Hospitals and Healthsystem Ass'n of Pa. v. Com.*, 621 Pa. 260, 286, 77 A.3d 587, 603 (Pa. 2013) is to ensure that Pennsylvania citizens have access to the care they need by incentivizing health care professionals to stay in Pennsylvania, or move to Pennsylvania, and fulfill those needs. The enabling rules included a venue provision and an addition to the section of the rules related to Professional Liability Actions (under Rule 1042) addressing damages, Rule 1042.72. In the court's view, the purpose of the rule was to take the legislative directive for a remittitur process under section 515 and outline a procedure

for fulfilling that directive.[12] Rule 1042.72 as promulgated by our Supreme Court previously provided:

> (a) In a medical professional liability action in which the trier of fact has made separate findings specifying the amount of noneconomic loss, any defendant may include in a motion for post-trial relief under Rule 227.1 the ground that the damage award for noneconomic loss is excessive.
>
> (b) A damage award is excessive if it deviates substantially from what could be reasonable compensation. In deciding whether the award deviates substantially from what could be considered reasonable compensation, the court shall consider (1) the evidence supporting the plaintiff's claim; (2) factors that should have been taken into account in making the award; and (3) whether the damage award, when assessed against the evidentiary record, strongly suggests that the trier of fact was influenced by passion or prejudice.

According to the Superior Court in *Vogelsberger v. Magee-Women's Hosp. of UPMC,* 903 A.2d 540, 552 (Pa. Super. 2006) (which was presented with a remittitur argument while rule 1042.72 was in effect, but in which defendant did not make an economic impact argument), the rule relaxed the standard for proving that a verdict for non-economic damages was excessive, from the general remittitur standard. The rule proposed a three-step analysis for determining excessiveness in a med mal case but provided no guidance to a court as to how to assess a claim of adverse impact on availability of or accessibility to medical services.

However, and importantly, the relaxed remittitur analysis of Rule 1042.72 was, without explanation, rescinded by the Supreme Court effective October 17, 2012. In addition, two other components of the statutory reforms in the MCARE legislation have been eliminated. The MCARE Act initially contained a statute of repose, which provided that "no cause of action

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[12] Defendants' Motion and Brief make the argument that section 515 constitutes a "legislative standard for remittitur." This court finds the statutory provision devoid of standards or even a process of how to consider an application or to weigh the factors. It simply allows the court discretion, as long as its decision discusses the impacts interposed by a healthcare provider.

asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort or breach of contract." 40 Pa. C.S.A. §1303.513(a). However, in *Yanakos v. UPMC*, 655 Pa. 615, 218 A.3d 1214 (Pa. 2019), the Plaintiffs argued that the legislative provision deprived a medical malpractice victim of a right to file a civil action (by abrogating the discovery rule for personal injury claims in the common law) and, accordingly, should be subject to exacting constitutional scrutiny.

The Supreme Court in *Yanakos* concluded that the MCARE law curtailed an important constitutional right to a remedy, 218 A.3d at 1222, and, while the MCARE Act advanced an important governmental interest in controlling the rising cost of medical malpractice premiums, the enactment was not substantially related to those goals, 218 A.3d at 1223. Neither the legislative history nor the submissions of the parties shed any light on how a seven-year statute contributed to the goal of providing actuarial predictability to insurers. In the absence of a sufficient legislative justification, the Court held the provision unconstitutional. 218 A.3d at 1226-27.

Additionally, the Supreme Court adopted a venue rule that purported to control medical malpractice verdicts by requiring a plaintiff to bring a cause of action in the county in which the medical malpractice occurred and not just in a county where the defendant engaged in business and could be sued. The court has recently rescinded the venue provision.

The decision in *Yanakos* coupled with the rescission of two court rules specific to the MCARE Act suggests that the Court is leaving these matters to the discretion of the trial court, without the need for these MCARE-specific provisions. The rescission of Rule 1042.72 is particularly germane to the court's disposition of Defendants' Motion for Post-Trial Relief herein. "Reasonable compensation" as that term was understood in the rule is no longer the

benchmark for considering an MCARE remittitur motion. There must be a showing of runaway jury/shocks the conscience under a traditional remittitur assessment.[13]

This court has already determined that Defendants' application falls far short of the required foundation to obtain remittitur. Looking at the entirety of the record, how Defendants elected to try the case, their difficulties of persuasion in light of conceded liability, and their failure to introduce any counterbalancing evidence addressing pain and suffering, the court cannot conclude that the jury acted out of improper motivation or prejudice. Nor can the court say that there was any evidence weighing against the verdict of the jury. Thus, the principal requisite for an MCARE remittitur inquiry – excessiveness—has not been demonstrated here.

D. Impact Evidence

Even if another court looking at this court's determination would conclude that the excessiveness standard for a healthcare provider under MCARE is less than for an ordinary remittitur argument, the court cannot conclude that Defendants have demonstrated the requisite impact on accessibility and availability (what this court refers to in shorthand as "impact evidence") to justify an MCARE remittitur. The statute references evidence of the general proposition of an "impact, if any, upon availability or access to health care in the community if the defendant health care provider is required to satisfy the verdict rendered by the jury."

Since the statute is considered largely a mechanism to address an insurance crisis and to ensure availability of coverage to protect providers while compensating victims, the purpose of an impact evidence inquiry is not immediately obvious. Was the legislature's concern with

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[13] Even if this court were to engage in the analysis outlined in former Rule 1042.72, it would conclude that there is overwhelming evidence supporting Plaintiff's claims for noneconomic loss, that the jury considered all of the relevant factors in assessing damages, and the award, assessed against the record, is not suggestive of a decision motivated by passion or prejudice.

potential insolvency necessitating a closure restricting access entirely? Or was one excessive verdict implicating a budgetary re-shuffle and a delay in purchasing updated equipment sufficient? Is TUH's evidence suggestive of a complete shutdown, deferral of a competitive expansion or an inhibition too aggressive to capture a more lucrative payor reimbursement population or at worst is it more akin to a temporary inconvenience or an increased cost for its excess coverage?

Nowhere in the submissions does TUH claim that the amount of the verdict is so impactful that it will cease operations, even in a single program. TUH obliquely hints at a delay in purchasing equipment for radiation oncology and some vague delay in its conversion of the former Cancer Centers of America property into a facility for Women and Children's Medicine. However, TUH does not claim the verdict will curtail its radiation oncology services, require it to decline treatment to any patients or table the new facility. In fact, it appears that some or more parts of the new facility have actually opened (and had been opened prior to TUH submitting its Declaration suggesting an impact on completion of the facility) (https://www.phillyvoice.com/maternal-infant-mortality-temple-health-women-families-campus/).

Defendants' submissions as to impact are purposefully nebulous and, as noted earlier, seem to assume that hitching TUH's wagon to its surrounding population and that population's economic disadvantage is sufficient to show impact. The Declaration of TUH's former CFO mentions "post-COVID pressures" and increasing costs, indicating that TUH had suffered a loss of $54 million in the first nine months of its fiscal years (Declaration ¶16) and had to reduce its capital expenditures budget. (*Id.*, ¶17).

Despite the inferred precariousness of TUH's finances, its CFO admits that it spent $16.8 million of its funds this year to purchase 60% of Chestnut Hill Hospital and purchased the former Cancer Treatment Center facility for $12 million in 2021 (and has invested millions in converting it to the Women and Children's facility) (*Id.*, ¶¶20, 22). Only days before the hearing, TUH announced plans to spend $8 million to update the emergency room at Jeanes Hospital in expectation of increased traffic due to the closure of Jefferson Health's Elkins Park ER. (- https://www.bizjournals.com/philadelphia/news/2023/08/07/jeanes-temple-health-emergency-room-visits-8m.html).

In the most recent publicly published figures (which does not include the current fiscal year reflecting the claimed $54 million loss) on TUH's finances in the PH-4 Report which details the financial condition of all hospitals in the state, TUH in FY 2022 had net patient revenue of $1.9 **billion** and total operating expenses of $1,843,000,000, an increase of 16.54% over its three-year average. Thus, while TUH may have had a loss in the current FY, it is hardly on the verge of insolvency. It is an almost $2 billion revenue generator, not the type of financially-impaired facility on the precipace that the legislature was likely seeking to protect in the remittitur provision. Furthermore, in late July 2023, Moody's upgraded TUH's rating to stable and confirmed a bond rating of BBB+, a strong indication that the institution's financial position is strong.

The apparently calculated undeveloped or factually unsupported "declaration" suggestions of impact and a suggested dire consequence of the verdict do not square with TUH's spending, its financial rating, or the scope of its operations in the region. Moreover, nowhere in its submissions does TUH provide any information as to its assets, assets which might be available to satisfy the verdict. At the hearing, the court sought to have TUH factually develop a

record beyond generalities, but responses were equally uninformative because Defendants "assumed" that they could create a new paradigm of post-trial litigation and then, in the fullness of time and at the expense of the successful verdict winner, secure an evidentiary hearing (trial) to present their evidence, experts and witnesses and repeatedly responded to the request for foundational facts for the Court to rule upon in deciding TUH's post-trial motion with "that's why we need a hearing." The court does not read the MCARE Act remittitur provision to impose full blown litigation practice post-trial to ferret out the facts. In this court's view, a party seeking to invoke this remedy must meet a threshold and provide a sufficient offer of proof and that means demonstrating the type of impact on healthcare that would rise to the level of a legislative concern. Having to take money from operating funds or delay spending on a future program is not the type of access crisis that the court conceives the legislature envisioned, or that would justify legislative intervention into a verdict in favor of a catastrophically injured party rendered by a jury.

With the statutory focus on the citizenry, the court is compelled to consider the impact evidence only insofar as citizens will be deprived of services, not that a provider will be inconvenienced or required to forego an expansion. To the extent that TUH bemoans fiscal impact at this outcome, perhaps it should examine its risk assessments and spending. In seeking to cloak itself in the nobility of its service to the regional community, TUH cannot credibly claim that it is expending so much money on charity care that this amount will sink that program. https://www.inquirer.com/health/charity-care-philadelphia-area-hospitals-tax-exemptions-20230620.html. While it may serve a community in part largely on public assistance or the elderly, TUH is not ,as with others, serving that cohort uncompensated.

The court concludes that the strategically undeveloped record supporting Defendants' post-trial submissions and full consideration of all of its proffered evidence does not meet a threshold to justify protracted post-trial proceedings that would unduly delay compensation to the verdict winner, Plaintiff. The court finds no basis in the law to require a hearing and no basis on the record before the court to engage in any deeper inquiry into impact evidence. The evidence at hand presented by TUH to support its motion for post-trial relief and Declaration simply does not meet a minimum threshold to show a sufficient impact to warrant considering a remittitur in the amount of the Plaintiff's recovery based upon the asserted impact here.

As to the difficulty for Defendants to pay a verdict of this magnitude (despite the admission that Defendants had more than sufficient insurance coverage), Defendants will certainly may have to make some choices about resource allocation (presuming that they blindly failed to treat this matter as the serious case that the court would expect). However, upon deciding to concede liability without making a serious offer[14] to resolve the matter, it was incumbent upon TUH to set a realistic reserve or to present a persuasive defense, neither of which it did. **MCARE cannot be construed as an incentive or invitation to the court to correct for litigation strategy decisions on the part of a provider or its counsel or to excuse witness performance leaving a provider exposed.** If such were the case, **every verdict** in a if any and also serious case would give rise to a motion for remittitur under this provision because every self-evaluated substantial verdict will have some impact on a provider's projected

[14] The April 24, 2023 letter mentions an offer of $3 million. However, the evidence at trial was that Plaintiff's future medical costs amounted to almost double that. While Defendants expert advanced an amount unadjusted for inflation of well over $1 million, which was likely to equate to an almost $3 million adjusted, the offer essentially provided the Plaintiff with nothing for pain and suffering, which should have merited a serious offer given the course of Mr. Parks' hospitalization and repeated surgeries. The fact that TUH seriously undervalued the case is not a basis for the court to grant remittitur.

business and pending priorities, and every losing health care provider defendant would invoke this procedure to obtain post trial litigation and judicial relief from the jury's verdict. Defendants seem to suggest just such a role for this statutory provision, with a potential for regularity that could convert this provision of the MCARE Act into a legislative cap on damages.

E. Constitutional Concerns

The application here poses an additional concern—the extent to which the MCARE remittitur provisions operates as an unconstitutional cap on damages, of particular concern to this court as it perceives the procedure available in section 515, dependent only upon a defendant's **assertion** that the verdict is excessive, becoming a routine argument in every provider's request for post-trial relief. The more providers advance this argument as a routine right to a remedy, the more likely that courts will be asked to serve as super-jurors in the name of community access. The rare use of this provision to date confirms to the court that the legislature intended, and litigants understood, that this remedy was designed for institutions in **dire** circumstances, not the provider facing a routine large verdict that may require shuffling of priorities. TUH seems to suggest otherwise, something the court finds a dangerous and potentially unconstitutional outcome to the extent TUH and other similarly situated asset-rich and high-revenue litigants place reliance on the courts to rescind a jury's decision and cap the Plaintiff's recovery.

The Supreme Court in *Yanakos* considered whether the adoption of a statute of repose of seven years for medical malpractice claims (with minor exceptions) violated the

constitutional provision on open courts to provide a person with a remedy "by due course of law." Art. I, §11. Because the provision could potentially deprive an injured party of a cause of action that was not discoverable within the statutory time frame, the Court concluded that it was unconstitutional. In *Yanakos*, the statute of repose operated to "close the doors" of the courthouse to causes of action that were heretofore available to a party, depriving that person of the right to a remedy. However, the providers and insurers touted the provision as bringing "certainty" and stability to insurance for and the disposition of medical malpractice claims.

In this case, the remittitur provision does not deprive injured parties of their day in court, as was asserted in *Yanakos*. Plaintiffs are free to litigate their claims to a verdict, and the courthouse doors are not closed. However, what is potentially worse than having no cause of action is having an outcome that is the product of a fully litigated proceeding largely taken away from an injured party after obtaining recovery, for no reason other than the defendant's assertion of an adverse economic impact. Presumably the impediment to an unconstitutional taking of the injured party's compensation is the threshold requirement that the court find the verdict excessive.

The MCARE provision on remittitur does not require a finding of excessive verdict as a predicate to making a claim for MCARE remittitur. Rather, it allows the losing party, a healthcare provider, to declare a verdict excessive and impose upon the court and the prevailing party a post-trial inquiry that could reduce the recovery after the fact potentially because the impact upon the provider affects programs it is able to offer or facilities it might have to close. Thus, the financial condition of the Defendant could give rise to an obligation by the court to reduce the plaintiff's recovery, creating a cap. This outcome is possible because the statute

contains no standards for the assessment of what is excessive or the determination of how substantial an impact is required to secure remittitur.

Section 18 of Article III of the Pennsylvania Constitution is the enabling provision for the Workers Compensation system. Beyond that, it expressly provides that "in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property." To the extent that the MCARE remittitur provision is, as written, a limitation on the amount that an injured party can recover or in its operation results in the taking of a recovery away from an injured party after the trial, thus capping the recovery, the statute would potentially give rise to constitutional problems.

Yanakos, the rescission of Rule 1042.72 and the Supreme Court's recission of the special venue provision for medical malpractice cases in Rule all suggest a cognizance of the concerns that this court apprehends regarding constitutionality of the remittitur provision. The Supreme Court has already determined that the reduction of the time allowed within which to bring suit did not further the goals of MCARE or serve the interests of injured plaintiffs. The Supreme Court is acknowledging that the legislature's goals cannot exceed the rights of litigants to open courts or a jury's legitimate determination.

This court is not faced with a decision of constitutional proportions herein because it disagrees with Defendants that this is a matter where the verdict is not supported by the evidence and disagrees that the weight of that evidence is in favor of Defendants' position. To the contrary, Plaintiffs presented more than enough evidence to support a substantial award for pain and suffering, and with no counterbalancing evidence from the defense, the determination of the fair value of compensation for non-economic loss was the jury's decision. Furthermore, in the face of weak evidence of an impact and overwhelming evidence that TUH is financially

stable with billions in revenue, the court is not required to wade into the merits of an MCARE remittitur analysis. However, in accordance with the statutory language, the court will discuss, and state the significance (or not) of the factors Defendants claim warrant remittitur.

F. Factors considered in Denying MCARE Remittitur

The parties presented the court with a fulsome record to consider the question of a remittitur under the MCARE Act. Defendants provided the court with its CFO's 27-paragraph declaration, with 46 pages of exhibits attached. Defendants' motion included the entire trial transcript and an 11-page brief and was later accompanied by a motion for an evidentiary hearing (with another brief). Only a week after the docketing of Defendants' Motion, Plaintiff filed a response, which attached 19 exhibits, consisting of 166 pages. Defendants denigrated the response in their memorandum in support of an evidentiary hearing, characterizing Plaintiff's opposition as "ignoring the sworn testimony of Mr. Barcellona" and "relying entirely on news articles," and further arguing that "allegations in motions and responses thereto do not constitute evidence[15] such that the trial court need not have conducted an evidentiary hearing on the disputed issues of fact." (Defendants' Brief in Support of Miscellaneous Motion for an Evidentiary Hearing, p. 5). Moreover, the initial oral argument on the post-trial motion was not scheduled for more than a month after Plaintiff's response was filed and Defendants certainly had the opportunity to supplement the record.

[15] The court disagrees with Defendants' characterization of the record, in their view consisting of an "air-tight" Declaration and Plaintiff's lesser collection of inapplicable hearsay reports from news media. The court finds that much of the information in the news articles is a result of press releases from TUH or economic data provided by it. Because Defendants' claimed impact is so vague and involves matters that are the subject of these news articles, the court deems it appropriate to consider such sources as an underpinning to evaluating the claimed financial hardships Defendants advance. Furthermore, some of the statistics that the court has considered such as the information in the PH-4 and in Moody's derives from publicly available financial information originating in Defendants' public filings.

Defendants' position presumes that a section 515 consideration contemplates a full-blown post-trial litigation procedure. However, the statute merely requires the court to "set forth" the evidence and factors *it considered* in denying remittitur. According to Defendants in their motion for an evidentiary hearing, the attested-to facts requiring remittitur were: TUH's posting of an operating loss for the first nine month of the current fiscal year; TUH having to reduce capital expenditures by over a third this year; TUH having to "take additional money out of its operating budget to pay a portion of the verdict," affecting the ability to purchase upgrades to its equipment; TUH already (prior to this verdict) having trouble obtaining adequate insurance coverage; and potential insurance difficulties that could jeopardize projects like the plan to open the women's hospital. None of these claimed "impacts" were asserted to the be result of this verdict – TUH had already experienced the loss and reduced capital expenditures. Furthermore, nowhere did TUH make clear "how much" of its operating budget would need to cover the verdict and according to its counsel April 24, 2023 letter, its "buffer" insurance provided to its physicians was always an "insurance layer" coming from operating expenses and thus a part of TUH's overall "cost of doing business" and its ordinary method of funding liabilities. Calling it a "factor" justifying court intervention and usurpation of the jury's purview is simply not a basis for finding the type of extraordinary financial impact that this legislation was designed to encompass.

The court simply cannot construe any assertions TUH makes related to insurance difficulties as a dispositive factor in a consideration of grounds for remittitur. TUH purposefully induced Plaintiff to dismiss at least three defendants, three parties having primary coverage each of $1 million on the representation that Dr. Lorei had more than adequate coverage of up to $85 million here—more than triple the verdict in this case. Moreover, the

Barcellona declaration is populated with "ifs" and "mays" while conceding that TUH has gone on a bit of a spending spree in the purchase of Chestnut Hill Hospital, the conversion of the Cancer Treatment Center facility and the allocation of $8 million to upgrade ER facilities at Jeanes. TUH's vague predictions of dire difficulties with insurance coverage against the backdrop of TUH's overall revenues, unstated assets, and overall financial stability (as indicated by bond ratings and PH-4 statistics) are coupled with equally vague assertions of how and what access to its patients will be affected by having to pay this verdict. When the lack of convincing evidence is coupled with TUH's assurances to Plaintiff that it had more than adequate coverage for any verdict likely to be awarded against Dr. Lorei, this court cannot agree that the criteria for an MCARE remittitur based upon impact to access has been met. It would be an abuse of this court's discretion to overturn the award of a jury verdict supported by the weight of the evidence or to substitute an amount the Defendants deem fair for the jury's assessment of damages based upon Defendants' wholly inconclusive evidence of impact.

VII. Admission of Demonstrative Evidence

Plaintiff's well-prepared case included exhibits used by his experts to explain and encapsulate their testimony. Dr. Micknevich testified as to the medical conditions she related to the negligent treatment that Mr. Parks received at TUH (e.g., the debridement surgeries, the amputation, the pain arising from those procedures and the immediate problems that Mr. Parks endured such as difficulty sleeping and falls) and prepared a list of the conditions as an exhibit to assist in her testimony. (P-43). Dr. Micknevich further assembled a list of five potential (or actual) complications that arise from living with the amputation (e.g., skin conditions, overuse injuries to other parts of the body, weight loss). (P-45). Both the lifecare planner (Alex Karras) and the economic expert (Andrew Verzilli) used documents in their testimony that

outlined their conclusions with respect to future medical costs. Mr. Karras assembled a list of the costs for various procedures and medical devices that Plaintiff would need for his lifetime and Mr. Verzilli took Mr. Karras' conclusions and projected those costs into the future, adjusting for inflation and calculating the costs on an annualized basis for Mr. Parks' life expectancy (44 years). (P-51 and P-55).

At the close of Plaintiff's case, Plaintiff moved these documents into evidence. At no time during their use in the testimony did Defendants interpose an objection to the jury seeing the documents or to the experts using them in their testimony. Defendants did not assert that they were inauthentic, unreliable, or inadmissible hearsay. However, at the close of Plaintiff's case, Defendants asserted that the exhibits were merely "aids for the jury's eyes" (despite that they were marked as exhibits and on Plaintiff's exhibit list pre-trial) and should not be admitted.

Defendants had ample opportunity to cross-examine these witnesses and to dispute their conclusions through Defendants' own experts. Defendants elected not to provide any visual aids in their experts' testimony. Defendants could have presented their experts with the exhibits in question and alternatively had the exhibits marked up to reflect their experts' disagreement with the information contained in them. Alternatively, counsel could have created his own writing with his experts' numbers (if any) while they testified, had the defense experts adopt the writing as part of their testimony, marked the document as an exhibit and sought to introduce it at the close of the Defendants' evidence. Defendants elected not to

provide the jury with documentation memorializing their experts' numeric assessments of medical costs or even their disagreement with Plaintiff's cost documents.[16]

In their post-trial motion, Defendants argue that the court's admission of these documents constituted error warranting a new trial. Now, Defendants complain that these were not substantive evidence (inferring that only substantive evidence can be formally admitted). Additionally, Defendants make an argument that was not raised at trial—that the probative value of these documents is outweighed by the prejudice to the Defendants, apparently because they consider the evidence "one-sided," and placing "undue emphasis on the testimony of Plaintiff's experts." However, at trial, counsel for Defendants conceded that he elected not to use demonstrative exhibits with his experts and asked the court not to penalize his clients for a strategy decision.

One would hope that evidence that a party seeks to introduce in their case in chief is evidence that favors that party's side of the case. It is unlikely that a party would move to admit evidence solely favoring their adversary. The court finds the Defendants' arguments vapid and almost nonsensical, particularly where, as here, the documents were displayed at length to the jury and used by and/or available to defense counsel in cross-examination or for use in his own experts' direct testimony. The charts prepared by the lifecare planner and economic experts contained numbers – representing the costs of care Mr. Parks was projected to need in the future, hardly a controversial or inherently prejudicial topic. Dr. Micknevich's lists were of medical conditions, again matters typically connected with Plaintiff's medical status and subject to attack in treatises and the competing opinions of the defense experts.

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[16] Defense counsel could have easily taken the admitted exhibits in question, presented them to his experts during their testimony and had his experts mark-up their own cost calculations right on the Plaintiff's records and remarked them as defense exhibits, but chose not to.

Defendants do not cite a single case in support of their position nor any case that classifies this evidence as a mere "aid" or inadmissible because it is "persuasive." The court considers the documents created by and used in the testimony of Plaintiff's experts as "demonstrative evidence. It is well-established that: "[d]emonstrative evidence is 'tendered for the purpose of rendering other evidence more comprehensible for the trier of fact.' 2 McCormick on Evidence § 212 (5th ed. 1999). As in the admission of other evidence, a trial court may admit demonstrative evidence whose relevance outweighs any potential prejudicial effect." *Kopytin v. Aschinger*, 947 A.2d 739, 747 (Pa. Super. 2008) (some citations and quotation marks omitted). *See also*, *Black v. Ronnermann*, 2017 WL 2829314 (Pa. Super. June 30, 2017); *Gulla v. Chyatte*, 2016 WL 81763 (Pa. Super. Jan. 6, 2016). Regarding demonstrative evidence such as the documents in question, the comment to Pennsylvania Rule of Evidence 901 provides: "Demonstrative evidence such as photographs, motion pictures, diagrams and models must be authenticated by evidence sufficient to support a finding that the demonstrative evidence fairly and accurately represents that which it purports to depict." Pa.R.E. 901, Comment. Here, the documents in question, particularly the charts relating to medical costs, made the experts' conclusions more understandable to the jury and were sufficiently confirmed and authenticated through the experts' testimony, with ample opportunity for cross-examination and challenge in the testimony of defense experts. Moreover, Defendants do not contend that the documents were not confirmed or authenticated during the experts' testimony.

Our Supreme Court has recognized that demonstrative evidence is an important component in expert testimony. In *Com v. Serge*, 586 Pa. 671, 896 A.2d 1170 (Pa. 2006), the Court upheld the use of a computer animation created to assist the prosecution's forensic expert

in illustrating how a murder took place. The Court stated: "An expert witness may offer testimony other than opinions. Pa.R.E. 702 provides that an expert witness may testify 'in the form of an opinion **or otherwise.**' (Emphasis added). An important function of an expert witness is to educate the jury on a subject about which the witness has specialized knowledge but the jury does not. *See Binder on Pennsylvania Evidence,* Third Ed., § 7.02, p. 314 (Pa.Bar.Inst. 2003). To help perform the function of educating a jury, an expert witness may use various forms of demonstrative evidence." 586 Pa. at 683, 896 A.2d at 1177. The Court further notes: "Pa.R.E. 702 permits expert testimony if it 'will assist the trier of fact to understand the evidence or to determine a fact in issue[.]' Such expert testimony is not limited to that which is purely verbal; rather, it includes pertinent illustrative adjuncts that help explain the testimony of one or more expert witnesses." 586 Pa. at 683-84, 896 A.2d at 1178.

The court concludes on the contents of the record, the weak basis for objection asserted by defense counsel at trial (and the concessions that the documents "aided" the jury), and the conclusion that the demonstrative exhibits were "pertinent illustrative adjuncts" to the testimony of the Plaintiffs' experts, the admission of P-43, P-45, P-51 and P-55 was not error. The claim of prejudice here arises not from the court's admission of the documents (the jury had already been exposed to the evidence as part of the testimony) but, rather, due to Defendants' election not to provide the jury with competing documentation, as a matter of strategy. The court is not required to grant a new trial as a means to provide Defendants with an opportunity to try out a better strategy.

VIII. Providing Documents to the Jury

The court's admission of the foregoing documents over Defendants' "mere aid" objection forms the basis for Defendants' further contention that the court committed reversible

error when it allowed the jury access to these exhibits during its deliberations. A brief repeat of the proceedings related to the formulation of the verdict slip and the colloquy over its format is required here. Initially, Plaintiff requested a verdict slip containing a single line for the jury to insert a number for future medical expenses. The court directed the parties to meet and confer regarding the contents of the jury charge and the form of the verdict slip.

At the hearing to discuss these matters following the conclusion of the Defendants' case, defense counsel indicated that Defendants were requesting a verdict slip setting forth the cost of future medical expenses with one line for every year of Plaintiff's life expectancy, or 44 lines for the jury to complete, calculating those expenses in 44 increments. Defendants insisted that this was "required by MCARE" and related to the purchase of an annuity. The court expressed concern that the Defendants' request represented a monumental task for the jury and sought information with the type of precision that the jury had unlikely prepared for in listening to the evidence. The court initially indicated that it was reluctant to adopt such a verdict slip without providing the jurors with the admitted exhibits discussed during the testimony of Plaintiffs' experts. The Defendants objected to the jury receiving the exhibits. Plaintiff did not object to the proposed form of the verdict slip.

In accordance with the parties' agreement, the court instructed the jury and released it to deliberate with only the jointly approved verdict slip. Shortly after the deliberations began, the court received a note from the jury requesting certain exhibits to assist it in the deliberations, most notably the charts prepared by Mr. Karas and Mr. Verzilli. Defense counsel strenuously objected, based principally on the claim that it would "overemphasize" the Plaintiff's evidence where Defendant had (voluntarily and consciously) elected not to produce any similar exhibits, as a "strategy" decision. (N.T. 5/9/23, p. 7). The court, having previously articulated a concern

with Defendants' insisted form of verdict slip containing 44 lines for future medical care, determined that the documents were necessary to assist the jury in fulfilling the task submitted to it by the parties and allowed the jury to take the exhibits into their deliberations.

Defense counsel requested that the court also provide the jury with his personally concocted, argumentative calculations that counsel had scribbled on a paper flip chart during his closing, claiming that the jury needed to see Defendants' numbers. (N.T. 5/9/23, p. 16). Aside from his near incomprehensible explanation of counsel's theories and math to the jury, the scribbling was never marked or offered as an exhibit (even if there was no fact or expert witness sponsoring the "exhibit"). However, this document represented an argument of counsel and had never been used in the examination of any witness or adopted as part of witness testimony. Nevertheless, in responding to the question, the court did provide the jury with an instruction to consider the documents "along with all the other testimony that you have heard from both sides in evaluating those exhibits." (*Id.*, p. 17).

Pennsylvania Rule of Civil Procedures 223.1 provides that the court "may make exhibits available to the jury during its deliberations." Pa.R.C.P. 223.1(d)(3). The case law in Pennsylvania provides that the trial court has the discretion to determine which exhibits should be permitted to go out with the jury. *Ratti v. Wheeling Pittsburg Steel Corp.*, 758 A.2d 695, 710 (Pa. Super. 2000); *Wagner by Wagner v. York Hosp.*, 415 Pa. Super. 1, 16, 608 A.2d 496, 503 (Pa. Super. 1992). In *Digiovanni v. Murphy*, 2016 WL 5266673 (Pa. Super. September 16, 2016), the court affirmed the trial court's decision to allow the jury to view exhibits used by the

expert during his testimony, finding that the entire transcript of the expert, along with the exhibits had been admitted into evidence.[17]

This court determined, upon receipt of the jury's question, that consistent with its initial concern expressed to counsel before adopting the parties' joint proposed verdict slip, that the jury was unable to fulfill the task of completing the 44 lines relating to future medical care without the assistance of the exhibits. At that point, the court determined, in its discretion, that Defendants' insistence on the form of the slip necessitated the court's decision to provide the jury with the requested exhibits. The court cannot conclude, under these circumstances, that its decision was in error or that Defendants are entitled to a new trial on account of the decision to exercise the court's discretion to allow the exhibits into the jury's deliberations.

IX. Objections to the Content of Plaintiff's Closing

At the oral argument on Defendants' Motion for Post-Trial Relief, defense counsel argued, for the first time, that Plaintiff's counsel had improperly urged the jury to go beyond mere compensation, referencing specific pages of the closing, resulting in a verdict that was allegedly the product of passion and emotion, and which had an impermissibly punitive effect. (N.T. of oral argument of 8/9/23, pp. 9-10). Defense counsel was likely aware that no objection to the closing had been made at the time of trial and no claim of error was asserted on this basis in Defendants' post-trial motion because counsel attempted to link the objection to the closing to counsel's remittitur argument (although it had also never been asserted in the numerous written submissions as a basis for remittitur). This argument is simply a case of too little, too late. Defendants cannot backdoor a complaint about counsel's closing remarks to

[17] Where the court determines that the requested exhibits would confuse the jury, it may decline the request to provide the documents. *See Kirksey v. Children's Hospital of Pittsburgh*, 2019 WL 5063370, *4 (Pa. Super. October 9, 2019).

assert an inflated verdict, asserting it for the first time at oral argument, when no objection to the closing was made at trial and no argument claiming any impropriety, remittitur-related or otherwise, was asserted in Defendants' filings. As such, it is nothing more than a gratuitous attempt to demean the jury's following the court's unobjected to jury instructions, their considered deliberations, and obedience to their faithful oath of office in an effort to undermine Plaintiff's arguments. Such an eleventh hour "hail Mary" cannot be considered in any way in assessing the outcome of the trial.

X. Conclusion

For all the foregoing reasons, the court finds that Defendants' Motion for Post-Trial Relief is wholly without merit and represents a disingenuous effort to enlist the court to relieve the Defendants from miscalculations in their trial strategy, an unsatisfactorily tried case, and equally non-credible and unpersuasive witness testimony. As such, important policy considerations such as those embodied in the MCARE Act are totally irrelevant. The weight of the evidence favoring Plaintiff and the questionable quality of Defendants' evidence can only lead to the conclusion that the court cannot, in its discretion, disturb the verdict of the jury. Accordingly, Defendants' Motion for a New Trial or in the alternative for remittitur of the jury's award for non-economic loss is DENIED. An appropriate Order will be entered in conjunction with this opinion.