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Editor's Note:

The following judicial opinion is one of the longest opinions that we have published. *Shimko v. Evans et al.,* published as 22B of Volume 110 on May 29, 2020, holds the record by two pages as the longest. This opinion comes in as a close second.

The *Shimko* opinion was also a Judge Gelb opinion, and like this opinion, it contained some excellent legal citations. We hope you enjoy reading the *Jacoby* opinion published here as its own part B issue.

There is a companion opinion to the case. It is far longer in length, far too long for us to manage to print in the size that our legal journal is limited to. It too is very well written, so *The Luzerne Legal Register* asked and received permission from Thomson Reuters for them to publish it. To read this opinion, log on to Westlaw and go to 2023 WL 11280617.

We are working to see if we can work out an arrangement with Reuters to publish all of our long Court opinions, so you don't miss out on being able to read these. If we can, this would be truly historic. We will keep you up to date if we are successful in achieving this endeavor.

In the meantime, enjoy reading this opinion and its companion opinion published online by Reuters!

JACOBY v. SPOHN ET AL.

Civil Law and Procedure—Appeal—Punitive Damages—Purpose—Hutchison ex rel. Hutchison v. Luddy, *870 A.2d 766, 770 (Pa. 2005)—Misconduct Constituting Ordinary Negligence—Reckless Indifference—State of Mind*—Martin v. Johns-Manville Corp., *494 A.2d 1088, 1097 n.12 (Pa. 1985)—Appreciation of the Risk of Harm—Necessary Element—Supporting Evidence—Willfully, Wantonly, or Maliciously—Recklessly Indifferent to the Rights of Others—Submission to Jury—Totality of the Evidence—Abuse of Discretion—Failure to Raise an Objection at Trial—Waiver —Verdict Slip Question—Motion in Limine Ruling—Modified Hybrid Trial—Denial of Request for Continuance—Denial of a Motion for Remittitur—Decision to Grant a New Trial—Discretion of the Trial Court—Standard of Review—Excessive Verdict—Where It Is Grossly Excessive as to Shock the Court's Sense of Justice—Starting Premise—Large Verdicts—Not Necessarily Excessive—Importance of the Jury—Province of the Jury—Weighing the Veracity and Credibility of Witnesses—Setting Aside a Verdict—Decision to Grant Remittitur—Highly Deferential Standard—Reviewing Court—Personal Injury Cases—Own Special Circumstances—Noneconomic Loss—Measured by Experience—Role of Juror—Quantification of Noneconomic Loss and Compensation—Size of Punitive Damage Award—Factors Applied—Punitive Damage Award in This Case Not Excessive—Medical Care Availability and Reduction of Error Act (MCARE) Provisions—State's Interest in Punishing or Deterring Particular Behavior—Analysis of Factors—Ensuring Patient Safety—Protecting Patients From Health Care Providers' Reckless and Outrageous Conduct—Six Enumerations of MCARE Act—Factors—Punitive Damage Award Reasonably Related to Pennsylvania's Interest—Length of Testimony Heard by Jury—Compensatory Award Amount—Nature and Extent of Harm—Endurance of the Harm—Appellant's Wealth—Totality of Circumstances Considered—Preserving an Issue for Appeal—Failure to Raise at Trial—Not Raised in Post-Trial Motion—Issue Waived on Appeal.*

1. The purpose of punitive damages is to punish outrageous conduct done in a reckless disregard of another's rights; it serves a deterrence as well as a punishment function.

2. The Supreme Court of Pennsylvania outlined the law of punitive damages in *Hutchison ex rel. Hutchison v. Luddy*, 870 A.2d 766, 770 (Pa. 2005.)

3. Punitive damages may not be awarded for misconduct which constitutes ordinary negligence such as inadvertence, mistake, and errors of judgment.

4. The Pennsylvania Supreme Court has considered the requisite state of mind which would constitute reckless indifference. *See Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1097 n.12 (Pa. 1985.)

5. An appreciation of the risk of harm is a necessary element of the mental state required to impose punitive damages.

6. A punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.

7. Appellants herein cite three cases. These cases are examples of a defendant acting willfully, wantonly, or maliciously; however, punitive damages may also be awarded when a defendant is recklessly indifferent to the rights of others.

8. In the instant case, the Court determined that there was sufficient evidence to support appellee's punitive damages claim which required the claim to be submitted to the jury.

9. Given the totality of evidence presented over the course of this trial, Appellee introduced sufficient evidence to support Appellee's claim for punitive damages. It was not an error to deny Appellants' Motion to Dismiss and submit the claim to the jury.

10. Appellant herein argues that the trial court erred and abused its discretion by charging the jury on reckless conduct and including question 9 on the Jury Verdict Slip.

11. It is axiomatic that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. It is well established that in order to preserve an issue for appeal, a litigant must make a timely, specific objection at trial and must raise the issue on post-trial motions.

12. The question on the verdict slip, at issue in this appeal, was not objected to during trial and was not raised in a post-trial motion, as such it is waived.

13. Appellant argues that the trial court "erred and abused its discretion in failing to follow its own ruling in granting a Motion in Limine to allow for a modified hybrid trial.

14. The argument that the court failed to follow its own Motion in Limine ruling regarding Appellants' Motion to Bifurcate is inaccurate.

15. The "modified hybrid" procedure was explained to counsel at a pre-trial conference, the procedure was agreed to by all parties and that was the procedure followed by the Court. The Court explains what happened and its reason for a denial of a request for continuance.

16. Appellants jointly argue that the jury should have been asked, first, whether the doctor was "reckless" and then, if answered in the affirmative, be directed to damages. The Court points out that this would certainly lead to an inflated compensatory award.

17. Appellant argues that the trial court erred and abused its discretion by denying a Motion for Remittitur of the Punitive Damage Award.

18. It is well established law in the Commonwealth that a decision to grant a new trial because of any impropriety in the verdict is well within the discretion of the trial court and in the absence of a clear abuse of its considerable discretion will not be disturbed on appellate review.

19. An appellate court's standard of review upon the denial of a motion for remittitur by the trial court is confined to determining whether there was an abuse of discretion or an error of law committed in such denial.

20. A reviewing court will not find an excessive verdict except where it is grossly excessive as to shock the court's sense of justice.

21. According to the Superior Court of Pennsylvania, the reviewing court begins 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.

22. When presented with a motion for a new trial on damages or remittitur, it is important that the trial court acknowledge and reflect upon the importance of the jury in rendering an award of damages.

23. It is fundamental that the duty to assess damages is squarely within the province of the jury, who as the finders of fact weigh the veracity and credibility of the witnesses and their testimony.

24. A court reviewing a jury's award of damages must give deference to the jury's exercise of judgment.

25. A verdict is set aside only when it is so inadequate as to indicate passions, prejudice, partiality, or corruption, or where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff.

26. Under Pennsylvania law, the decision to grant a remittitur depends on whether the award of compensatory damages lies beyond the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the conscience as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption.

27. Thie standard is highly deferential, because the trial judge serves not as finder of facts but as impartial courtroom authority with obligation to give great respect to the jury's function. If the compensatory award is excessive, any remittitur must fix the highest amount any jury could properly award. That amount must necessarily be as high—and may well be higher—than the level the court would have deemed appropriate if working on a clean slate.

28. The reviewing court is not free to substitute its judgment for that of the fact-finder. Rather, it is the reviewing court's task to determine whether the lower court committed a clear or gross abuse of discretion when conducting its initial evaluation of a defendant's request for remittitur.

29. Each personal injury case is unique and dependent on its own special circumstances. Thus, noneconomic loss must be measured by experience rather than any mathematical formula.

30. It is immediately apparent that there is no logical or experiential correlation between the monetary value of medical services required to treat a given injury and the quantum of pain and suffering endured as a result of that injury. For this reason, the law entrusts jurors, as the impartial acting voice of the community, to quantify noneconomic loss and compensation.

31. Under Pennsylvania law, the size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion. In accordance with this limitation, the standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character and nature of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.

32. At the outset, in the matter *sub judice*, it is worth noting that the punitive damage award of three hundred thousand dollars ($300,000), which is twenty-five percent (25%) of the compensatory award of one million two hundred thousand dollars ($1,200,000.00), is in no way excessive, does not shock the Court's sense of justice, and does not warrant remittitur of the award.

33. Since this is a medical malpractice action the Medical Care Availability and Reduction of Error Act (MCARE) applies.

34. The MCARE Act, in relevant part, states: "Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others." 40 P.S. §1303.505(a.)

35. The MCARE Act further provides that "[e]xcept in cases alleging intentional misconduct, punitive damages against an individual physician shall not exceed 200% of the compensatory damages awarded. Punitive damages, when awarded, shall not be less than $100,000 unless a lower verdict amount is returned by the trier of fact." 40 P.S. §1303.505(d.)

36. The punitive damage award, in this case, clearly comports with the relevant provision of the MCARE Act and there is nothing about the award that shocks the court's sense of

justice. Accordingly, it is was not an error or abuse of discretion for the Court to deny the Motion for Remittitur of the Punitive Damage Award.

37. Under Pennsylvania law, the size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion. In accordance with this limitation, the standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character and nature of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.

38. Pennsylvania undoubtedly has a significant interest in ensuring patient safety, well-being, and protecting patients from health care providers' reckless and outrageous conduct.

39. The MCARE Act was signed into law on March 20, 2022 and the General Assembly declared the purpose of the Act. 40 P.S. Section 1303.102. [*See* enumerated purposes cited in the case text.]

40. In order to aid in achieving these objectives, the MCARE Act established six enumerations as noted by the court.

41. As it relates to punitive damages, the MCARE Act states: "Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider's act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider." 40 P.S. §1303.505(a.)

42. The factors set forth in the Act for assessing a punitive damage award are identical to the three factors Pennsylvania courts apply in their assessment of a punitive damage award in non-medical malpractice actions.

43. Pennsylvania's significant interest in protecting patients' well-being, safety, and punishing and deterring health care providers' reckless conduct is further evidenced by a provision of the MCARE Act that allocates a percentage of a punitive damage award into the MCARE fund. Section 505(e)(2) of the MCARE Act states: "Upon the entry of a verdict including an award of punitive damages, the punitive damages portion of the award shall be allocated as follows: (1) 75% shall be paid to the prevailing party; and (2) 25% shall be paid to the Medical Care Availability and Reduction of Error Fund."40 P.S. §1303.505(e)(2.)

44. After reviewing the same the court concludes that there is nothing excessive about the punitive damage award in this matter.

45. The punitive damage award in this case is reasonably related to Pennsylvania's interests in punishing and deterring the doctor, in this case, and other health care providers in future medical malpractice actions.

46. The court notes that it is clear that the jury took into account the character of the doctor's conduct which it found rose to the level of reckless indifference to the rights of the appellee herein.

47. As is noted, the jury in this matter heard nearly two (2) weeks of testimony.

48. After all the testimony, the jury deliberated and concluded that the doctor's actions, as summarized in this case, rose to the level to justify an award of punitive damages.

49. The jury rendered a verdict in favor of the plaintiff and issued a compensatory award of one million two hundred thousand dollars ($1,200,000.00.)

50. The Appellee in this case has sustained significant, permanent, painful, and disabling injuries as a result of the doctor's reckless conduct. The nature and extent of the harm that the Appellee has endured and will continue to endure is elaborated in this case.

51. Given all of the facts cited herein, the Court finds that the punitive damage award in the case is certainly related to the nature and extent of the harm that the Appellee endured and will continue to endure as a result of the doctor's reckless conduct.

52. Appellant argues that the jury failed to properly take into account Appellant's wealth when rendering the punitive damage award in this case.

53. Given the totality of the evidence presented during the punitive damage phase of the trial, it is impossible to say that the jury's punitive damage award did not take into consideration the doctor's wealth.

54. Appellant cites to six factors that Pennsylvania courts have considered when determining whether a jury verdict should be remitted; however, Appellant provides no support that these factors apply when addressing a punitive damage award. Even if the six factors were applied in this case to assess the punitive damage award, when considering the totality of the circumstances the award would not justify remitter.

55. Appellant's final issue raised on appeal in this case was not preserved at trial.

56. It is axiomatic that issues not raised in the lower court are waived and cannot be raised for the first time on appeal.

57. Pennsylvania law is well settled that in order to preserve an issue for appeal, a litigant must make a timely, specific objection at trial and must raise the issue on post-trial motions.

58. As with Appellant's second issue raised during this appeal, this final issue was not raised at trial and was not raised on a post-trial motion, consequently, this issue is waived.

In the Court of Common Pleas of Luzerne County—Civil Division—Consolidated at No. 09981 of 2018. Appeal filed to the Superior Court of Pennsylvania. See *Superior Court Docket No. 1410 MDA 2022—Praecipe for Discontinuance filed by Appellant (Spohn)—GRANTED by the Superior Court of Pennsylvania—September 21, 2023/filed: September 26, 2023—Appeal DISCONTINUED. Praecipe for Discontinuance filed by Appellee/Plaintiff to Luzerne County Court of Common Pleas, January 25, 2024—Praecipe for Satisfaction of Judgment filed February 21, 2024.* See *County Docket 2018-09981 and Pennsylvania Superior Court Docket No. 1410 MDA 2022 for specifics.*

Melissa A. Scartelli, Esquire, Peter Paul Olszewski, Jr., Esquire, Rachel D. Olszewski, Esquire, Kristin Mazzarella, Esquire, Conrad A. Falvello, Esquire, and James T. Shoemaker, Esquire, for Appellee/Plaintiff.

Patrick C. Carey, Esquire, Jamie Schelling, Esquire, Bruce K. Anders, Esquire and Ciara DeNaples, Esquire, for Appellant/Defendant, Peter Spohn, M.D.

Howard S. Stevens, Esquire, and Sarah H. Charette, Esquire, for Hazleton Prof. Services d/b/a Lehigh Valley Physician Group.

Before: Gelb, J.

GELB, J., April 25, 2023:

Opinion

I. Introduction

This Opinion is filed in accordance with Pa. R.A.P. No. 1925(a.) There are two separate appeals that stem from the above-captioned matter. First, Appellants Peter Spohn, M.D. and Hazleton Professional Services d/b/a Lehigh Valley Physician Group—Hazleton (hereinafter collectively, "Appellants," individually, "Dr. Spohn" and "LVH-H" respectively) filed an appeal, which is docketed as 1412 MDA 2022, based on this Court's denial of Appellants' Joint Motion for Remittitur and/or Motion for a New Trial. Second, Dr. Spohn, through independent counsel, filed an appeal, which is docketed as 1410 MDA 2022, to this Court's Order of September 1, 2022. Specifically, Dr. Spohn filed an appeal to this Court's Molded Verdict Order filed on September 1, 2022. As the two matters are not consolidated on appeal, this Court will issue two separate Opinions addressing the specific issues raised in each matter. Despite being

distinct appeals, there are duplicative issues raised in each matter and as such, this Court's analysis may be similar or identical.

This opinion addresses Appellant Dr. Spohn's Notice of Appeal to this Court's Molded Verdict Order of September 1, 2022. Appellants' joint appeal will be addressed in a separate opinion.

II. Background

a. Abridged Factual Background

Sometime in late June or early July of 2017, Plaintiff/Appellee Jonathan Jacoby (hereinafter "Appellee" or "Jonathan Jacoby") banged or pinched his left ring finger while doing work at his home on the weekend. (N.T. p. 962, line 15-963, line 2;1033, line 21-23.) At first, it did not appear that anything was wrong with the Appellee's finger, but as time passed the Appellee experienced pain and swelling. (N.T. p. 1033, line 21-1034, line 5.) The Appellee made an appointment with his primary care physician, Dr. Yurko, in July of 2017 because the bump on his finger started to become more visible and the Appellee began to have some concerns. (N.T. p. 1034, lines 7-12.) Dr. Yurko ordered an X-ray of Appellee's finger which showed that there was swelling that was possibly indicative of a contusion or hematoma that should resolve on its own. (N.T. p. 960, line 24-961, line 14; p. 1034, line 24-1035, line 2.)

After the Appellee saw Dr. Yurko, the swelling continued to increase, persisting until late August or early September which is when the Appellee sought a second opinion from the Lehigh Valley Health Network. (N.T. p. 961, line 17-962, line 12.) Prior to obtaining a second

opinion, the Appellee described being in pain due to his left ring finger and in September of 2017 when he went to bend the tip of his left ring finger, he was unable to as it was restricted. (N.T. p. 961, line 15-962, line 4.) Appellee decided to get a second opinion, called the 1-800 number for Lehigh Valley, and explained to them what was occurring with his finger. (N.T. p. 962, lines 8-14.) Appellee received a call back from Lehigh Valley informing him that he had an appointment with Appellant Dr. Spohn (hereinafter, individually, "Dr. Spohn") on September 25, 2017. (N.T. p. 962, lines 8-14.)

At the September 25, 2017 appointment, Dr. Spohn ordered another X-ray and MRI of Appellee's left ring finger. (N.T. p. 134, line 17-135, line 7; p. 158, lines 1-5.) When Dr. Spohn read the X-ray of the Appellee's finger he noted new bone growth, while the radiologist Dr. Hearter's impression was "soft tissue swelling without additional abnormal findings." (N.T. p. 134, lines 3-7; p. 134, line 19-136, line 10.) The MRI ordered by Dr. Spohn did not show evidence of a mass, but revealed edema instead. (N.T. p. 155, lines 10-20.) After Dr. Spohn noted new bone growth, he conducted an excisional biopsy of the mass on his finger on October 3, 2017. (N.T. p. 138, lines 7-12.)

Dr. Spohn's operative note from the excisional biopsy states that "the entire egg shaped mass was dissected out of the soft tissue and removed" and Dr. Spohn testified he remembered the mass "being mostly on the top, but going a little bit to both sides and more on the side closest to the thumb." (N.T. p. 138, lines 7-23.) Dr. Null, the local pathologist at Hazleton General Hospital, sent Dr. Alexandrin the pathology slides from the excisional biopsy performed by Dr. Spohn. (N.T. p. 219, line 23-

220, line 12; N.T. p. 222, lines 9-14.) Dr. Null did not make a diagnosis based on the pathology slides from the Appellee's excisional biopsy. (N.T. p. 220, lines 21-24.)

Dr. Alexandrin reviewed the pathology slides and issued a report which stated "atypical cellular proliferation with osteoid and new bone formation." (N.T. p. 223, lines 10-17.) Dr. Alexandrin stated that he "favored" a diagnosis of osteosarcoma but admitted that the diagnosis of osteosarcoma would be unusual given what was occurring with the specimen. (N.T. p. 223, lines 10-22.) Dr. Alexandrin sought a review of the pathology from this case from an expert in the field of bone pathology, Dr. Carrie Inwards from the Mayo Clinic. (N.T. p. 223, line 24-224, line 1.) Dr. Alexandrin testified that he did not make a diagnosis of osteosarcoma. (N.T. p. 224, line 2-9.)

Dr. Inwards received the pathology slides on October 12, 2017. (N.T. p. 229, line 25-230, line 2.) Dr. Inwards issued her report on October 18, 2017. (N.T. p. 230, lines 3-6.) Dr. Inwards had two differential diagnoses of a florid reactive process and osteosarcoma. (N.T. p. 249, line 22-250, line 7.) Dr. Inwards diagnosed a "reactive periostitis" which is also known as florid reactive periostitis (hereinafter "FRP".) (N.T. p. 193, line 11-194, line 4; N.T. p. 248, lines 19-23.) Dr. Inwards' report was received by Dr. Alexandrin on October 17, 2017. (N.T. p. 255, lines 3-7) and Dr. Null at Lehigh Valley Hazleton Hospital on October 20, 2017. (N.T. p. 255, lines 8-12.)

On October 11, 2017, Dr. Spohn called the Appellee in for an unplanned visit. (N.T. p. 936, lines 2-18.) At that appointment, Dr. Spohn told the Appellee that he felt the Appellee had osteosarcoma. (N.T. p. 102, line 24-103, line 13; N.T. p. 199, lines 16-21.) Dr. Spohn testified that he offered the Appellee three options: (1)

to either wait for the final pathology to come back; (2) to consult with a specialist in Hershey or Philadelphia; (3) or to proceed with the amputation. (N.T. p. 98, lines 2-13.) Appellee underwent an amputation of his left ring finger on October 17, 2017. (N.T. p. 965, lines 3-12.)

Following the amputation of October 17, 2017, Appellee attended physical therapy sessions for approximately one (1) month which was prescribed by Dr. Yurko. (N.T. p. 1008, lines 16-1009, line 13.) Additionally, after the amputation Appellee sought mental health counseling. (N.T. 1003, line 8-1009, line 6.) Finally, the Appellee underwent a ray amputation in November of 2018. (N.T. p. 989, lines 10-14; p. 1016, lines 15-17.)

b. Relevant Procedural Background

On August 27, 2018, Appellee commenced this action via the filing of a complaint against Peter Spohn, M.D., Hazleton Professional Services d/b/a Lehigh Valley Physician Group—Hazleton, and Lehigh Valley Physician Group Affiliated with the Lehigh Valley Health Network d/b/a Lehigh Valley Physician Group—Hazleton.[1] Appellee's complaint alleges that Dr. Spohn acted negligently and recklessly in his care of Appellee's left ring finger and sought compensatory and punitive damages. Appellee's complaint also alleges that Dr. Spohn did not obtain the informed consent of Appellee prior to amputating his left ring finger. Finally, Appellee's complaint alleges that Hazleton Professional Services d/b/a Lehigh Valley Physician Group—Hazleton were vicariously liable for the negligent acts of Dr. Spohn. Appellants' Preliminary

[1]The parties entered into a stipulation that was filed on January 11, 2021, which clarified the name of Dr. Spohn's employer as Hazleton Professional Services d/b/a Lehigh Valley Physician Group—Hazleton and Appellee dismissed all claims against the improperly named corporate defendants.

Objections were disposed of on January 3, 2019, Appellants filed their Answer and New Matter on January 23, 2019 and Appellee filed his reply on February 7, 2019. (Order of January 3, 2019, Answer and New Matter, and Reply to New Matter.)

Trial was scheduled for August 17, 2021 and the parties filed various Motions in Limine and complied with all pre-trial filing requirements. This Court ultimately declared a Mistrial due to the illness of Dr. Spohn's Counsel, Attorney Carey. On September 10, 2021, trial was rescheduled to March 7, 2022 with jury selection to occur on March 4, 2022. (Order of September 10, 2021.) The parties renewed their previously filed Motions in Limine and filed Supplemental and Additional Motions in Limine. On February 28, 2022, this Court ruled on the previously filed Motions in Limine. With respect to Appellants' Motion in Limine to Bifurcate Trial Regarding Punitive Damages, this Court granted the motion as the parties agreed to a "modified hybrid" arrangement for trial. (Order of February 28, 2022, p. 8.)

The trial in the matter occurred from March 7, 2022 to March 18, 2022. The jury found that Dr. Spohn was negligent in the care rendered to Appellee and that Dr. Spohn's negligence was the factual cause of Appellee's harm. (Verdict Slip, p. 1.) Further, the jury found that Appellee was not comparatively negligent. (Verdict Slip, p. 2.) The jury also found that Dr. Spohn did not obtain the informed consent for amputation that occurred on October 17, 2017 and that the information given or not given would have been a substantial factor in Appellee's decision whether or not to undergo the amputation on October 17, 2017. (Verdict Slip, p. 3.) To compensate the Appellee for past, future pain and suffering, emo-

tional distress, embarrassment and humiliation, loss of ability to enjoy the pleasures of life, and disfigurement, the jury awarded one million two hundred thousand dollars ($1,200,000.00.) (Verdict Slip, p. 4.) Finally, the jury found that Dr. Spohn was recklessly indifferent to the safety and well-being of the Appellee. After hearing testimony regarding Dr. Spohn's net worth, the jury awarded three hundred thousand dollars ($300,000) in punitive damages.

On March 24, 2022, Appellee filed a Motion for Delay Damages. On March 28, 2022, Appellants filed a Joint Motion for Remittitur and a Joint Motion for a New Trial. On March 28, 2022, Dr. Spohn, individually, filed a Motion for Remittitur and/or for New Trial because of Excessive Punitive Damage Verdict. Appellee and Appellants filed briefs in support of their respective motions. Appellants filed a Joint Response in Opposition to Appellee's Motion for Delay Damages on July 12, 2022. Also on July 12, 2022, Appellee responded to Dr. Spohn's Motion for Remittitur and/or for New Trial because of Excessive Punitive Damage Verdict, Appellants' Motion for Remittitur, and Motion for a New Trial. On June 8, 2022, Appellants filed a Supplemental Brief in Support of Defendants' Joint Motion for Remittitur due to the Excessive Verdict and/or Motion for New Trial. Notably, Dr. Spohn's Motion for Remittitur and/or for New Trial because of Excessive Punitive Damage Verdict was not supplemented. On July 29, 2022, Appellee filed a Reply to Appellants' Response in Opposition to Appellee's Motion for Delay Damages. On August 19, 2022, Appellee filed a Supplemental Reply to Appellants' Response in Opposition to Appellee's Motion for Delay Damages. By Order dated September 1, 2022, this Court denied

Appellants' Motion for Remittitur, Appellants' Motion for New Trial, and Dr. Spohn's Motion for Remittitur because of Excessive Punitive Damage Verdict. In the same September 1, 2022 Order, this Court granted Appellee's Motion for Delay Damages. In a separate Order also filed on September 1, 2022, this Court entered a Molded Verdict to account for the award of delay damages.

On September 29, 2022, Appellants praeciped to enter judgment in the amount of one million three hundred fifty-two thousand nine hundred eighty-three dollars and fifty-seven cents ($1,352,983.57), which accounted for the amount of compensatory damages awarded at trial and delay damages and did not account for the award of punitive damages. Throughout the course of this litigation LVNH-H, as Dr. Spohn's employer, has maintained that it is not responsible for acts outside the scope of Dr. Spohn's employment. The jury returned a verdict on punitive damages against Dr. Spohn only. (Verdict Slip.) On September 30, 2022, Appellants filed a Notice of Appeal to this Court's Order denying Appellants' Motion for Remittitur due to Excessive Verdict and/or Motion for a New Trial. Appellants' Notice of Appeal specifically states "[t]his appeal does not include the Court's Order denying Dr. Spohn's Motion for Remittitur due to Excessive Punitive Damages." (Appellants' Notice of Appeal, p. 1.) Dr. Spohn retained independent Counsel for purposes of this appeal. Dr. Spohn filed a Notice of Appeal which appealed this Court's Order of September 1, 2022.

On September 30, 2022, Appellee filed a Motion to Strike Appellants' Praecipe for Entry of Judgment and the Entry of Judgment filed on September 29, 2022. On October 1, 2022, Appellants filed a Response in

Opposition to Appellee's Motion which was also a Motion to Modify. On October 3, 2022, this Court entered an Order which was filed "pursuant to Pa.R.A.P. 1701, in order to clarify this Court's Order of September 1, 2022 and to preserve the status quo between the parties" which granted both Appellee's Motion to Strike and Appellants' Motion to Modify. An appropriate Amended Molded Verdict was filed that same day. The Amended Molded Verdict added a footnote that stated "[i]n accordance with 40 P.S. §1303.505 and the Jury Verdict Slip, agreed on by both parties, Punitive Damages are assessed against Defendant Peter Spohn, M.D. only."

This opinion addresses Appellants' Notice of Appeal to this Court's Order denying Appellants' Motion for Remittitur due to Excessive Verdict and/or Motion for a New Trial. Dr. Spohn's appeal will be addressed in a separate opinion as the cases are not consolidated on appeal.

c. Statement of Matters Complained of on Appeal

Dr. Spohn raises the following issues on Appeal:

1. The trial court erred and abused its discretion in allowing the jury to determine whether punitive damages were warranted where the evidence presented to the jury failed to establish that the conduct of Defendant Peter Spohn, M.D. was outrageous.

2. The trial court erred and abused its discretion by charging the jury on reckless conduct and allowing Question 9 of the Jury Verdict Slip to be submitted to the jury.

i. Question 9 reads as follows:

Do you find that the conduct of Peter Spohn, M.D. in this case was recklessly indifferent to the safety and well-being of Jonathan Jacoby?

Yes _____ No_____

ii. Because the charge gave the same definition to both reckless conduct and to the type of conduct that would permit a punitive damage award, the jury was compelled to award punitive damages if they found Defendant Peter Spohn, M.D.'s conduct was reckless.

iii. The trial court's instructions to the jury and the wording of Question 9 of the Jury Verdict Slip failed to impart to the jury the idea that something more than reckless conduct, as defined in Jury Instruction 13.60, is necessary to justify a punitive damage award.

3. The trial court erred and abused its discretion in failing to follow its own ruling in granting Defendant Peter Spohn, M.D.'s motion in limine to allow for a modified hybrid trial and instead conflated the punitive damage claim with the compensatory damage claim by including Question 9 on the Jury Verdict Slip, thereby confusing and misleading the jury.

4. The trial court erred and abused its discretion by failing to grant Defendant Peter Spohn, M.D.'s Motion for Remittitur Because of Excessive Punitive Damage Verdict when the punitive damages award was excessive in light of the facts presented at trial.

5. The trial court erred and abused its discretion in failing to instruct the jury that punitive damages could be awarded against Co-Defendant Hazleton Professional Services d/b/a Lehigh Valley Physicians Group if the jury found by a preponderance of the evidence that Co-Defendant Hazleton Professional Services d/b/a Lehigh Valley Physicians Group knew of and allowed the conduct of Defendant Peter Spohn, M.D. that resulted in the award of punitive damages and the

> trial court further erred and abused its discretion by failing to include a question on the Jury Verdict Slip regarding Co-Defendant Hazleton Professional Services d/b/a Lehigh Valley Physicians Group's vicarious liability for punitive damages. (See 40 P.S. § 1303.505 of the Mcare Act.)

(Concise Statement of Matters Complained of on Appeal, filed October 25, 2022.)

III. Discussion

a. The Trial Court Erred and Abused Its Discretion in Allowing the Jury to Determine Whether Punitive Damages Were Warranted Where the Evidence Presented to the Jury Failed to Establish That the Conduct of Defendant Peter Spohn, M.D. Was Outrageous.

Appellants also raise this issue in their Joint Motions for Remittitur and/or Motion for a New Trial; accordingly, this Court's analysis on the issue is identical to the Opinion in that appeal.

"The purpose of punitive damages is to punish outrageous conduct done in a reckless disregard of another's rights; it serves a deterrence as well as a punishment function." *Hall v. Jackson,* 788 A.2d 390, 402 (Pa. Super. 2001) (internal citations omitted.) The Pennsylvania Supreme Court outlined the law of punitive damages as follows:

> Punitive damages may be awarded for conduct that is outrageous because of the defendant's evil motives or his reckless indifference to the rights of others. ... As the name suggests punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct. ... The purpose of

> punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others like him from similar conduct. ... Additionally, this court has stressed that, when assessing the propriety of the imposition of punitive damages, [t]he state of mind of the actor is vital. The act, or failure to act, must be intentional, reckless or malicious.

Hutchison ex rel. Hutchison v. Luddy, 870 A.2d 766, 770 (Pa. 2005) (internal citations omitted.) However, "[p]unitive damages may not be awarded for misconduct which constitutes ordinary negligence such as inadvertence, mistake, and errors of judgment." *McDaniel v. Merck, Sharp & Dohme,* 533 A.2d 436, 447 (Pa. Super. 1987) (internal citations omitted.)

In *Martin v. Johns-Manville Corp.,* 494 A.2d 1088, 1097 n.12 (Pa. 1985) (plurality opinion), the Pennsylvania Supreme Court "considered the requisite state of mind which would constitute reckless indifference in this context, and we set forth the standard the courts are to apply when called upon to determine whether the evidence supports a punitive damages award on such basis." *Hutchison,* supra at 771. The court noted that "Comment b to Section 908(2) of the Restatement refers to Section 500 as defining the requisite state of mind for punitive damages based on reckless indifference. ... " *Id.* Section 500 of the Second Restatement of Torts states:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical

> harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

An appreciation of the risk of harm is a necessary element of the mental state required to impose punitive damages. *Hutchison*, supra. Accordingly, in Pennsylvania, "a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk." *Id.* at 772, *citing Martin v. Johns-Manville Corp.*, supra at 1097-98.

Appellants point specifically to three cases to support their argument that the punitive damages should not have been submitted to the jury. First, Appellants cite to *Medvecz v. Choi*, 569 F.2d 1221 (3d Cir. 1977), in which an anesthesiologist left a patient on the table in the operating room. Second, Appellants cite to *Hoffman v. Memorial Osteopathic Hospital*, 492 A.2d 1382 (Pa. Super. 1985), in which an emergency room physician allowed a Guillain-Barre patient with neurological paralysis to remain crying and immobile on the floor for two hours as the physician repeatedly stepped over the patient. Finally, Appellants cite to *Bowser v. Albert Einstein Medical Center*, 2014 WL 10917588 (Pa. Super. 2014), in which a patient was forcibly restrained and an IV was inserted into her neck without her consent. These cases are examples of a defendant acting willfully, wantonly, or maliciously; however, punitive damages may also be awarded when a defendant is recklessly indifferent to the rights of others. Punitive damages "must be supported by evidence sufficient to establish that (1)

a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk." *Hutchison,* supra.

In the instant case, there was sufficient evidence to support Appellee's punitive damages claim which required the claim to be submitted to the jury. Here, Dr. Spohn's subjective appreciation of the risk of harm to which Mr. Jacoby was exposed is supported by the following: (1) Dr. Spohn actually documented that he researched how rare osteosarcoma of the finger before treating Appellee (N.T. 124, lines 12-15); (2) Dr. Spohn testified that depending what the MRI showed, he planned to "send [Appellee] to a hand surgeon" because even at that time Dr. Spohn was "concerned" about the presentation of the Appellee's left ring finger (N.T. p. 157, lines 7-25); and (3) Dr. Spohn felt that Appellee disregarded his "biggest" recommendation to consult with a specialist (N.T. p. 98, lines 2-8.)[2]

Evidence that Dr. Spohn acted, or failed to act, in conscious disregard of the risk includes: (1) Dr. Spohn did not wait for the final pathology to come back from the Mayo Clinic before proceeding to amputating the Appellee's left ring finger (N.T. p. 172, line 23-174, line 6); (2) Dr. Spohn, admittedly, was not an oncologist or a cancer orthopedist, yet he treated the Appellee despite his feeling that Appellee had osteosarcoma (N.T. p. 94, lines 4-8, 19-22); (3) Dr. Spohn testified that he never observed or diagnosed osteosarcoma of the finger (N.T. p. 124, lines 16-19); (4) Dr. Spohn testified that he only

[2]Despite testifying at his deposition that all three (3) recommendations were equal, he testified at trial that consulting with a specialist "was the one he really wanted him to do." (N.T. p. 99, lines 5-6.)

does "simple things" on hands as he was not specifically trained in hand surgery, but offered Appellee an amputation for an extremely rare cancer that he was not qualified to treat (N.T. p. 158, lines 5-8); (5) Dr. Spohn never confirmed or checked on the diagnosis of possible osteosarcoma by personally attempting to call the Mayo Clinic prior to offering an amputation to Appellee (N.T. p. 116, lines 5-16); (6) Dr. Spohn never discussed the case with Dr. Alexandrin, another Lehigh Valley physician, who completed the preliminary pathology and stated that he favored osteosarcoma (N.T. p. 116, line 17-22); and (7) despite Dr. Spohn's primary recommendation being that Appellee consult with a hand specialist in Philadelphia or Hershey, he proceeded to offer and proceed with an amputation. (N.T. p. 99, lines 5-6.)

Given the totality of evidence presented over the course of this trial, Appellee introduced sufficient evidence to support Appellee's claim for punitive damages. It was not an error to deny Appellants' Motion to Dismiss and submit the claim to the jury.

Assuming arguendo, that Appellee's punitive damages claim should not have been submitted to the jury, there is no need for a new trial as the punitive damage award was separated from the compensatory award. A sufficient remedy would be to strike the punitive damage award in this case.

b. The Trial Court Erred and Abused Its Discretion by Charging the Jury on Reckless Conduct and Allowing Question 9 of the Jury Verdict Slip to Be Submitted to the Jury.

Appellant argues that this Court erred and abused its discretion by charging the jury on reckless conduct

and including question 9 on the Jury Verdict Slip. In support of this argument, Appellant contends (1) that "the charge gave the same definition to both reckless conduct and to the type of conduct that would permit a punitive damage award, the jury was compelled to award punitive damages if they found Defendant Peter Spohn, M.D.'s conduct was reckless" and (2) "the trial court's instructions to the jury and the wording of Question 9 of the Jury Verdict Slip failed to impart to the jury the idea that something more than reckless conduct, as defined in Jury Instruction 13.60, is necessary to justify a punitive damage award." (Concise Statement of Matters Complained of on Appeal, p. 2.)

"It is axiomatic that 'issues not raised in the lower court are waived and cannot be raised for the first time on appeal.'" *Kennett Consolidated School District v. Chester County Board of Assessment Appeals*, 228 A.3d 29, 42 (Pa. Commw. 2020) (*quoting* Pa. R.A.P. No. 302.) "It is well established that '[i]n order to preserve an issue for appeal, a litigant must make a timely, specific objection at trial and must raise the issue on post-trial motions.'" *Id.* (*quoting Dennis v. Southeastern Pennsylvania Transportation Authority*, 833 A.2d 348, 352 (Pa. Commw. 2003)). This question on the verdict slip was not objected to during trial and was not raised in a post-trial motion, as such it is waived.

c. The Trial Court Erred and Abused Its Discretion in Failing to Follow Its Own Ruling in Granting Defendant Peter Spohn, M.D.'s Motion in Limine to Allow for a Modified Hybrid Trial and Instead Conflated the Punitive Damage Claim With the Compensatory Damage Claim by Including Question 9 on the Jury Verdict Slip, Thereby Confusing and Misleading the Jury.

Appellant next argues that this Court "erred and abused its discretion in failing to follow its own ruling in granting Defendant Peter Spohn, M.D.'s motion in limine to allow for a modified hybrid trial" which "conflated the punitive damage claim with the compensatory damage claim by including Question 9 on the Jury Verdict Slip." (Concise Statement of Matters Complained of on Appeal, p. 2.)

First, as fully explained above, any argument regarding the inclusion of Question 9 on the jury verdict slip is waived as it was not raised prior to this appeal. To the extent Appellant takes issue with this Court's modified hybrid procedure and argues that this Court failed to follow its own Motion *in Limine,* this issue was raised in Appellants' Joint Motion for Remittitur and/or Motion for a New Trial and subsequent appeal and this Court's reasoning on this issue is identical.

The argument that this Court failed to follow its own Motion in Limine ruling regarding Appellants' Motion to Bifurcate is inaccurate. This Court's Motion in Limine Order states "Defendants' Motion in Limine to Bifurcate Trial Regarding Punitive Damages is GRANTED as agreed to by the parties ("modified hybrid".) (Order 2/28/2022, p. 8.) The "modified hybrid" procedure was explained to counsel at a pre-trial conference, the procedure was agreed to by all parties and that was the procedure followed by this Court. (Transcript filed 11/18/2021, pp. 4-5.) Appellants cannot point to the record to support this argument due to the fact that what was explained to counsel is exactly what occurred at time of trial.

It was only after the jury found that Dr. Spohn was reckless and requested personal counsel that Appellants'

Counsel objected to the procedure and requested a continuance, which was denied. (N.T. p. 2135, lines 17-25.) This Court denied this request for a continuance in that the parties were aware that punitive damages were an issue in the case after the denial of a Motion for Summary Judgment and Motion to Dismiss on the issue and granting a continuance would only prejudice the Appellee. (N.T. p. 2127, lines 15-16.) Dr. Spohn was advised of his right to personal counsel prior to phase two; however, he decided not to employ personal counsel. (N.T. p. 2135, lines 17-25.)

Furthermore, the Appellants jointly argue that the jury should have been asked, first, whether Dr. Spohn was "reckless" and then, if answered in the affirmative, be directed to damages. (Appellants' Supplemental Brief in Support of their Joint Motion for Remittitur and/or Motion for a New Trial, p. 28.) In support of their argument, Appellants reason that the jury should have been asked first whether Dr. Spohn was reckless prior to considering negligence. Appellants contend that by allowing the jury to consider the negligence, causation, and render a compensatory award prior to addressing the question of Dr. Spohn's recklessness, ultimately led to an inflated compensatory award. Appellants claim that it would instead be better for the jury to answer whether or not Dr. Spohn was reckless prior to addressing his negligence, causation issues, and rendering a compensatory award. Such a scheme would almost certainly lead to an inflated compensatory award due to the fact that the question of Dr. Spohn's recklessness would be in the forefront of the jury's mind when issuing a compensatory award.

d. The Trial Court Erred and Abused Its Discretion by Failing to Grant Defendant Peter Spohn, M.D.'s Motion for Remittitur Because of Excessive Punitive Damage Verdict When the Punitive Damages Award Was Excessive in Light of the Facts Presented at Trial.

Appellant next argues that this Court erred and abused its discretion by denying Dr. Spohn's Motion for Remittitur of the Punitive Damage Award when the punitive damage award was excessive in light of the facts presented at trial. (Concise Statement of Matters Complained of on Appeal, p. 3.) After hearing testimony for approximately ten (10) days, the jury rendered a compensatory award in favor of the Plaintiff in the amount of One million two hundred thousand dollars ($1,200,000.00) and a punitive damage award against Dr. Spohn in the amount of three hundred thousand dollars ($300,000.) (Jury Verdict Slip.)

The Pennsylvania Supreme Court has stated that "[i]t is well established law in the Commonwealth that a decision to grant a new trial because of any impropriety in the verdict is well within the discretion of the trial court and in the absence of a clear abuse of its considerable discretion will not be disturbed on appellate review." *Dranzo v. Winterhalter*, 577 A.2d 1349, 1352 (Pa. Super. 1990) (*citing Reitz v. Donise Enterprise*, 465 A.2d 1060, 1063 (Pa. Super. 1983).) Additionally, an appellate court's standard of review upon the denial of a motion for remittitur by the trial court " ... is confined to determining whether there was an abuse of discretion or an error of law committed in such denial." *Whitaker v. Frankford Hosp. of the City of Philadelphia*, 984 A.2d 512, 523 (Pa. Super. 2009) (*citing Smalls v. Pittsburgh-Corning Corp.*, 843 A.2d 410, 414 (Pa. Super. 2004).) A reviewing court will not find an excessive verdict except where "... it is grossly excessive as to shock [the court's] sense of justice."

Id. (*citing Kravinsky v. Glover,* 396 A.2d 1349, 1358 (Pa. Super. 1979)); *see also, Gbur v. Golio,* 932 A.2d 203, 212 (Pa. Super. 2007.) According to the Superior Court, "[w]e 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." *Id.* (*citing Mineo v. Tancini,* 502 A.2d 1300, 1305 (Pa. Super. 1986)); *see also, Gbur,* supra at 212.

When presented with a motion for a new trial on damages or remittitur, it is important that the trial court acknowledge and reflect upon the importance of the jury in rendering an award of damages. It is fundamental that "[t]he duty to assess damages is squarely within the province of the jury, who as the finders of fact weigh the veracity and credibility of the witnesses and their testimony." *Dranzo,* supra (*citing Cree v. Horn,* 539 A.2d 446, 450 (Pa. Super. 1988), *appeal denied,* 546 A.2d 621 (Pa. 1988).)

A court reviewing a jury's award of damages must give deference to the jury's exercise of judgment. *Ferrer v. Trustees of Univ. of Pennsylvania,* 825 A.2d 591, 611 (Pa. 2002) (internal citations omitted.) Accordingly, a verdict is set aside only "... when it is so inadequate as to indicate passions, prejudice, partiality, or corruption, or where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff." *Dranzo,* supra (*quoting Slaseman v. Myers,* 455 A.2d 1213, 1215 (Pa. Super. 1983).)

Recently the Pennsylvania Superior Court summarized the following standard in determining whether to

grant a remittitur, citing many of the cases cited above by this Court:

> Under Pennsylvania law, the decision to grant a remittitur depends on whether the award of compensatory damages lies beyond 'the uncertain limits of fair and reasonable compensation' or whether the verdict 'so shocks the conscience as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption.' Potochnick v. Perry, 861 A.2d 277, 285 (Pa. Super. 2004.) This standard is highly deferential, because the trial judge serves not as finder of facts but as impartial courtroom authority with obligation to give great respect to the jury's function. Ferrer v. Trustees of Univ. of Pennsylvania, 573 Pa. 310, 825 A.2d 591, 611 (2002.) If the compensatory award is excessive, any remittitur must fix 'the highest amount any jury could properly award.' Neal v. Bavarian Motors [Inc.], 882 A.2d 1022, 1028 (Pa. Super. 2005.) That amount 'must necessarily be as high—and may well be higher—than the level the court would have deemed appropriate if working on a clean slate.' *Id.* This Court is not free to substitute its judgement for that of the fact finder. 'Rather, it is our task to determine whether the lower court committed a "clear" or "gross" abuse of discretion when conducting its initial evaluation of a defendant's request for remittitur.' Dubose v. Quinlan, 125 A.3d 1231, 1244 (Pa. Super. 2015) (citation omitted.)
>
> Each personal injury case 'is unique and dependent on its own special circumstances.' Kemp v. Philadelphia Transportation Co., 239 Pa. Super. 379, 361 A.2d 362, 364 (1976.) Thus, noneconomic loss must be meas-

> ured by experience rather than any mathematical formula. Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022, 1025 (1983) ('it is immediately apparent that there is no logical or experiential correlation between the monetary value of medical services required to treat a given injury and the quantum of pain and suffering endured as a result of that injury'.) For this reason, the law entrusts jurors, as the impartial acting voice of the community, to quantify noneconomic loss and compensation. Nelson v. Airco Welders Supply, 107 A.3d 146, 161 (Pa. Super. 2014.)

Brown v. End Zone, Inc., 259 A.3d 473, 486 (Pa. Super. 2021), *citing Hammons v. Ethicon, Inc.,*190 A.3d 1248, 1285-86 (Pa. Super. 2018.)

Pennsylvania courts evaluate an award of punitive damage by considering the following principles:

> Under Pennsylvania law, the size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion. In accordance with this limitation, the standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character and nature of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.

Id. at 487 (*citing Hollock v. Erie Ins. Exchange,* 842 A.2d 409, 419 (Pa. Super. 2004) (internal citations omitted).)

i. The punitive damage award in this case is not excessive and does not shock the court's sense of justice

At the outset it is worth noting that the punitive damage award of three hundred thousand dollars ($300,000), which is twenty-five percent (25%) of the compensatory award of one million two hundred thousand dollars ($1,200,000.00), is in no way excessive, does not shock the Court's sense of justice, and does not warrant remittitur of the award.

Since this is a medical malpractice action the Medical Care Availability and Reduction of Error Act (hereinafter "MCARE Act") applies. The MCARE Act, in relevant part, states: "Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others." 40 P.S. §1303.505(a.) The MCARE Act further provides that "[e]xcept in cases alleging intentional misconduct, punitive damages against an individual physician shall not exceed 200% of the compensatory damages awarded. Punitive damages, when awarded, shall not be less than $100,000 unless a lower verdict amount is returned by the trier of fact." 40 P.S. §1303.505(d.)

As fully explained above, Dr. Spohn's conduct could have been considered recklessly indifferent to the rights of the Plaintiff Jonathan Jacoby and as such the jury was permitted to decide whether Dr. Spohn's actions rose to the level necessary to justify a punitive damage award. The jury in this matter heard nearly two (2) weeks of testimony and during the time the Plaintiff produced sufficient evidence to justify the jury's award of punitive damages against Dr. Spohn. The punitive damage award in this matter was twenty-five percent (25%), a far cry from the limit of 200% of the compensatory award established by the MCARE Act. The punitive damage award clearly comports with the relevant provision of

the MCARE Act and there is nothing about the award that shocks the Court's sense of justice. Accordingly, it is was not an error or abuse of discretion for this Court to deny Dr. Spohn's Motion for Remittitur of the Punitive Damage Award.

ii. The punitive damage award

The punitive damage award in this matter obviously comports with the relevant provisions of the MCARE Act; however, in Pennsylvania, a punitive damage award is analyzed by considering the following:

> Under Pennsylvania law, the size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion. In accordance with this limitation, the standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character and nature of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.

Brown, supra at 487 (*citing Hollock*, supra at 41 (internal citations omitted).)

1. Pennsylvania's Interest

Pennsylvania undoubtedly has a significant interest in ensuring patient safety, well-being, and protecting patients from health care providers' reckless and outrageous conduct. The MCARE Act was signed into law on March 20, 2022 and the General Assembly declared the purpose of the Act as follows:

> (1) It is the purpose of this act to ensure that medical care is available in this Commonwealth through a comprehensive and high-quality health care system.

(2) Access to a full spectrum of hospital services and to highly trained physicians in all specialties must be available across this Commonwealth.

(3) To maintain this system, medical professional liability insurance has to be obtained at an affordable and reasonable cost in every geographic region of this Commonwealth.

(4) A person who has sustained injury or death as a result of medical negligence by a health care provider must be afforded a prompt determination and fair compensation.

(5) Every effort must be made to reduce and eliminate medical errors by identifying problems and implementing solutions that promote patient safety.

(6) Recognition and furtherance of all of these elements is essential to the public health, safety and welfare of all citizens of Pennsylvania.

40 P.S. §1303.102.

In order to aid in achieving these objectives, the MCARE Act established the following: (1) a Patient Safety Authority (40 P.S. §1303.303); (2) physician reporting requirements regarding legal matters and disciplinary actions (40 P.S. §1303.903); (3) a procedure for the commencement of investigations by the licensure board of complaints filed against a physician (40 P.S. §1303.904); (4) requirements for health care providers to purchase and maintain professional liability insurance (40 P.S. §1303.711); (5) establishment of the Medical Care Availability and Reduction of Error Fund which is used to pay claims against participating health care providers for losses and damages awarded

in a medical professional liability action in excess of the basic insurance coverage required (40 P.S. §1303.7.12); and (6) requirements of continuing medical education for individuals licensed to practice medicine and surgery (40 P.S. §1303.910.)

As it relates to punitive damages, the MCARE Act states:

> Punitive damages may be awarded for conduct that is the result of the health care provider's willful or wanton conduct or reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the health care provider's act, the nature and extent of the harm to the patient that the health care provider caused or intended to cause and the wealth of the health care provider.

40 P.S. §1303.505(a.) The factors set forth in the Act for assessing a punitive damage award are identical to the three factors Pennsylvania courts apply in their assessment of a punitive damage award in non-medical malpractice actions.

Pennsylvania's significant interest in protecting patients' well-being, safety, and punishing and deterring health care providers' reckless conduct is further evidenced by a provision of the MCARE Act that allocates a percentage of a punitive damage award into the MCARE fund. Section 505(e)(2) of the MCARE Act states: "Upon the entry of a verdict including an award of punitive damages, the punitive damages portion of the award shall be allocated as follows: (1) 75% shall be paid to the prevailing party; and (2) 25% shall be paid to the Medical Care Availability and Reduction of Er-

ror Fund." 40 P.S. §1303.505(e)(2.) Arguably, the State of Pennsylvania not only has an interest in punishing and deterring the reckless conduct of physicians and other health care providers, but the State also has an interest in any punitive damage award rendered in a medical malpractice action.

Appellant fails to even mention any of the relevant provisions of the MCARE Act in his Motion for Remittitur of the Punitive Damage Award. The applicable provisions of the MCARE Act are clearly relevant and necessary for this Court to consider when determining whether the punitive damage award was excessive. Appellant offered boilerplate arguments that the punitive damage award in this matter was "grossly excessive" in his Post-Trial Motion for Remittitur of the Punitive Damage award. (Brief in Support of Motion for Remittitur because of Excessive Punitive Damages Verdict, p. 5.) There is nothing excessive about the punitive damage award in this matter.

Pennsylvania's interest in punishing and deterring physicians and other health care providers for their reckless conduct is clear given the MCARE Act as a whole and, specifically, the various provisions emphasizing patient safety. The punitive damage award in this case is reasonably related to Pennsylvania's interests in punishing and deterring Dr. Spohn, in this case, and other health care providers in future medical malpractice actions.

2. The Character and Nature of the Act

It is clear that the jury took into account the character of Dr. Spohn's conduct which it found rose to the level of reckless indifference to the rights of the Appellee. Dr. Spohn's reckless conduct is evidenced by the following: (1) Dr. Spohn did not wait for the final pathology to

come back from the Mayo Clinic before proceeding to amputating the Appellee's left ring finger (N.T. p. 172, line 23-174, line 6); (2) Dr. Spohn, admittedly, was not an oncologist or a cancer orthopedist, yet he treated the Appellee despite his feeling that Appellee had osteosarcoma (N.T. p. 94, lines 4-8, 19-22); (3) Dr. Spohn testified that he never observed or diagnosed osteosarcoma of the finger (N.T. p. 124, lines 16-19); (4) Dr. Spohn testified that he only does "simple things" on hands as he was not specifically trained in hand surgery, but offered Appellee an amputation for an extremely rare cancer that he was not qualified to treat (N.T. p. 158, lines 5-8); (5) Dr. Spohn had the ability to check on the status of the pending pathology of the Appellee as Dr. Alexandrin testified that surgeons often call in to find out the status of pathology reports and his office contacts Dr. Inwards at the Mayo Clinic to check on the reports (N.T. p. 227, line 4- p. 229, line 9); (6) Dr. Spohn never confirmed or checked on the diagnosis of possible osteosarcoma by personally attempting to call the Mayo Clinic prior to offering an amputation to Appellee (N.T. p. 116, lines 5-16); (7) Dr. Spohn never discussed the case with Dr. Alexandrin, another Lehigh Valley physician, who completed the preliminary pathology and stated that he favored osteosarcoma (N.T. p. 116, line 17-22); and (8) despite Dr. Spohn's primary recommendation being that Appellee consult with a hand specialist in Philadelphia or Hershey, he proceeded to offer and proceed with an amputation (N.T. p. 99, lines 5-6.)[3]

[3]A majority of this summary of Dr. Spohn's reckless conduct is also listed in section III(a) of this Opinion which addresses Dr. Spohn's first error complained of on appeal which argued that this Court erred or abused its discretion in allowing the jury to determine whether punitive damages were warranted where the evidence presented to the jury failed to establish that the conduct of Defendant Peter Spohn, M.D. was outrageous.

The jury in this matter heard nearly two (2) weeks of testimony. The jury heard from the Appellant, Dr. Spohn, the Appellee, Jonathan Jacoby, and numerous experts. After all the testimony, the jury deliberated and concluded that Dr. Spohn's actions, as summarized above, rose to the level to justify an award of punitive damages. Appellant incorrectly states that the jury deliberated on punitive damages for five (5) minutes, when the record shows that the jury exited the courtroom at 5:46 p.m. to deliberate and entered to render their verdict at 6:11 p.m. (N.T. p. 2157, lines 2-9.) This deliberation took place after the jury had already deliberated for over an hour on the compensatory award. (N.T. p. 2108, line 25-2109, line 4; p. 2114, line 11-2119, line 10; p. 2119, lines 9-13.) Undoubtedly in their deliberations, the jury considered the reckless nature of Dr. Spohn's actions when rendering its verdict and the punitive damage award is reasonably related to Dr. Spohn's reckless conduct.

3. The Nature and Extent of the Harm

The jury rendered a verdict in favor of the Plaintiff and issued a compensatory award of one million two hundred thousand dollars ($1,200,000.00.) Despite Dr. Spohn testifying that Appellee's amputation had "very little consequences," the fact remains that the Appellee sustained significant, permanent, painful, and disabling injuries as a result of Dr. Spohn's reckless conduct. (N.T. p. 2146, line 10-2148, line 1.) The nature and extent of the harm that Appellee has endured and will continue to endure includes the following:

a. Appellee had an amputation that was not necessary at the time to treat his condition. (N.T. p. 944,

line 18-945, line 23; p. 976, line 2-977, line 4; N.T. p. 1229, line 19-1230, line 7.)

b. Appellee has permanent scarring and disfigurement due to the amputation of his left ring finger.

c. Appellee was led to believe that he had osteosarcoma, a rare form of bone cancer, until November 13, 2017, when Dr. Hotcher's office, not Dr. Spohn's office, informed the Appellee that the pathology report was received and the Appellee did not have cancer. (N.T. p. 1001, line 3-1002, line 2.)

d. After the amputation, for approximately one (1) year, Appellee experienced two (2) neuromas which caused him extreme pain that would "bring him to his knees." (N.T. p. 990, line 15- 991, line 13; p 1112, line 25-1113, line 7; p. 1773, line 4-1774, line 11.)

e. Appellee experienced phantom limb pain and would feel like his finger is still there. (N.T. p. 990, lines 12-24, p. 280, line 12-281, line 6.)

f. Plaintiff would often drop items due to the gap between his third and fifth finger. (N.T. p. 1010, lines 3- 14.)

g. After the amputation performed by Dr. Spohn, Appellee was embarrassed and humiliated by the appearance of his hand because it was noticeable and it was impossible to hide. (N.T. p. 1011, line 21-1012, line 6.)

h. A co-worker of the Appellee made him a custom glove to combat the problem of constantly getting his glove caught and Appellee testified that "[i]t just made me feel normal again." (N.T. 1012, lines 7-24.)

i. After the amputation performed by Dr. Spohn, the Appellee did physical therapy for approximately one month, which was prescribed by the Appellee's primary care physician, Dr. Yurko. (N.T. p. 1008, line 16-1009, line 13.)

j. In order to improve many of the post-amputation symptoms that the Appellee experienced, the Appellee underwent an additional surgery, called a ray amputation, just one year after the amputation performed by Dr. Spohn. (N.T. p. 1112, line 10-20.)

k. After the ray amputation, the Appellee completed approximately five (5) additional physical therapy sessions. (N.T. p. 1017, lines 17-23.)

l. Appellee sought treatment with a mental health professional and attended approximately fifteen (15) sessions. (N.T. p. 1020, line 25, 1021, line 16.)

m. Due to the experience with Dr. Spohn, Appellee experienced a sense of self-doubt and self-blame as he explained 'looking back on it now, maybe I should have asked more questions. Maybe I shouldn't have been so trustworthy. Maybe there was something else that I could have done and I just kind of kick myself. ... ' (N.T. p. 983, lines 7-13.)

n. Following Appellee's experience with Dr. Spohn, Appellee is angrier, he holds his feelings in more, and does not trust people like he once did. (N.T. p. 1002, line 22-1003, line 5.)

o. Lynzee Kunkel, a co-worker of the Appellee, testified that she could see that the Appellee struggles from time to time 'especially when lifting things and picking things up' and she noted that 'it definitely ef-

fects his day-to-day abilities ... .' (N.T. p. 1134, line 25-1135, line 4.)

p. The Appellee's weakened grip strength affects his ability to participate in recreational activities, such as riding a quad. (N.T. p. 996, line 14-998, line 6.)

q. The amputation performed by Dr. Spohn affected Appellee's ability to play catch with his nephew, Carter. The Appellee testified as follows: 'I try to play catch and unfortunately the mitt has five fingers holes and I only have four fingers. So trying to squeeze the mitt, it's hard to close the ball. You get the ball and it pops out. But you still kind to manage (sic) to catch it. In the meantime, every time the ball would hit my palm, I would I would (sic) have that sensation. And he would even recognize it and say uncle, we can take a break now, because he could see my hand was just getting in pain.' (N.T. p. 1007, line 14-25.)

r. Appellee's missing left ring finger is a daily reminder of Dr. Spohn's negligent and reckless conduct. (N.T. p. 1028, line 22-1029, line 7.)

s. Appellee has a forty-four (44) year life expectancy in which he will continue to suffer physical and emotional pain and suffering, embarrassment, humiliation and disfigurement.

t. Appellee will never be able to wear a wedding band in a traditional fashion.[4]

Given all of these facts, the punitive damage award in this case is certainly related to the nature and extent of

[4]This summary of the injuries and harm that Appellee endured and will continue to endure is included in this Court's Opinion in the companion case docketed to 1412 MDA 2022.

the harm that the Appellee endured and will continue to endure as a result of Dr. Spohn's reckless conduct.

4. The Wealth of the Defendant

Appellant, Dr. Spohn testified during the punitive damage phase of the trial that his base compensation for 2017, the year he treated the Appellee, was five hundred thousand dollars ($500,000.00.) (N.T. p. 2145, lines 5-7.) The next year, Dr. Spohn's base compensation was two hundred fifty thousand dollars ($250,000.00.) (N.T. p. 2145, lines 1-4.) At the time of the trial, Dr. Spohn was seventy (70) years old. (N.T. p. 2139, lines 10-11.) Dr. Spohn also testified that he received social security, which is a result of age, not need. (N.T. p. 2139, lines 12-13.) At the time, Dr. Spohn testified that he worked part-time, two days to three days a week, in New York City which is his sole means of income. (N.T. p. 2139, lines 16-22.) Despite being aware that punitive damages was an issue in this case from its inception, Dr. Spohn testified that he does not even know that his annual income from his part-time work as his wife handles the finances. (N.T. p. 2139, line 23-p. 2140, line 1.) At the time of trial, Dr. Spohn had been a practicing physician for forty-nine (49) years. Dr. Spohn also testified that he owns assets that are held jointly with his wife which are not subject to attachment in Pennsylvania. (N.T. p. 2141, line 16-p. 2142, line 5.)

Appellant argues that the jury "failed to properly take into account [Appellant's] wealth" when rendering the punitive damage award in this case. Arguably, the jury was not able to properly consider the Appellant's wealth because the Appellant provided absolutely no basis for the jury to consider his wealth. Dr. Spohn testified that

he did not know his annual income from his current part-time employment or what he received from social security. (N.T. p. 2139, line 23-p. 2140, line 1; p. 2142, lines 6-24.) To the extent the jury was left to speculate as to the amount of Dr. Spohn's earnings that is the fault of Dr. Spohn as he did not even provide an approximation of his current income.

Aside from Dr. Spohn's current financial situation, the jury also heard testimony regarding Dr. Spohn's past compensation and his employment history. Given the totality of the evidence presented during the punitive damage phase of the trial, it is impossible to say that the jury's punitive damage award did not take into consideration Dr. Spohn's wealth.

Finally, Appellant cites to the six factors that Pennsylvania courts have considered when determining whether a jury verdict should be remitted; however, Appellant provides no support that these factors apply when addressing a punitive damage award. Even if the six factors were applied in this case to assess the punitive damage award, when considering the totality of the circumstances the award would not justify remittitur.[5]

Upon consideration of the factors set forth in the MCARE Act and Pennsylvania case law, the jury's punitive damage award of three hundred thousand dollars ($300,000.00) in this case is fair and supported by the record. There is nothing about this punitive damage award that shocks the Court's sense of justice and there is no evidence that the award was the result of arbitrariness or unfettered discretion; therefore, it was not an error

[5]This Court fully analyzed Appellants' Joint Motion for Remittitur of the Compensatory Award in its Opinion in the companion case which is docketed to 1412 MDA 2022. This analysis, which is begins on page 18 and ends on page 55, directly addresses many of the six factors often used by Pennsylvania courts.

for this Court to deny Appellant's Motion for Remittitur of the Punitive Damage award.

*e. The Trial Court Erred and Abused Its Discretion in Failing to Instruct the Jury That Punitive Damages Could Be Awarded Against Co-Defendant Hazleton Professional Services d/b/a Lehigh Valley Physicians Group if the Jury Found by a Preponderance of the Evidence That Co-Defendant Hazleton Professional Services d/b/a Lehigh Valley Physicians Group Knew of and Allowed the Conduct of Defendant Peter Spohn, M.D. That Resulted in the Award of Punitive Damages and the Trial Court Further Erred and Abused Its Discretion by Failing to Include a Question on the Jury Verdict Slip Regarding Co-Defendant Hazleton Professional Services d/b/a Lehigh Valley Physicians Group's Vicarious Liability for Punitive Damages. (*See *40 P.S. §1303.505 of the MCARE Act.)*

Appellant's final issue raised on appeal is that this Court erred or abused its discretion "in failing to instruct the jury that punitive damages could be awarded against Co-Defendants Hazleton Professional Services d/b/a Lehigh Valley Physicians Group if the jury found by a preponderance of the evidence that Co-Defendant Hazleton Professional Services d/b/a Lehigh Valley Physicians Group knew of and allowed the conduct of" Dr. Spohn. (Concise Statement of Matters Complained of on Appeal, p. 3.) Appellant also argues that this Court erred by failing to include a question on the Jury Verdict Slip regarding Co-Defendants Hazleton Professional Services d/b/a Lehigh Valley Physicians Group if the jury found by a preponderance of the evidence that Co-Defendant Hazleton Professional Services d/b/a Lehigh Valley Physicians Group. (Concise Statement of Matters Complained of on Appeal, p. 3.)

"It is axiomatic that 'issues not raised in the lower court are waived and cannot be raised for the first time on appeal.' " *Kennett Consolidated School District*, supra, 228 A.3d at 42 (*quoting* Pa. R.A.P. No. 302.) Pennsylvania law is well settled that "[i]n order to preserve an issue for appeal, a litigant must make a timely, specific objection at trial and must raise the issue on post-trial motions." *Id.* (*quoting Dennis*, supra at 352). As with Appellant's second issue raised during this appeal, this issue was not raised at trial and was not raised in a post-trial motion, consequently, this issue is waived.

[EDITOR'S NOTE: Appeal filed to Superior Court of Pennsylvania. Superior Court—No. 1410 MDA 2022—Praecipe for Discontinuance—*GRANTED* by the Superior Court—September 21, 2023/filed: September 26, 2023—Appeal *DISCONTINUED*. Thereafter, praecipe for Discontinuance filed to Luzerne County Court of Common Pleas, January 25, 2024—Praecipe for Satisfaction of Judgment filed February 21, 2024. *See* County Docket 2018-09981 and Superior Court Docket No. 1410 MDA 2022 for specifics.]

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*** Dated Material. Do Not Delay. Please Deliver Before Monday, July 1, 2024**