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I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Kyra Hatwood and David Jacobs initiated this medical malpractice action on behalf of their deceased son, Hyseem Jacobs, against the Hospital of the University of Pennsylvania (“HUP”) and Peter Chen, M.D.

Shortly after midnight on March 22, 2006, Ms. Hatwood was seen in HUP’s Perinatal Evaluation Center (“PEC”). The plaintiff was 38 weeks pregnant, her water had broken and she was in labor. At 3:05 a.m., Ms. Hatwood commenced heavy vaginal bleeding. The medical residents conferred with their attending physician, Dr. Chen, and agreed that a cesarean section was needed due to suspected placental abruption. At 3:44 a.m. on March 22, 2006, Hyseem Jacobs was delivered by cesarean section. He was limp and required resuscitation. It was determined that he experienced a severe hypoxic ischemic brain injury. Hyseem died on August 25, 2007, age of seventeen months, from complications of Cerebral Palsy.

During a two-week trial in February, 2011, the jury heard from seventeen fact and medical expert witnesses. On February 14, 2011, the jury returned a verdict in favor of Plaintiffs. The jury award was \$1,654,583.00 under the Wrongful Death Act and \$500,000.00 under the Survival Act. The jury determined that HUP was 80% causally negligent and that Dr. Chen was 20% causally negligent.

Post-trial briefing was completed. The Court heard oral argument on July 22, 2011. HUP and Dr. Chen seek judgment notwithstanding the verdict and/or a new trial and/or remittitur. For the reasons which follow, the Motion for Post-Trial Relief is DENIED. Plaintiffs' Motion for Delay Damages is GRANTED.

II. LEGAL DISCUSSION

A. The Plaintiffs Met Their Burden of Proof in This Medical Malpractice Case.

In Sutherland v. Monogahela Valley Hospital, 856 A.2d 55 (Pa. Superior Ct. 2004), the Superior Court considered the proof required to present a cause of action in medical negligence, citing Mitzelfelt v. Kamrin, 584 A.2d 888 (Pa. 1990); Montgomery v. South Philadelphia Medical Group, Inc., 656 A.2d 1385 (Pa. Superior Ct. 1995). The Sutherland Court held at 856 A.2d 60:

“A cause of action sounding in negligence for medical malpractice requires proof of four elements: (1) the medical practitioner owed a duty to the patient; (2) the practitioner breached that duty; (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient; and, (4) the damages suffered by the patient were the direct result of the harm.”

A fair reading of the Post-Trial Briefs filed by HUP and Dr. Chen reveal that these defendants are challenging the jury’s prerogative to accept the evidence presented by plaintiffs in this two week trial. Challenges to the weight of the evidence are not a basis for judgment notwithstanding the verdict or a new trial.

James L. Mollick, M.D., plaintiffs’ expert witness in obstetrics and gynecology, evaluated the care and treatment of Kyra Hatwood and her baby Hyseem Jacobs in March, 2006. All of his opinions were expressed to a reasonable degree of medical certainty. Feb. 7, 2011, A.M., N.T. 25-122. In this case, the jury was provided medical opinion evidence that the conduct of these defendants directly caused injury and also

increased the risk of harm to Baby Hyseem. They heard from Allen D. Elster, M.D., neuroradiology; Brian E. Woodruff, M.D., pediatric neurology; Jennifer Lynn Johnson, nurse expert; Andrew C. Verzilli, economist, and from numerous fact witnesses including both Plaintiff-Parents.

The undisputed HUP medical records established that Ms. Hatwood had an uneventful pregnancy. She was monitored monthly at HUP. At about 11:40 p.m. on March 21, 2006, Plaintiff-Hatwood's water broke (SRM/spontaneous rupture of the membranes); there was meconium stained fluid; and, positive fetal movements. Feb. 3, 2011, N.T. 54-55. Four hours later at 3:44 a.m. on March 22, 2006, Baby Hyseem was delivered by high transverse cesarean section; limp with no respiratory effort; failed to respond to stimulation; no voluntary movements; and, suffered injuries from lack of blood flow and lack of oxygen to the brain (hypoxic ischemic encephalopathy). Feb. 2, 2011, A.M., N.T. 32-40.

The jury was asked by these defendants to accept that the hypoxic ischemic injury occurred days before Ms. Hatwood arrived at the Hospital. Feb. 1, 2011, A.M., N.T. 144-145; Feb. 8, 2011, P.M., N.T. 144-148. The jury had the opportunity to consider testimony presented by defense experts Douglas Wilkerson, M.D., pediatric neurologist; Frank A. Manning, M.D., obstetrics and gynecology; Patricia Marie Constanty, nurse expert; by Defendant-Dr. Chen and from several fact witnesses involved in the care of Plaintiff-Hatwood.

When looking at all of the evidence which supports the verdict, the court gives the verdict winner the benefit of all doubt and of every fact and inference. Griffin v. University of Pittsburgh Medical Center-Braddock Hospital, 950 A.2d 996, 999 (Pa. Superior Ct. 2008); Niles v. Fall Creek Hunting Club, 545 A.2d 926 (Pa. Superior Ct. 1988). Neither judgment notwithstanding the verdict or a new trial is warranted here.

B. The Defendants Are Not Entitled to JNOV.

HUP and Dr. Chen contend that they are entitled to judgment notwithstanding the verdict (“JNOV”). This Court does not agree.

JNOV may be entered only in a clear case. It is an extreme remedy. Niles v. Fall Creek Hunting Club, 545 A.2d 926 (Pa. Superior Ct. 1988), “a drastic remedy”. JNOV is appropriate where either the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant, or, the movant is entitled to judgment as a matter of law. Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1074 and cases cited (Pa. 2006); Somerset Community Hospital v. Allan B. Mitchell & Assoc., Inc., 685 A.2d 141, 146 (Pa. Superior Ct. 1996).

In this case, Dr. Mollick testified that the failures of the nurses and first year resident, Dr. Chavkin, to diagnose the baby’s transverse “lie” (position) when Plaintiff-Hatwood was first evaluated in the Perinatal Evaluation Center (“PEC”) shortly after midnight and again later in the Labor and Delivery area, commenced a cascade of sub-standard actions and omissions of care by the defendants and caused injury to the baby. If the transverse lie had

been diagnosed upon admission, Plaintiff-Hatwood would have been promptly prepared for cesarean section. The multiple delays throughout the four hours increased the risk of harm and did cause harm to the baby. Feb. 7, 2011, A.M., N.T. 92. The danger of placental abruption, profuse maternal bleeding and hypoxia would have been avoided. Feb. 7, 2011, A.M., N.T. 32, 36-40. Dr. Mollick explained the basis for his opinion that Baby Hyseem was in the transverse position at the time of admission, N.T. 48-49:

“Well, none of the material up to that point, this examination here, the abdominal examination here, indicated that the baby’s head was down; didn’t indicate what part was down. And as we’ll see in the records presented later on, none of the documentation by any physician or nurse indicates what the presenting part was; non documentation of what the part that was presenting down in the pelvis was.

But then what we had was, when the delivery time came, was the baby was sideways. Okay? And one thing we do know is this: Is that once the membranes rupture, because the baby’s encased in a bag of fluid, as soon as membranes rupture and that fluid goes away, that baby becomes squished.

It’s almost like being in a straight jacket, because the fluid is what keeps the baby kind of floating in the uterus. Well, imagine what happens when that water all drains away. The baby is now compressed by the muscle in that uterus. The baby can’t move. So if the baby is sideways when they delivered, and all the water had drained away when she came into the hospital, how could that baby move to any other position? So that’s now I came to my conclusion.”

He told the jury when the mother’s “water bag” breaks, the baby “can’t really just go spinning around the uterus back and forth because all the fluid now is gone.” N.T. 50.

The jury learned that Ms. Hatwood began extensive bleeding from her vagina while she was in the Labor and Delivery area. Feb. 7, 2011, A.M., N.T. 70. They heard testimony from several witnesses, including Dr. Chen, that at 3:05 a.m. the records state: (Feb. 3, 2011, N.T. 154-155)

“Patient’s pad changed. Large amount of bright red blood with softball-sized cloth noted. Patient continuing to actively bleed
. . . .

Large amounts of blood pouring out of vagina. Pitocin turned off; discussing necessity of C-section with the patient; patient verbalizes understanding and denies having questions at this time.”

Dr. Mollick expressed his opinion that the response by the healthcare providers at HUP to these signs of placental abruption deviated from the standard of care. Feb. 7, 2011, A.M., N.T. 71-75. He testified that placental abruption is “an obstetrical emergency”, meaning life threatening to mother and baby; N.T. 71. The jury heard that Dr. Chen, the residents and nurses should have tried to “get the baby out as soon as possible”. N.T. 72. He explained at N.T. 73:

“To prevent this baby from lack of oxygen, lack of blood and from brain damage. Because what happens in a placental abruption is the placenta is separating from the uterus; and when that placenta separates from the uterus, it’s separating from all the blood and oxygen that mom’s providing to the baby.”

In this case, the records indicated it took at least 40 minutes from the discovery of active bleeding to delivery. Dr. Mollick testified at Feb. 7, 2011, A.M., 74-75:

“. . . in a university hospital where they can get the patient from a room to the operating room in a minute. . . . you should be able to get that baby out in less than ten minutes.”

The defense expert obstetrician, Frank Manning, M.D., agreed that HUP could have done the cesarean in ten minutes. Feb. 9, 2011, A.M., N.T. 108.

Significantly, the fetal monitor was removed at 3:23 a.m. There are no records of the condition of Baby Hyseem until 3:44 a.m. when he was delivered in transverse lie and “came out profoundly injured.” Feb. 7, 2011, A.M., N.T. 79. Nursing expert, Jennifer Lynn Johnson testified that after Ms. Hatwood started bleeding (3:05 a.m.) the nurses deviated from the standard of care when they failed to write on the charts whether they were monitoring the vital signs of the mother, whether she was hydrated, and failed to position the fetal monitoring strips to assess the baby’s condition. Feb. 4, 2011, N.T. 90-93, 111-113. Nurse Johnson opined that the nurses did not act quickly enough to prepare their patient for the “emergent situation”. N.T. 114-116. Additionally, Dr. Mollick expressed very serious concerns about HUP’s fetal monitoring machines which malfunctioned, the fetal monitoring strips which were not positioned properly or which were non-reactive with constant areas of “dropout” throughout Ms. Hatwood’s four hour labor. Dr. Chen confirmed that some of the strips did not provide reassuring data.

In Cruz v. Northeastern Hospital, 801 A.2d 602 (Pa. Superior Ct. 2002), the Appellate Court quoted well-established Pennsylvania case law at 610:

“Once a plaintiff has demonstrated that defendant’s act or omissions . . . have increased the risk of harm to another, such evidence furnishes the basis for the fact-finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm; the necessary proximate cause will have been made out if the jury sees fit to find cause in fact.”

See also, Carrozza v. Greenbaum, M.D., 866 A.2d 369, 380 (Pa. Superior Ct. 2004).

Dr. Mollick's criticisms of the nurses and the first year resident, and of Dr. Chen's failures of oversight, and the harm to Baby Hyseem were expressed to a reasonable degree of medical certainty. The failure of the nurse to identify or record the presenting part of the baby was a breach of the standard of care. This increased the risk of harm when it was discovered, too late, that the baby was in a transverse lie and not vertex. Feb. 7, 2011, A.M., N.T. 28, 32, 36-40, 47-50. Dr. Chavkin did not perform a cervical examination instead she relied on the nurse. Dr. Chen simply "signed-off" on Dr. Chavkin's notes, Feb. 7, 2011, A.M., N.T. 40, 51-53, without adequate supervision or any independent verification of an "inexperienced first year resident." Feb. 7, 2011, A.M., N.T. 94-97, Feb. 3, 2011, N.T. 54, 68-73. See also, Feb. 7, 2011, A.M., N.T. 92.

These plaintiffs' presented ample evidence for the jury to conclude that the conduct of Dr. Chen, First Year Resident Dr. Chavkin and the nurses at HUP deviated from the appropriate standards of care and that their conduct increased the risk of harm and caused the harm to Baby Hyseem. The negligent conduct commenced from the time Ms. Hatwood arrived at HUP and the HUP personnel failed to recognize the baby's transverse lie.

To the extent that the defendants are challenging the facts and data upon which Dr. Mollick based his opinions, these arguments address weight and not the admissibility of his testimony. Dr. Mollick's testimony was based on his review of the medical records. He fully explained the basis for all of his opinions. See, Rule 703 of Pennsylvania Rules of Evidence; Plaintiffs' Post-Trial Brief, pages 19-26. Dr. Mollick did not test the credibility of

other witnesses, rather, the trial transcripts reveal that his conclusions, based on Hospital records, were not the same as conclusions formed by defense witnesses. It was up to the jury to weigh conflicting opinions of expert witnesses to arrive at their verdict.

The jury's decision to reject the defendants' "cord blood gas defense" is supported by the evidence from plaintiffs' expert witnesses. There were believability and weight issues raised about the late discovery of a lab slip. See also, Plaintiff's Post-Trial Brief, pages 24-26. Dr. Mollick provided testimony which was rationally based on the medical records. Feb. 3, 2011, A.M., N.T. 84, 187-190. Contrary to defendants' argument, it would have been error to exclude his testimony. In Foflygen v. Allegheny General Hospital, 723 A.2d 705 (Pa. Superior Ct. 1999), the Honorable Superior Court provided guidance about the admission and exclusion of expert testimony at 710:

"In addition, 'fact testimony may include opinion or inferences so long as those opinions or inferences are rationally based on the witness's perception and helpful to a clear understanding of his or her testimony.' *Brady v. Ballay, Thornton, Maloney Medical Associates, Inc.*, 704 A.2d 1076, 1082 (Pa. Super. 1997) (citing *Havasy v. Resnick*, 415 Pa. Super. 480, 609 A.2d 1326, 1333 (Pa. Super. 1992))."

See also, Tiburzio-Kelly v. Montgomery, 681 A.2d 757 (Pa. Superior Ct. 1996) relied on by the Foflygen court.

Based upon all of the circumstances set forth above, the defendants' requests for judgment notwithstanding the verdict are denied.

Vicarious Liability

HUP and Dr. Chen suggest that because the nurses and Dr. Chavkin were not named defendants, they can not cause HUP to be found liable for their negligent conduct. The case law does not support this argument. See also, Feb. 11, 2011, N.T. 189-190. In this case it was admitted that the nurses and Dr. Chavkin were employees of the Hospital of the University of Pennsylvania.

As a general rule, a master may be held liable for the acts of the servant when those acts are committed during the course and scope of employment. “Pennsylvania law concerning the extent to which an employer is vicariously liable for the actions of its employee is well established and crystal clear.” R.A. v. First Church of Christ, 748 A.2d 692 (Pa. Superior Ct. 2000), quoted in Sutherland v. Monogahela Valley Hospital, *supra*, 856 A.2d at 62; Valles v. Albert Einstein Medical Center, 805 A.2d 1232 (Pa. 2002), holding that hospitals can not be held vicariously liable when employee-physicians fail to obtain informed consent. That Court provided a comprehensive analysis of Pennsylvania’s law on vicarious liability.

The facts in the case at bar fall within the general rule where vicarious liability is applicable. The conduct of the nurses and Dr. Chavkin was committed during the course of and within the scope of their employment on March 22, 2006. Their employer, the named defendant, was properly determined to be held vicariously liable for their acts and omissions. Even though the jury heard no evidence or explanation proffered why Dr. Chavkin did not testify, HUP could still be found liable. But see, Feb. 3, 2011, N.T.132.

The jury also concluded that Dr. Chen was liable directly and/or vicariously. He acknowledged that the nurses and Dr. Chavkin were under his supervision. Defendants' Post-Trial Brief, page 16; Defendants' Supplemental Post-Trial Brief, page 2; Feb. 3, 2011, N.T. 60-64, 70-72.

In a related argument, it appears that the defendants contend it was error for the Trial Court to select a Verdict Sheet which they prepared. Defendants' Post-Trial Brief, page 22. In the absence of a full transcript relating to preparation of the Verdict Sheet, post-trial review is impossible. Moreover, the challenge to the Verdict Sheet was not specified in the defendants' Post-Trial Motion, per Rule 227.1(b)(2) of the Pennsylvania Rules of Civil Procedure. See also, Plaintiffs' Supplemental Reply Brief, pages 5-6; Goldberg v. Isander, M.D., 780 A.2d 654, 662 (Pa. Superior Ct. 2001).

C. The Defendants Are Not Entitled To a New Trial.

The underlying argument raised by HUP and Dr. Chen is that the decision by the jury to reject their "cord blood gas defense" warrants a new trial. See, Defendants' Post-Trial Brief, pages 20-21, Defendants' Reply Brief, pages 12-13. This Court does not agree.

The jury is the fact-finding body. These jurors had two weeks to weigh the contradictory evidence and inferences, to consider all of the experts, to judge the credibility of the witnesses, and to draw the ultimate conclusions. See generally, Criswell v. King, 834 A.2d 505 at 512 (Pa. 2003), a new trial based on weight of the evidence only in "truly extraordinary circumstances"; Arbrumster v. Horowitz, 813 A.2d 698 at 703 (Pa. 2002),

credibility is solely for the jury and a new trial only when the verdict shocks one's sense of justice; Martin v. Evans, 711 A.2d 458 (Pa. 1998), the jury may believe all, part or none of the witnesses' testimony.

HUP and Dr. Chen assert that because Dr. Mollick's opinions contradicted their blood gas evidence, then his opinions make "no sense", Post-Trial Brief, page 21:

"Apart from making no sense, that testimony was based on pure supposition and constituted impermissible opinions in the face of uncontested factual support that the blood gas was in fact arterial."

Despite this bald and inaccurate commentary, the defendants acknowledge that theirs is simply a challenge to the weight of evidence, at page 20:

"Plaintiffs contended that the brain injury occurred during the 15 minutes immediately preceding birth, when the fetal heart monitor could not be used due to the need to perform c-section surgery. The jury's verdict, of course, indicates that they accepted plaintiffs' theory of the timing of causation of brain injury. That conclusion is contrary to the great weight of the evidence in this case."

The plaintiffs have aptly responded in their Post-Trial Brief, pages 24-25:

". . . Hyseem Jacobs was severely depressed at the time of birth, could not breath, and was on a ventilator, yet had positive movement on exam in the PEC and variability on fetal monitor strip which indicated that no profound hypoxic injury had occurred up until the time that monitoring was discontinued at 3:23 a.m. [Mollick, Feb. 7, 2011, N.T. 84, 112-117] The cord blood gas values reported, if arterial, could not fit with the child's clinical presentation, but could if the sample were venous in origin. [Mollick, N.T. 84]"

Over vigorous objections from plaintiffs, the Trial Court permitted the jury to hear evidence about a “lab slip” which was disclosed a few days prior to trial. See, Feb. 1, 2011, A.M., N.T. 54-66, 72. The document was presumably proffered by defendants to conclusively establish that the umbilical cord blood was drawn from arterial blood for testing. The jury heard Nurse Caroline Simmons testify that some of the writing on the lab slip “doesn’t look extremely similar” to her signature. Feb. 10, 2011, A.M., N.T. 65. The jury also heard that in March, 2006, Nurse Simmons had graduated from school a year earlier and had been a Labor and Delivery Nurse for fifteen months. Feb. 10, 2010, N.T. 80. Dr. Mollick testified that, “the most experienced person in the operating room did not obtain the cord blood sample”. Feb. 7, 2011, A.M., N.T. 86. He explained that by pushing through the blood vessels, the person who performed the blood draw would get “mixed” results. N.T. 86-92. He repeatedly stated that the low Apgar scores were not consistent with the cord blood report. Plaintiff’s pediatric neurologist also explained to the jury why the cord blood gas values may have been in error. Feb. 2, 2011, P.M., N.T. 76.

At this post-trial juncture, the issue is whether there was enough evidence in the record to support the jury’s verdict. The response is a resounding “yes”. It is not the function of the court to set aside a jury’s verdict simply because the fact finders could have drawn different inferences or conclusions or because the defendants believe a different result is more reasonable. In Baldino v. Castagna, M.D., 478 A.2d 807 (Pa. 1984), the Supreme Court reversed an order for a new trial and commented at 812:

“We have consistently held that a new trial should not be granted on a mere conflict in the testimony.”

D. The Plaintiffs Established The Causal Nexus Between The Defendants' Negligence and The Baby's Injuries and Death.

The plaintiffs' expert witnesses were consistent in their testimony about the time when Baby Hyseem's brain injury occurred. All three experts provided overlapping opinions that the brain injury occurred during the period after the placental abruption (3:05 a.m.) and prior to the delivery of the child (3:44 a.m.) on March 22, 2006.

"If plaintiff calls more than one expert, there must be no absolute contradiction in their essential conclusions." Brodowski v. Ryave, 885 A.2d 1045, 1060 (Pa. Superior Ct. 2005) quoting Mudano v. Philadelphia Rapid Transit Co., 137 A. 104 (Pa. 1927). In the absence of "absolute conflicts", the Superior Court recognizes that expert opinions have not been compromised and will not create jury speculation and conjecture. Brodowski v. Ryave, supra at 1062 relying on Brannan v. Lankenau Hospital, 417 A.2d 196 (Pa. 1980). There were no conflicts or contradictions here.

In this litigation, the plaintiffs presented Brian Woodruff, M.D., a pediatric neurologist. His specialty involves diagnosis and treatment of children with neurological diseases or conditions in the brain, the spinal cord or the nerves. Feb. 2, 2011, P.M., N.T. 6-8. Dr. Woodruff testified that based on his review of the medical records, Baby Hyseem demonstrated a "classic presentation" of serious profound lack of oxygen to the brain. Feb. 2, 2011, P.M., N.T. 37. He explained the baby's injury to the jury at N.T. 36-37:

"So you look at the exam, you look at the MRI findings, you look at how those MRI findings came about, and I would have to agree with the neuroradiologist that the MRI findings are very classic; and in that the injuries seen in that deep, what

he called the “basal ganglia,” it’s a very deep kind of primitive area within the brain, and it’s -- it’s highly metabolic, meaning it needs a lot of energy; and if it doesn’t get a lot of energy, it’s the first area in a term baby to be damaged.

And, classically there’s a term that we use called “near total acute asphyxia,” meaning the child sustained very profound severe lack of oxygen to the brain for a period of time that my experience and training and review of literature over the years, it’s generally a 15 to 20-minute window of time that presents like this. And children will be born -- they’ll be born very similar to the way Hyseem presented with very -- what we call depressed. They can have seizures.

And the interesting thing about this sort of injury, which is different than a lot of other injuries in babies, is that it’s so short and so intense that it affects -- it generally preferentially affects the brain without causing a lot of damage to other organ systems. When there’s more -- when it’s more prolonged, then you start picking up other organ systems.

Just like, you know, if somebody has a cardiac arrest and they’re resuscitated, generally, the biggest issue that that person has as an adult, too, is brain injury. The heart and the kidneys are generally after that.

Well, if you have a very discrete, serious profound hypoxic time, 15 or 20 minutes, you have this classic presentation. You won’t have kidney injury, you won’t have liver injury, what you do see, classically, with a more prolonged state of hypoxia. And so the state of history after the child was born also coincides with a very profound hypoxic state like this.”

Dr. Woodruff explained that this “discrete” classic presentation of brain injury coincided and “matches up” with the timing of Ms. Hatwood’s vaginal bleeding and placental abruption which was recorded in the HUP records. Feb. 2, 2011, P.M., N.T. 31, 47-49.

Plaintiff also presented Allen D. Elster, M.D., an expert neuroradiologist. His work specializes in X-rays, MRI's, ultrasounds and images of the brain and nervous system. Feb. 2, 2011, A.M., N.T. 7. Dr. Elster showed the jury Hyseem's MRI scans and described the abnormal findings. N.T. 36-46. The white spots on the scans are the precise patterns of "severe, relatively short duration lack of blood flow". The expert stated, "90% of children that have this type of injury have very severe, very poor outcomes."

Dr. Elster testified to a reasonable degree of medical certainty as to the timing of the brain injury. When he reviewed two films taken during the first week of the baby's life, he was able to provide his conclusions that the injury happened on the day of birth or the day before. Feb. 8, 201, P.M., N.T. 49-50. The expert based his opinion on the MRI scan taken at Childrens' Hospital of Philadelphia on the 7th day of life on March 29, 2006. N.T. 50:

"Putting it all together, I will summarize it and say I think this is something that happened, most likely, within the first two days before birth, up to the time of birth minus 48 hours, maybe as far as three days beyond; but probably on the day of birth, or the day before.

And I'm basing it on just the relative color changes on some of these sequences, looking at this diffusion image; normally, goes back to normal appearance after -- between seven and ten days. So since this is still abnormal, I know we're probably within a seven-to-ten day window. This [MRI] is done at day 7. So this is where I'm getting it at.

It's not just a guess, that is based upon science and measurements that people have made; but it's relatively large -- broad range that could admit to several different theories for how it occurred, and I suspect that's part of the argument here."

The jury also heard Douglas Wilkerson, M.D., defense expert pediatric neurologist agree that the Children's Hospital MRI indicated an injury as late as a day or so prior to birth. Dr. Wilkerson agreed that the March 29, 2006 MRI provides a 7 to 10 day window. Feb. 8, 2011, P.M., N.T. 226. The Children's Hospital physicians also commented on the abnormal findings, called a diffusion sequence, which correlates to the 7 to 10 day parameter. Feb. 2, 2011, A.M., N.T. 53-54.

Dr. Elster further compressed and pinpointed the time of the injury. He explained that the abnormal patterns seen in Hyseem's brain scans are associated with either placental abruption or cord prolapse (not involved in this case). Feb. 2, 2011, A.M., N.T. 55:

“When we see this pattern in humans . . . they have been associated with the following types of diseases: One is placental abruption. That's where the placenta tears away from the uterus. Underneath the placenta, it tears away, and so, therefore, there can't be effective transfer of mother's blood, the baby's blood.”

The jury heard defense expert Dr. Wilkerson confirm that HUP's medical records state that Ms. Hatwood suffered a placental abruption while in the care of the Hospital and Dr. Chen. Feb. 8, 2011, P.M., N.T. 209, 235. Dr. Wilkerson also confirmed that Baby Hyseem did suffer a hypoxic ischemic injury. Feb. 8, 2011, P.M., N.T. 145-147.

Dr. Mollick, plaintiffs' expert obstetrician, stated that when the bleeding started, the placenta separated, and it caused the baby's brain injury. Feb. 7, 2011, A.M., N.T. 75:

“I believe that eventually the placenta separated to the point where it caused the injury It eventually cuts off the blood flow, oxygen and eventually causes brain damage.”

Feb. 7, 2011, A.M., N.T. 77-78:

“I believe the injury occurred sometime after the monitor was removed . . . at 3:23.

. . . . It happened somewhere between 3:23 and 3:44.”

It is apparent that the evidence from the three experts called by the plaintiffs are reasonably consistent and unequivocal. There are no contradictions in their essential conclusions. The jurors were presented medical and scientific evidence from which they could conclude and did conclude that the severe brain injury to the baby occurred while Ms. Hatwood was under the care and treatment of Dr. Chen and the nurses and Dr. Chavkin of HUP. See generally, Halper v. Jewish Family & Children’s Service, 963 A.2d 1282, 1287 (Pa. 2009); Simmons v. Mullen, 331 A.2d 892, 900 (Pa. Superior Ct. 1974).

The defendants contend that the plaintiffs’ “entire case” was that the conduct of Dr. Chen and HUP’s employees directly caused the baby’s brain injury and subsequent death. Defendant’s Post-Trial Brief, page 23. The trial record is more expansive.

It is accurate that the plaintiffs met their burden to establish the direct proximate causal link between the acts and omissions of defendants and the injuries. It is also true that where, as here, the plaintiffs introduced evidence that the negligent acts increased the risk of harm sustained by the baby, the jury must then be instructed to determine whether the health care providers’ conduct was a substantial factor in bringing about the injuries. Gradel v. Inouye, M.D., 421 A.2d 676, 677-678 (Pa. 1980); Winschel v. Ajay Jain, M.D., 925 A.2d 782, 789 (Pa. Superior Ct. 2007).

Dr. Mollick testified that the failure of the defendants to recognize the transverse presentation at the time of admission to PEC increased the risk of harm to the baby. He opined that the defendants failed to anticipate and prepare for a cesarean because they did not evaluate the fetal lie. He explained that the only way to deliver a transverse baby is by cesarean. Next, two hours later when Ms. Hatwood began profuse bleeding, these defendants failed to expeditiously deliver the baby and increased the risks of injury to Baby Hyseem. The jury was properly instructed about increased risk of harm. Feb. 11, 2011, N.T. 186-188.

E. The Jury’s Award For Wrongful Death And Survival Damages Is Supported By The Record.

HUP and Dr. Chen argue that as a matter of law, a parent cannot claim damages for loss of society and companionship of a deceased child. Defendant’s Post-Trial Brief, page 13. This Court does not agree.

The Wrongful Death Act states in pertinent part, 42 Pa. C.S. §8301:

“(a) An action may be brought . . . to recover damages for the death of an individual caused by the wrongful act or neglect . . . or negligence of another . . .

(b) . . . the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased. . . .”

Our Superior Court has set forth the purpose of the Act in Machado v. Kunkel, M.D., 804 A.2d 1238 (Pa. Superior Ct. 2002) quoting Linebaugh v. Lehr, 505 A.2d 303 (Pa. Superior Ct. 1986) at 1245-1246:

“The purpose of the Wrongful Death Statute, 42 Pa.C.S. § 8301, is to compensate ‘the decedent’s survivors for the pecuniary losses they have sustained as a result of the decedent’s death.... This includes the value of the services the victim would have rendered to his family if he had lived.’ *Slaseman v. Myers*, 309 Pa.Super. 537, 545, 455 A.2d 1213, 1218 (1983). A wrongful death action does not compensate the decedent; it compensates the survivors for damages which they have sustained as a result of the decedent’s death. See: *Dennick v. Scheiwer*, 381 Pa. 200, 201, 113 A.2d 318, 319 (1955).

Under the wrongful death act the widow or family is entitled, in addition to costs, to compensation for the loss of the contributions decedent would have made for such items as shelter, food, clothing, medical care, education, entertainment, gifts and recreation.”

The Machado Court also clarified that HUP’s use of the term “filial consortium” is erroneous from a purely technical and semantic viewpoint. 804 A.2d at 1244. Thus, the cases relied on in Defendant’s Post-Trial Brief, page 10, are inapposite and may be the source of defendants’ confusion. “Consortium” refers to the affection and sexual relations between spouses. See also, Machado supra at 1244. See also, Rittenhouse v. Hanks, M.D., 777 A.2d 1113 (Pa. Superior Ct. 2001) which distinguishes between a claim for losses under the Wrongful Death Act, “value of services, society and comfort”, and the separate action for loss of consortium. Although the words “society and comfort” are the same for each of those distinct causes of action, the right to claim the monetary value of **lost services** under the

Wrongful Death Act is cognizable in the law. Similarly in Gaydos v. Domabyl, 152 A. 549 (Pa. 1930), cited by these defendants, the Supreme Court held that pecuniary loss is the “destruction of a reasonable expectation of pecuniary advantage.” 152 A. at 552. Pecuniary advantage may be shown by “. . . services, food, clothing education and gifts. . . .”. Thus, again the **loss of services** of the deceased is compensable. In the case at bar, Plaintiff-Parents base their cause of action on the loss of services of their child, which includes society and comfort.

In Rettger v. UPMC Shadyside, 991 A.2d 915 (Pa. Superior Ct. 2010) allocator denied, 2011 Pa. LEXIS 377 (Pa. Feb. 16, 2011), the Superior Court was eloquent in championing the measure of damages in a Wrongful Death case for loss of a child.

The Rettger Court made it clear that in Pennsylvania a parent can claim damages for loss of society and companionship of a deceased child. At 991 A.2d 932-933:

“‘Damages for wrongful death are the value of the decedent’s life to the family, as well as expenses caused to the family by reason of the death.’ *Slaseman v. Myers*, 309 Pa. Super. 537, 455 A.2d 1213, 1218 (Pa. Super. 1983). **Thus, members of the decedent’s family enumerated in the Wrongful Death Act, see 42 Pa.C.S. § 8301(b), may recover not only for medical, funeral, and estate administration expenses they incur, but also for the value of his services, including society and comfort.**” (emphasis added).

The jury in this trial was instructed at Feb. 11, 2011, N.T. 195-196, with language approved in Rittenhouse v. Hanks, M.D., *supra* at 1119:

“. . . monetary value of the companionship, society and comfort . . . including work around the home, provision of physical comfort and services, and provision of society and comfort.”

Rettger v. UPMC Shadyside, *supra*, at 932, specifically holds that Wrongful Death damages includes the value of decedent's services which includes loss of society and comfort. "Services" also extends to the "profound emotional and psychological loss suffered" by these Plaintiff-Parents. 991 A.2d at 932-933. The defendants' post-trial argument is meritless.

Finally, HUP and Dr. Chen contend that the verdict awards for both Wrongful Death and the Survival Action are excessive. They argue that they are entitled to remittitur. This Trial Court does not agree.

Baby Hyseem lived for seventeen months. Loss of life's pleasures, embarrassment, humiliation and disfigurement were established when the jury heard that during his lifetime both of his parents took him to doctors and therapists several times each week. Ms. Hatwood described speech therapy, cardiologists, cerebral palsy clinic, feeding and swallowing clinic. Feb. 1, 2011, P.M., N.T. 200. Mr. Jacobs indicated that the heavy equipment -- special chair and machines -- had to be transported each time the parents took Hyseem to the doctors. Feb. 8, 2011, A.M., N.T. 61. They took the baby for Emergency Room visits several times when he had difficulty breathing. Plaintiff-Parents explained that Childrens' Hospital provided classes for them to learn CPR and to learn how to use the feeding tube and the breathing/suction machine as well as physical therapy before Baby Hyseem came home. Feb. 8, 2011, A.M., N.T. 54-55; Feb. 1, 2011, P.M., N.T. 194-196. Therapists also visited their home on a regular basis.

Additional evidence of non-economic damages in the Survival Action included testimony by Hyseem's brother, Vyshan, who stated that the infant communicated by "laughing, smiling, crying." Feb. 8, 2011, A.M., N.T. 76. Vyshan stated the baby did express when he liked certain TV shows and others that he did not like. This was confirmed by Hyseem's father, Plaintiff-Jacobs, who testified that Hyseem enjoyed action movies and would react to the excitement. Feb. 8, 2011, A.M., N.T. 64. Both parents testified that his "noises" had meaning and Hyseem would make certain noises if he was not comfortable. Feb. 1, 2011, P.M., N.T. 199; Feb. 8, 2011, A.M., N.T. 63.

The record in support of Wrongful Death established the value of Baby Hyseem to the family, as a family member. Mr. Jacobs explained that he had looked forward to having his first child and he attended all prenatal visits. Feb. 8, 2011, A.M., N.T. 34. Mr. Jacobs described when Hyseem came home at Feb. 8, 2011, A.M., N.T. 62-63:

"You know, we wanted him to enjoy us and we wanted to enjoy him, but we had to, you know, come to the conclusion . . . there's just some things that he wasn't able to do . . . we had to make up different ways to actually -- or what we thought we were trying to give him -- fun . . .

So, it was hard but we treat him as regular as possible, like a regular kid . . . I would wake him up every morning or he would wake me up . . . it was always trying to be -- live a regular life. . . ."

Ms. Hatwood described the emotional loss of her child at Feb. 1, 2011, P.M., N.T. 152:

"He was a sweet child, very lovable, just full of joy . . . he made my life joyful that's how he was."

While Ms. Hatwood managed the household and kept two older children ready for school, the record reflects that it was Mr. Jacobs who spent a great deal of time with his son. Mr. Jacobs told the jury about their bond and companionship at Feb. 8, 2011, A.M., N.T. 67-68:

“It was a process . . . It took a lot to care for my son . . . It’s just I knew . . . I would wake up the next day, I already knew my day consisted of Hyseem. It was nothing else I could possibly plan in my day, or anything that I could do that I didn’t plan on doing with him, because it was just a constant thing.”

The Pennsylvania Appellate Courts have often repeated the test for remittitur. Generally, the granting or refusal to grant remittitur is within the discretion of the Trial Court. Each case is unique and must be assessed based on the trial record. In Stoughton v. Kinzey, 445 A.2d 1240 (Pa. Superior Ct. 1982), it was held that when a plaintiff’s verdict is supported by the evidence, an order of the court modifying the award is an abuse of discretion, citing Prather v. H-K Corporation, 423 A.2d 385, 389 (Pa. Superior Ct. 1980).

In this case, the jury heard and saw the profound emotional and psychological loss suffered by both of Baby Hyseem’s parents. When Hyseem died in August, 2007, the parents had a funeral attended by family and friends. Mr. Jacobs expressed their loss at Feb. 8, 2011, A.M., N.T. 68:

“Well, I lost a lot when my son passed away. I lost a piece of me, actually. That’s how I feel right now. You know, up to this day, I constantly think about him, and I always just kind of wonder . . . why. That was always my only question, and I never questioned anything that happened, but when I did, I did question that. And it’s hard to deal with, man.

Like when I lost him, it's just -- that was a part of me. He's gone, and I can't get it back and nothing I can do change the way I feel about it."

Many tangible and intangible factors were properly considered by the jury for damages under the Survival Action and under the Wrongful Death Act. The jury considered the loss of services, including the loss of society and comfort and companionship in order to award a monetary value. This Court which sits as an experienced civil Trial Court and which had the benefit of seeing and hearing all of the evidence, has no hesitancy in concluding that the jury's verdict was fair, thoughtful and reasonable. Haines v. Raven Arms, 640 A.2d 367 (Pa. 1994). The verdict award does not shock this Court's conscience.

F. The Plaintiffs Motion For Delay Damages is Granted.

The plaintiffs filed a Motion for Delay Damages at Control No. 11023048. The defendants responded, inter alia, by challenging the calculations set forth in Plaintiffs' Motion. After discussion, the calculation is agreed to be \$143,000.08.

Accordingly, delay damages in the amount of **\$143,000.08** will be added to the jury verdict award of **\$2,154,583.73**. Judgment will be entered in favor of the plaintiffs in the amount of **\$2,297,583.81**.

III. CONCLUSION

For all the reasons set forth above the Motion for Post-Trial Relief filed by the Hospital of the University of Pennsylvania and Dr. Peter Chen is **DENIED**. The Motion for Delay Damages filed by Kyra Hatwood and David Jacobs as Parents and Co-Administrators of the Estate of Hyseem Jacobs, Deceased is **GRANTED**.

BY THE COURT:


FREDERICA A. MASSIAH-JACKSON, J.
OCT. 18, 2011