

IN THE SUPREME COURT OF PENNSYLVANIA

No. 30 EAP 2026

DAJAH HAGANS, as Parent and Natural Guardian of J.H., a minor,
individually and in her own right,
Plaintiff,

v.

HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, THE
TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA and
UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM (D/B/A PENN
MEDICINE), KIRSTIN LEITNER, M.D., JULIE A. SUYAMA, M.D.,
WHITNEY R. BENDER, M.D., SARA GUTMAN, M.D., DENISE
JOHNSON, M.D., JESSICA PETERSON, M.D., and VICTORIA
KROESCHE, R.N.,
Defendant

Appeal of: Hospital of the University of Pennsylvania

**BRIEF *AMICI CURIAE* OF THE AMERICAN MEDICAL
ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY
IN SUPPORT OF APPELLANT HOSPITAL OF THE
UNIVERSITY OF PENNSYLVANIA**

Appeal from the Opinion of July 10, 2025 of the Superior Court at
No. 536 EDA 2024, affirming the Judgment
of the Court of Commons Pleas of Philadelphia County, entered
January 19, 2024, and the Order entered December 27, 2023, at
No. 190607280

SAXTON & STUMP, LLC

Matthew W. Rappleye (I.D. No. 81746)
Jennifer S. Snyder (I.D. No. 89495)
100 Deerfield Lane, Suite 240
Malvern, PA 19355
(484) 328-8500
Counsel for Amici Curiae

TABLE OF CONTENTS

I.	STATEMENT OF INTEREST OF AMICI CURIAE	1
II.	INTRODUCTION AND SUMMARY OF ARGUMENT	2
III.	FACTS AND PROCEDURAL HISTORY RELEVANT TO THIS BRIEF	5
IV.	ARGUMENT	8
A.	The increased risk of harm standard does not eliminate the need for a jury finding on causation	8
1.	In <i>Hamil</i> and subsequent cases on increased risk of harm, this Court has uniformly recognized that, to hold a defendant liable, the jury must “go further” and find factual causation	9
2.	No jurisdiction recognizing the concept of increased risk of harm has dispensed with the requirement to determine factual causation	21
B.	The Trial Court and Superior Court erred in permitting the jury to find liability based on increased risk of harm, alone	27
C.	The legally inaccurate verdict slip was prejudicial, and a new trial is required.....	30
D.	A proper jury charge cannot cure a clearly erroneous verdict slip	31
V.	CONCLUSION	35

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>A.Y. v. Janssen Pharms. Inc.</i> , 224 A.3d 1 (Pa. Super. 2019)	31
<i>Billman v. Saylor</i> , 761 A.2d 1208 (Pa. Super. 2000).....	15, 16
<i>Bito Bucks in Potter, Inc. v. Nat'l Fuel Gas Supply Corp.</i> , 449 A.2d 652 (Pa. 1982).....	28
<i>Brozana v. Flanigan</i> , 454 A.2d 1125 (Pa. Super. 1983) .	20
<i>Burton-Lister v. Siegel, Sivitz & Lebed Assocs.</i> , 798 A.2d 231 (Pa. Super. 2002).....	16
<i>Cangemi ex rel. Est. of Cangemi v. Cone</i> , 774 A.2d 1262 (Pa. Super. 2001)	15
<i>Clayton v. Sabeh</i> , 594 A.2d 365 (Pa. Super. 1991)	20
<i>Cohen v. Kalodner</i> , 345 A.2d 235 (Pa. Super. 1975)	19
<i>Com. v. Antidormi</i> , 84 A.3d 736 (Pa. Super. 2014)	35
<i>Com. v. DeHart</i> , 650 A.2d 38 (Pa. 1994)	passim
<i>Com. v. Pownall</i> , 278 A.3d 885 (Pa. 2022).....	29
<i>Com. v. Williams</i> , 640 A.2d 1251 (Pa. 1994).....	35
<i>Delaney v. Cade</i> , 873 P.2d 175 (Kan. 1994)	24
<i>Doull v. Foster</i> , 163 N.E.3d 976 (Mass. 2021)	22
<i>Est. of Frey v. Mastroianni</i> , 463 P.3d 1197 (Haw. 2020)	24
<i>Ford v. Jeffries</i> , 379 A.2d 111 (Pa. 1977)	13
<i>Fritz v. Wright</i> , 907 A.2d 1083 (Pa. 2006)	27,33,34

<i>Gradel v. Inouye</i> , 421 A.2d 674 (Pa. 1980).....	15, 17
<i>Hagans v. Hosp. of the Univ. of Pennsylvania</i> , No. 19067280, 2024 WL 3361402 (Pa. C.C.P. Phila Cnty. May 16, 2024)	8
<i>Hagans v. Hosp. of the Univ. of Pennsylvania</i> , 343 A.3d 251 (Pa. Super. 2025).....	8
<i>Hamil v. Bashline</i> , 392 A.2d 1280 (Pa. 1978)	passim
<i>Harman v. Borah</i> , 756 A.2d 1116 (Pa. 2000).....	34
<i>Jones v. Montefiore Hosp.</i> , 431 A.2d 920 (Pa. 1981)	passim
<i>Jones v. Owings</i> , 456 S.E.2d 371 (S.C. 1995)	22
<i>Joyce v. Boulevard Physical Therapy & Rehab. Ctr.</i> , P.C., 694 A.2d 648 (Pa. Super. 1997)	16
<i>Kramer v. Lewisville Mem’l. Hosp.</i> , 858 S.W.2d 397 (Tex. 1993)	22
<i>Lewis v. Reading Hosp.</i> , 345 A.3d 257 (Pa. Super. 2025)	20
<i>Matsuyama v. Birnbaum</i> , 890 N.E.2d 819 (Mass. 2008).....	22, 23
<i>McKellips v. Saint Francis Hosp., Inc.</i> , 741 P.2d 467 (Okla. 1987)	25
<i>Mitzelfelt v. Kamrin</i> , 584 A.2d 888 (Pa. 1990)	14, 20
<i>Morena v. S. Hills Health Sys.</i> , 462 A.2d 680 (Pa. 1983)	12
<i>O’Rourke on Behalf of O’Rourke v. Rao</i> , 602 A.2d 362 (Pa. Super. 1992)	16
<i>Palmer v. Foss Motors, Inc.</i> , 327 A.2d 80 (Pa. 1974)	28

<i>Reichman v. Wallach</i> , 452 A.2d 501 (Pa. Super. 1982) .	16
<i>Reynolds v. Gonzalez</i> , 798 A.2d 67 (N.J. 2002)	24
<i>Riddle Mem'l Hosp. v. Dohan</i> , 475 A.2d 1314 (Pa. 1984)	17
<i>Rolon v. Davies</i> , 232 A.3d 773 (Pa. Super. 2020)	16
<i>Sacks v. Mambu</i> , 632 A.2d 1333 (Pa. Super. 1993).....	16
<i>Sharp v. Kaiser Found. Health Plan</i> , 710 P.2d 1153 (Colo. App. 1985)	25
<i>Smith v. Grab</i> , 705 A.2d 894, 899 (Pa. Super. 1997) ...	16
<i>Sutherland v. Monongahela Valley Hosp.</i> , 856 A.2d 55 (Pa. Super. 2004).....	16
<i>Tincher v. Omega Flex, Inc.</i> , 104 A.3d 328 (Pa. 2014).....	27, 31
<i>VanVleet v. Pfeifle</i> , 289 N.W.2d 781 (N.D. 1980)	25
<i>Vogelsberger v. Magee-Womens Hosp. of UPMC Health Sys.</i> , 903 A.2d 540 (Pa. Super. 2006)	16
<i>Winschel v. Jain</i> , 925 A.2d 782 (Pa. Super. 2007).....	15

Rules of Appellate Procedure

Pa. R.A.P. 531	1
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Other Authority

Dan B. Dobbs, <i>et al.</i> , <i>The Law of Torts</i> (2d ed.)	11
Jennifer K. Wagner, Michelle N. Meyer, "Genomic medicine and the 'loss of chance' medical malpractice doctrine," <i>Human Genetics and Genomics Advances</i> 2 (July 8, 2021).....	22
Joseph King, Jr., "Reduction of Likelihood Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine," 28 U. Mem. L. Rev. 492 (1998)	23
Pa. SSJI (Civ) § 13.20 (2020)	12
Pa. SSJI (Civ) § 14.20 (2020)	12
Pa. SSJI (Civ) § 14.160 (2020)	29
Restatement (Second) of Torts § 323 (1965)	11
Restatement (Third) of Torts: Medical Malpractice TD No 2 § 8 (2024)	22, 23

I. STATEMENT OF INTEREST OF AMICI CURIAE

The American Medical Association (“AMA”) and Pennsylvania Medical Society (“PAMED”), file this brief in support of Appellant the Hospital of the University of Pennsylvania (“HUP”) under Pa.R.A.P. 531.

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups in the AMA’s House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA’s policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area, in every state, including Pennsylvania. In support of its mission, the AMA regularly participates as *amicus curiae* in state and federal courts, including in Pennsylvania.

PAMED is a Pennsylvania nonprofit corporation that represents physicians of all specialties and is the

Commonwealth's largest physician organization. PAMED regularly participates as *amicus curiae* in Pennsylvania's appellate courts in cases raising important healthcare issues, including issues that have the potential to adversely affect the quality of medical care.

The AMA and PAMED appear for themselves and as representatives of the Litigation Center, a coalition among the AMA and the medical societies of all states and the District of Columbia, the mission of which is to represent the interests of patients and physicians in the courts of the United States.¹

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The instant appeal raises the question of whether, under Pennsylvania law, a jury may hold a healthcare professional liable for medical negligence based solely on a finding of an increased risk of harm, without finding that the healthcare professional's negligence was a "factual cause" of harm to the plaintiff. This Court has already answered that question: factual causation is a

¹ This brief was not authored or paid for, in whole or in part, by any person or entity other than amici and their counsel.

required element—for liability to attach, the jury must find the increased risk to be a substantial factor in the resultant harm.

In *Hamil v. Bashline* and every case since, this Court has consistently and unequivocally maintained that a plaintiff may not recover unless the jury finds not only that the defendant's conduct increased the risk of harm, but also that the defendant's conduct was a "substantial factor" (now referred to as "factual cause") in bringing about the resultant harm. As this Court opined in *Hamil*: "the **necessary proximate cause will have been made out if the jury sees fit to find cause in fact.**" 392 A.2d 1280, 1299 (Pa. 1978) (emphasis added).²

In this case, the jury made no finding on factual cause. Instead, on Ms. Hagans's request, and over HUP's objections, the trial court gave the jury a non-standard verdict slip, which deleted the standard question on "factual cause" and instructed the jury to determine, instead:

2. Was the Defendant's negligence a factual cause of any harm to the minor-Plaintiff, **and/or** did the

² Unless otherwise noted, all citations to other cases and all internal quotations are omitted.

Defendant's negligence increase the risk of harm to the minor-Plaintiff?

(R. 983) (emphasis added).

The verdict slip misstated Pennsylvania law, conflating the concepts of increased risk of harm and factual cause by juxtaposing them as an "either/or" proposition. That error was patently prejudicial.

The Superior Court's reliance on the harmless error doctrine to excuse the trial court's mistake overlooks how the jury (and this Court) treats the verdict slip: it *is* a legal instruction—the *final, written instruction* the trial court gives the jury. Here, it conflicted with the court's prior oral instructions and misstated Pennsylvania law, erroneously suggesting that the jury could hold HUP liable on a finding of increased risk of harm, alone, without making the requisite finding that the individual provider's actions were a factual cause of injury. The verdict slip's wording as to causation rendered the jury's verdict, at best, ambiguous as to whether it actually found an element essential to a determination of liability in this case, and the only appropriate remedy is a new trial.

Allowing a medical negligence verdict to stand without a finding on causation would constitute a stark departure from established Pennsylvania law and foundational tort principles. That is especially true in a jurisdiction like Pennsylvania, where the increased risk of harm doctrine already lowers the threshold of evidence needed to get to the jury, while still permitting the plaintiff to seek a full measure of damages.

Amici files this brief in support of Defendant HUP and urges the Court to reverse the rulings below; remand the case for a new trial; and reiterate that, to be sustained, a negligence verdict—including in cases alleging an increased risk of harm—must be supported by a jury’s unambiguous finding of factual causation.

III. FACTS AND PROCEDURAL HISTORY RELEVANT TO THIS BRIEF

Plaintiff/Respondent Dajah Hagans instituted this medical malpractice action after her child was born with profound developmental impairments, alleging that the obstetrics care rendered by healthcare providers at HUP fell below the standard of care, resulting in injury to her child.

At trial, Ms. Hagans requested a non-standard verdict slip, which added a standalone interrogatory asking “Did Defendant’s negligence increase the risk of any harm to the minor-Plaintiff,” (see R. 1093a-1094a) arguing that factual cause and increased risk of harm are “alternative aspects of medical causation,” and that “plaintiffs’ verdict slip is set up...to allow for both alternatives in terms of causation.” (R. 900a, at 5:18-7:6)

HUP objected and argued that the question on increased risk of harm was inappropriate because, although part of the jury instructions, increased risk is “not a separate basis for causation under the verdict slip”; and that the jury should be asked one question about factual cause, as in the standard verdict slip. (R. 899a-900a, at 4:11-5:16, 7:8-20)

The trial court then suggested, “We can make it part of one question” asking “was the defendants’ negligence a factual cause of any harm to the minor plaintiff, or you can add, and/or did the defendants’ negligence increase the risk of any harm to the minor plaintiff, if you want it all one question dealing with factual cause.” (R. 900a, at 8:11-18)

Ultimately, Ms. Hagans proposed the following question: “Was the defendants’ negligence a factual cause of the harm to minor Jay, and/or did the defendants’ negligence increase the risk of harm to minor Jay?” (R. 901a-902a, at 12:21-13:8) The court instructed Ms. Hagans “to frame the verdict slip that way, over defense objection.” (R. 902a, at 13:9-11) When presented with that interrogatory in the verdict slip, the jury answered, “yes.” (*Id.*)

In its post-trial motion, HUP renewed its objection to the verdict slip (see R. 1035a-1088a; R. 1256a-1624a; R. 1690a-1767a), which Ms. Hagans opposed. (See R. 1192a-1223a; R. 1634a-1689a)

The court held that a new trial was not warranted based on the verdict slip question combining factual cause and increased risk of harm, because the jury was properly instructed on “factual cause” and “increased risk of harm,” HUP did not object to the jury instructions, and the jury is presumed to follow the court’s instructions. *Hagans v. Hosp. of University of Pennsylvania*, No.

19067280, 2024 WL 3361402, at *16 (Pa. C.C.P. Phila Cnty. May 16, 2024).

On appeal, the Superior Court held that the trial court did not abuse its discretion, because “**even if the trial court erred when it included increased risk of harm on the verdict slip,** the error was harmless.” *Hagans v. Hosp. of the Univ. of Pennsylvania*, 343 A.3d 251, 271 (Pa. Super. 2025), *reargument denied* (Sept. 15, 2025) (emphasis added).

IV. ARGUMENT

A. The increased risk of harm standard does not eliminate the need for a jury finding on causation

Increased risk of harm remains, at its core, a negligence claim: the traditional increased risk of harm doctrine permits a plaintiff to establish a *prima facie* case of medical negligence under a relaxed causation threshold, where the plaintiff—due to another independent source, such as a preexisting injury or illness—could not otherwise establish the element of causation by the traditional preponderance of the evidence standard. *Hamil*, 392 A.2d at 1286. Simply stated, increased risk of harm relaxes

the degree of proof needed to get to the jury; it does not eliminate the requirement of a jury finding on causation.

Moreover, requiring a jury finding on causation is also consistent with the approach taken by other states that have recognized increased risk of harm or the more modern theory of lost chance, as well as fundamental negligence principles, because without causation, there is no doctrinal justification for holding a defendant liable for the plaintiff's damages.

1. In *Hamil* and subsequent cases on increased risk of harm, this Court has uniformly recognized that, to hold a defendant liable, the jury must “go further” and find factual causation

Increased risk of harm is not (and never has been) a substitute for finding factual causation. Beginning with the seminal decision in *Hamil v. Bashline*, this Court has maintained that, to hold a defendant liable under increased risk, the jury must still “go further” and find factual causation.

In *Hamil*, the plaintiff presented expert testimony asserting that the negligent acts of medical personnel had terminated the decedent's considerable chances of surviving the heart attack he

was experiencing when admitted to the hospital; whereas defendants, although conceding the evidence supported an increased risk of harm (the decedent's death) which did occur, argued that the plaintiff had failed to establish it was the provider's negligence (as opposed to the decedent's heart attack) that actually caused his death. 392 A.2d at 1286.

The Court began by recognizing that "[a] proper resolution of the present controversy requires that it be viewed in the context of certain well-established principles of tort law," including that "the mere occurrence of an injury does not prove negligence"; "an admittedly negligent act does not necessarily entail liability"; and that, "even when it is established that the defendant breached some duty of care owed the plaintiff, it is incumbent on a plaintiff to establish a causal connection between defendant's conduct and the plaintiff's injury....the defendant's conduct must be shown to have been the proximate cause of plaintiff's injury." *Id.* at 1284.

However, *Hamil*, citing the Restatement (Second) of Torts § 323(a), also identified a subset of claims proceeding on "the

theory that the defendant's act or omission failed in a duty to protect against harm from another source," where the "fact-finder must consider not only what did occur, but what might have occurred—i.e., whether the harm would have resulted from the independent source even if the defendant had performed his service in a non-negligent manner."³ *Id.* (cleaned up).

Hamil reasoned that such cases, "by their very nature elude the degree of certainty one would prefer and upon which the law normally insists before a person may be held liable," and that

³ Section § 323(a) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm[.]

Restatement (Second) of Torts § 323(a) (1965).

Notably, § 323(a) neither addresses nor eliminates the element of causation. See Dan B. Dobbs, et al., *The Law of Torts* § 196 n.7, "Increasing the risk of harm and the lost chance rule" (2d ed.) (Section 323(a) "does not purport to address...causation requirements, which are specified several chapters later."). As discussed *infra*, causation remains an essential element, whether under Pennsylvania's increased risk of harm approach or the more modern theory of lost chance, because causation is the doctrinal justification for holding a negligent party liable for the plaintiff's damages.

“Section 323(a) tacitly acknowledges this difficulty and permits the issue to go to the jury upon a less than normal threshold of proof,” as “a negligent actor should not be insulated because of uncertainties as to the consequences of his conduct.” *Id.* at 1287.

Ultimately, the *Hamil* Court recognized increased risk of harm, stating:

[O]nce a plaintiff has demonstrated that defendant’s acts or omissions, in a situation to which Section 323(a) applies, have increased the risk of harm to another, such evidence furnishes a 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.**

Id. at 1288 (emphases added).⁴

This Court has made clear that its adoption of § 323(a) “does not...change the burden of a plaintiff to establish the underlying elements of an action in negligence”—*i.e.*, duty, breach, causation, and damages. *Morena v. S. Hills Health Sys.*,

⁴ It is now preferable to instruct the jury on “factual cause” instead of “substantial factor.” See Pa. SSJI (Civ) § 13.20, Factual Cause (2020), Subcommittee Note (explaining rationale); *id.* § 14.20 Medical Malpractice—Factual Cause (2020).

462 A.2d 680, 684 (Pa. 1983); *see also Ford v. Jeffries*, 379 A.2d 111, 114 (Pa. 1977) (predating *Hamil*, applying causation requirement set forth in Second Restatement of Torts § 431(a) (stating “actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and....”)).

Indeed, as stated in *Hamil* itself, causation remains a basic tenet that a plaintiff pursuing a medical negligence case is required to prove—which is normally a fact question for the jury, to find by a preponderance of the evidence, and (in most cases) to do so via expert medical testimony provided to a reasonable degree of medical certainty. *See Hamil*, 392 A.2d at 1284-86.

Accordingly, where a plaintiff is permitted to proceed under an increased risk of harm theory, a jury is required to make a finding on causation, and a plaintiff may not recover unless the jury finds not only that the defendant’s conduct increased the risk of harm, but also that the defendant’s conduct giving rise to the increased risk was a factual cause of the plaintiff’s harm. As this Court explained in *Hamil*:

Once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was in fact sustained, **it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm.**

Id. at 1286 (emphasis added).

Following *Hamil*, a medical negligence plaintiff cannot recover damages merely by proving that a defendant's negligence increased the risk of harm and that the harm in fact occurred.

Rather, as dozens of appellate cases have consistently and uniformly stated since *Hamil*, the plaintiff must prove, and the jury must find, causation. *See, e.g.:*

- *Mitzelfelt v. Kamrin*, 584 A.2d 888, 894-95 (Pa. 1990):
"Once there is sufficient testimony to establish that (1) the physician failed to exercise reasonable care, that (2) such failure increased the risk of physical harm to the plaintiff, and (3) such harm did in fact occur, **then it is a question properly left to the jury to decide whether the acts or omissions were the proximate cause of the injury.**" (Emphasis added).
- *Jones v. Montefiore Hosp.*, 431 A.2d 920, 924 (Pa. 1981):
"[M]edical opinion need only demonstrate, with a reasonable degree of medical certainty, that a defendant's conduct increased the risk of the harm actually sustained, and **the jury then must decide whether that conduct was a substantial factor in bringing about the harm.**" (Emphasis added).

- *Gradel v. Inouye*, 421 A.2d 674, 679 (Pa. 1980):
 “[M]edical opinion need only demonstrate, with a reasonable degree of medical certainty, that a defendant’s conduct increased the risk that the harm sustained by plaintiff would occur. **The jury, not the medical expert, then has the duty to balance probabilities and decide whether defendant’s negligence was a substantial factor in bringing about the harm.**” (Emphasis added).
- *Winschel v. Jain*, 925 A.2d 782, 789 (Pa. Super. 2007):
 “[O]nce the plaintiff introduces evidence that a defendant-physician’s negligent acts or omissions increased the risk of the harm ultimately sustained by the plaintiff, then **the jury must be given the task of balancing the probabilities and determining**, by a preponderance of the evidence, **whether the physician’s conduct was a substantial factor in bringing about the plaintiff’s harm.**” (Emphasis added).
- *Cangemi ex rel. Est. of Cangemi v. Cone*, 774 A.2d 1262, 1265 (Pa. Super. 2001): “[W]here evidence has been presented establishing conduct by a physician which increased a risk of a specific harm to the patient and evidence that the specific harm did in fact occur, **causation must still be proven.**” (Emphasis added).
- *Billman v. Saylor*, 761 A.2d 1208, 1212 (Pa. Super. 2000): “[W]here the plaintiff is unable to show to a reasonable degree of medical certainty that the physician’s actions/omissions caused the resulting harm, but is able to show to a reasonable degree of medical certainty that the physician’s actions/omissions increased the risk of harm, **the question of whether the conduct caused the ultimate injury should be submitted to the jury.**” (Emphasis added).

- *Billman v. Saylor*, 761 A.2d 1208, 1212 (Pa. Super. 2000): “[W]here the testimony of the plaintiff’s expert establishes that the defendant’s failure to diagnose and treat an existing condition has increased the risk of harm, **the question of whether that conduct caused the plaintiff’s ultimate injury requires a jury determination.**” (Emphasis added).
- *Reichman v. Wallach*, 452 A.2d 501, 505 (Pa. Super. 1982): “It is now well settled that in a medical malpractice action to which Section 323(a) of the Restatement (Second) of Torts is applicable, once a plaintiff has established a prima facie case of professional negligence through the introduction of expert testimony, which negligence has increased the risk of harm, **the issue of proximate cause is to be determined by the jury.**” (Emphasis added).

See also Rolon v. Davies, 232 A.3d 773, 777 (Pa. Super. 2020); *Vogelsberger v. Magee-Womens Hosp. of UPMC Health Sys.*, 903 A.2d 540, 563-64 (Pa. Super. 2006); *Sutherland v. Monongahela Valley Hosp.*, 856 A.2d 55, 60 (Pa. Super. 2004); *Burton-Lister v. Siegel, Sivitz & Lebed Assocs.*, 798 A.2d 231, 240 (Pa. Super. 2002); *Smith v. Grab*, 705 A.2d 894, 899 (Pa. Super. 1997); *Joyce v. Boulevard Physical Therapy & Rehab. Ctr., P.C.*, 694 A.2d 648, 657 (Pa. Super. 1997); *Sacks v. Mambu*, 632 A.2d 1333, 1336 (Pa. Super. 1993); *O’Rourke on Behalf of O’Rourke v. Rao*, 602 A.2d 362, 365 (Pa. Super. 1992).

A finding on causation is essential precisely because increased risk of harm cases involve an independent source of harm which may have resulted in injuries, regardless of the defendant's conduct. *See Hamil*, 392 A.2d at 1286-87 (distinguishing ordinary tort case as alleging that defendant's conduct "set in motion a force which resulted in harm," whereas increased risk of harm case involves allegations that defendant's conduct failed to protect the plaintiff against harm from a different source); *see also Riddle Mem'l Hosp. v. Dohan*, 475 A.2d 1314, 1317 (Pa. 1984) (factor distinguishing cases under § 323(a) "from an action normally sounding in tort is that the tortfeasor failed to act reasonably in preventing harm from another source").

For example, in *Hamil*, the defendant argued that the plaintiff's husband would have died of a heart attack regardless of any treatment provided. In *Gradel* and *Jones*, the question was whether the defendant's conduct worsened the plaintiff's cancer prognosis. In sum, if that different source is the true cause of the plaintiff's ultimate harm and the plaintiff would have suffered

the harm regardless of the actions taken (or not) by the provider, fairness dictates that the provider should not and cannot be held liable.

Moreover, this Court has specifically rejected the notion that a plaintiff need only prove increased risk of harm and not also causation. In *Jones*, the plaintiff had requested the following instruction: “A person who undertakes to render services to another is liable for physical harm resulting from his failure to exercise reasonable care, if that failure increased the risk of harm.” 431 A.2d at 923. This Court found the proposed charge erroneous, explaining as follows:

[T]he specific wording [the plaintiff] requested would unduly restrict the discretion of the jury, since it instructs that once a defendant’s negligence is found to have increased the risk of the harm suffered by a plaintiff, liability must follow. **This misconstrues the function of the jury as contemplated by Section 323(a)....[which] requires the jury to decide whether or not to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm.**

Id. (emphasis added).

Although ultimately concluding that the trial court erred in refusing to give an increased risk instruction, *see id.* at 924, *Jones* reinforced that a jury finding of increased risk, alone, does not automatically establish liability; the jury must still decide causation. *Id.* at 924 n.8. In sum, in decades of precedent, this Court has consistently held that it is erroneous to instruct a jury that, once evidence has been presented that a defendant physician's conduct increased a risk of a specific harm to a patient and the specific harm occurred, causation has been proven.

Likewise, the Superior Court has applied this Court's "requirement that the jury must find the increased risk to be a substantial factor in the resultant harm before liability attaches," and rejected a plaintiff's proposed instruction that would have removed from the jury its essential finding on causation.⁵ *See,*

⁵ Even before this Court's decision in *Hamil*, the Superior Court had found a proposed jury instruction "at best confusing and at worst a misstatement of the law" where it would have permitted a finding of liability based on findings of negligence and increased risk of harm, alone, without a finding of causation. *Cohen v. Kalodner*, 345 A.2d 235, 236-37 (Pa. Super. 1975).

e.g., *Clayton v. Sabeh*, 594 A.2d 365, 367-68 (Pa. Super. 1991) (citing *Hamil* and *Mitzelfelt*); *Brozana v. Flanigan*, 454 A.2d 1125, 1128 (Pa. Super. 1983) (holding trial court properly instructed jury that defendant could be found liable if his negligence was either a substantial factor in bringing about loss of plaintiff's leg or increased the risk of losing the leg *and that increased risk was a substantial factor in the loss of the leg*—highlighting that question on increased risk also appropriately asked whether increased risk was substantial factor).

Shortly after *Hagans*, the Superior Court squarely addressed the impropriety of conflating increased risk of harm and factual causation. In *Lewis v. Reading Hospital*, it found reversible error where the jury charge and verdict form incorrectly equated increased risk of harm with factual cause, which the Superior Court concluded, inappropriately eased the plaintiff's burden and deprived defendants of a fair trial. See *Lewis*, 345 A.3d 257, 277 (Pa. Super. 2025), *reargument denied* (Nov. 7, 2025) (citing *Mitzelfelt*'s "two-part inquiry by the fact-finder," requiring finding on factual cause).

The *Lewis* Court, applying *Hamil*, stated that “a finding of an increased risk of harm is not equivalent to a finding of factual (proximate) cause.” *Id.* at 277. In sum, decades of Pennsylvania appellate jurisprudence have consistently required that before liability attaches, a finding on factual cause is required.

2. No jurisdiction recognizing the concept of increased risk of harm has dispensed with the requirement to determine factual causation

In the decades following *Hamil*, a majority of states have likewise confronted whether to adopt the increased risk of harm or another exception. A brief review of those developments is instructive because, although diverging approaches have emerged, one through-line remains: none dispenses with the requirement of a finding of factual causation or assumes causation is satisfied upon a showing of increased risk of harm, alone.

Several courts and scholars have attempted to catalog the various approaches,⁶ generally describing states as falling into one of three categories:

1. “all or nothing” approach: retained in a substantial minority of states, which have declined to recognize an exception to the traditional negligence doctrine, see, e.g., *Kramer v. Lewisville Mem’l. Hosp.*, 858 S.W.2d 397, 406 (Tex. 1993) (“We see nothing unique about the healing arts which should make its practitioners more responsible for possible but not probable consequences than any other negligent actor.”).

⁶ The Massachusetts Supreme Court opinion in *Matsuyama v. Birnbaum* is frequently cited for its detailed review, which includes citation to scholarship debating the various state approaches. See generally, *Matsuyama*, 890 N.E.2d 819 (Mass. 2008), *abrogated in part on other grounds by Doull v. Foster*, 163 N.E.3d 976 (Mass. 2021) (adopting Restatement (Third) of Torts approach of “but-for” causation).

Matsuyama divided states into two categories: “all or nothing” states that have not recognized any exception; and those that do recognize an exception for “loss of chance.” *Id.* at 828-33 & n.26-29. The second category can be further divided based on whether the state employs a valuation or causation approach. Some states, like Massachusetts, recognize and compensate the injury of lost chance; whereas others, like Pennsylvania, relying on § 323, relax the degree of proof on causation required to state a *prima facie* claim under increased risk, and allow recovery of the full measure of damages for physical harm ultimately sustained. *Id.* at 828-33 & n.26-29; see also *Jones v. Owings*, 456 S.E.2d 371, 373 (S.C. 1995) (cataloging three groups: traditional approach; relaxed causation approach; and proportional approach, compensating lost chance of survival, not death itself); Jennifer K. Wagner, Michelle N. Meyer, “Genomic medicine and the ‘loss of chance’ medical malpractice doctrine,” *Human Genetics and Genomics Advances* 2 (July 8, 2021) (cataloging state approaches as of 2019), available at <https://www.sciencedirect.com/science/article/pii/S2666247721000130> (last accessed Oct. 1, 2026).

2. "lost chance" approach: an exception adopted in a growing minority of states, which treats the problem as one of valuation (not causation), retaining traditional negligence elements and standard of proof and instead recognizing the injury as the loss of chance, itself, with more measured damages based on the value of the chance lost, *see, e.g., Matsuyama*, 890 N.E.2d at 829 (endorsing lost chance and quoting Restatement (Third) of Torts conclusion that "recognizing lost opportunity as harm is preferable to employing a diluted substantial-factor or other factual-causation test"); Restatement (Third) of Torts: Medical Malpractice § 8 Lost Chance TD No 2 (2024).⁷
3. "increased risk of harm" or hybrid approach: adopted in a few states, including Pennsylvania, which, instead of recognizing the lost chance as the injury in its own right, relaxes the causation inquiry, permitting a plaintiff to send the case to the jury, which must then determine whether the negligence was a substantial factor, or "factual cause" in bringing about the harm,

⁷ ALI has taken the following position in the Third Restatement:

Some courts adopting lost chance have relied on Restatement Second of Torts § 323 (AM. L. INST. 1965). That Section, however, is not an appropriate grounding for the doctrine because it addresses only duty; it does not address legally compensable harm or factual causation, the matters at issue for lost-chance claims.

Id. § 8 (Cmt a) (citing scholarship discussing historic and reconceptualized approaches); *see also* Joseph King, Jr., "Reduction of Likelihood" Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine," 28 U. Mem. L. Rev. 492, 508 (1998) (criticizing increased risk of harm, reasoning "[this] approach represents the worst of both worlds" by reducing proof required to establish causation while still allowing a jury to award full compensation for ultimate injury which defendant did not cause).

see, Hamil, 392 A.2d at 1299; *see also Est. of Frey v. Mastroianni*, 463 P.3d 1197 (Haw. 2020).

Among the states that have endorsed increased risk of harm, none has dispensed with the requirement of a finding of factual causation, and several have expressly rejected a plaintiff's suggestion that evidence of increased risk, alone, is sufficient to find liability. *See, e.g., Frey*, 463 P.3d at 1211 (requiring finding that "defendant's negligence was a substantial factor in causing the plaintiff's injury"); *Reynolds v. Gonzalez*, 798 A.2d 67, 78 (N.J. 2002) (rejecting plaintiff's argument that showing defendant's negligence has increased the risk of harm should suffice, reasoning "plaintiff's formulation dispenses with the need for proof of any causal connection between defendant's negligence and the resultant harm," and retaining two-prong increased risk, substantial factor test for medical malpractice cases involving preexistent conditions, which requires finding that defendant's negligence was factor in causing plaintiff's injuries); *Delaney v. Cade*, 873 P.2d 175, 187 (Kan. 1994) (adopting increased risk of harm and finding that substantial loss of chance is sufficient to withstand summary judgment, but reiterating

traditional rule that “causation is generally a matter to be determined by the finder of fact”); *McKellips v. Saint Francis Hosp., Inc.*, 741 P.2d 467, 475 (Okla. 1987) (“[T]he jury may determine that the tortious act of malpractice was in turn a substantial factor in causing a patient’s injury or death.”); *Sharp v. Kaiser Found. Health Plan*, 710 P.2d 1153, 1156 (Colo. App. 1985) (“Once a plaintiff has introduced evidence that a defendant’s neglig[en]ce...substantially increased the risk of harm..., and that the harm in fact has been sustained, it becomes a question of fact for the jury to determine whether that increased risk of harm was a substantial factor in producing the harm.”), *aff’d on other grounds*, 741 P.2d 714 (Colo. 1987); *VanVleet v. Pfeifle*, 289 N.W.2d 781, 784 (N.D. 1980) (reversing summary judgment and remanding for trial, holding evidence on increased risk “raised a genuine issue of fact...as to a causal relationship between the actions of the three physicians and the subsequent death” of patient).

Sick and injured patients require care. Hospitals and the medical professionals who work in and for hospitals exist to

provide that care and routinely do so without incident. That is their *raison d'être*. However, healthcare providers are not guarantors of favorable outcomes. Like all defendants in personal injury actions, healthcare providers are only liable for injuries where they had a duty to a patient, they were negligent in carrying out the duty, and their negligence was the cause of the complained of injury resulting in damages. If any part of a plaintiff's burden is not satisfied, a healthcare provider cannot and should not be held liable.

Eliminating the requirement for a plaintiff to prove and secure a finding of factual causation makes medical providers virtual guarantors of the care provided. That would be an unprecedented shift in the law and substantial expansion of liability which, if allowed to stand, will impose financial and other burdens on healthcare providers that would inevitably have a detrimental impact on the delivery of healthcare in the Commonwealth.

B. The Trial Court and Superior Court erred in permitting the jury to find liability based on increased risk of harm, alone

The Trial Court and Superior Court erred in permitting the jury to find liability based on increased risk of harm, alone.

“[W]hen a court instructs the jury, the objective is to explain to the jury how it should approach its task[.]” *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 351 (Pa. 2014). The verdict slip is an important part of those instructions, serving as a roadmap for the jury’s deliberations. *See Fritz v. Wright*, 907 A.2d 1083, 1093 (Pa. 2006) (noting “analytical thicket arising when a jury of lay people are confronted with the components and subcomponents of negligence,...and potential other legal theories,” and recognizing that verdict interrogatories “permit a jury unlearned in the law to frame and structure their deliberations, if they so choose”).

Here, the verdict is problematic, because it is unclear whether it was based on an insufficient finding of increased risk of harm, alone. The verdict slip misstated Pennsylvania law by juxtaposing factual cause “and/or” increased risk, signaling they

were alternatives. Specifically, question two inappropriately asked the jury to decide whether HUP's negligence was "a factual cause of any harm to the minor-Plaintiff, **and/or** did the Defendant's negligence increase the risk of harm to the minor-Plaintiff?" (R. 983a) (emphasis added). The "and/or" conjunction allowed the jury to find *either* factual cause *or* increased risk of harm *or* both; and it offered no mechanism through which to determine from a "yes" response which option the jury chose.

The use of "and/or" is not trivial. Words have meaning, and it cannot be assumed that the jury's "yes" answer pertained to both factual cause and increased risk of harm. As the Superior Court has recognized, "use of the conjunction 'and/or' leads to two equally possible constructions." *Bito Bucks in Potter, Inc. v. Nat'l Fuel Gas Supply Corp.*, 449 A.2d 652, 654 (Pa. Super. 1982).

While a "strict form" of verdict is not required, it is critical that the intent of the jury "be free of ambiguity and clearly understood." *Palmer v. Foss Motors, Inc.*, 327 A.2d 80, 83 (Pa. 1974).

But here, the wording of the verdict slip renders the jury's verdict unacceptably ambiguous, because it misstated Pennsylvania law by suggesting that the Plaintiff could prove liability by showing (1) factual cause **or** (2) increased risk of harm. Before liability attaches, the jury absolutely *is* required to "go further" and find factual causation.

Indeed, if there were any question as to what an appropriate verdict slip should ask, it is readily answered by the suggested standard verdict slip, which proposes a single question on factual cause, without any reference to increased risk. See Pa. SSJI (Civ) § 14.160 (2020).⁸

The standard verdict slip is appropriately simple, limited to the required elements of the cause of action, and not unduly complicated by an attempt to capture every aspect of the jury instructions. The question on factual cause does not and should not mention increased risk at all.

⁸ Although a trial court need not use the standard jury interrogatories, they may nonetheless serve as useful guidance. See *Com. v. Pownall*, 278 A.3d 885, 896 n.11 (Pa. 2022).

It was Ms. Hagans who injected ambiguity by proposing a non-standard verdict slip that conflicted with the court's jury charge. Moreover, once mentioning increased risk, the verdict slip was required to do so in a way that accurately reflected Pennsylvania law and was not misleading. Here, the verdict slip's reference to increased risk without requiring a finding that the increased risk was a factual cause of harm was materially incomplete. See Pa. SSJI (Civ) § 14.20(B). It was error to permit such ambiguity in the verdict, and the appropriate remedy is a new trial.

C. The legally inaccurate verdict slip was prejudicial, and a new trial is required

The prejudicial effect of allowing a jury to find a defendant negligent based solely on a finding of increased risk, without the requisite finding of factual causation, is obvious. It substantially lowers the liability standard, contrary to the law.

Hamil already lowered the bar considerably by relaxing the proof required for plaintiffs to make out a *prima facie* case of negligence under increased risk of harm. See *Hamil*, 392 A.2d at 1286-88. To lower the bar even more is a step too far. Yet that

is precisely what occurred here, where the verdict slip suggested that the jury could find the defendant liable without finding factual causation at all, contrary to decades of precedent recognizing factual causation as an essential element of all negligence cases—including medical negligence cases alleging increased risk of harm.

Where it is possible that an erroneous instruction (or verdict slip) might have prejudiced a litigant, this Court must grant a new trial, even if it cannot determine the extent to which the error influenced the jury. *See Tincher*, 104 A.3d at 351 (“This Court will afford a new trial if an erroneous jury instruction amounted to a fundamental error or the record is insufficient to determine whether the error affected the verdict.”).

D. A proper jury charge cannot cure a clearly erroneous verdict slip

Finally, the Superior Court’s reliance on the harmless error doctrine as a basis for denying a new trial is misplaced, because a prior accurate jury charge cannot cure an inaccurate verdict slip.

The trial court relied on *A.Y. v. Janssen Pharms. Inc.*, 224 A.3d 1 (Pa. Super. 2019) for the premise that “[i]n other cases

where verdict-slip issues have been raised, the analysis looks to whether the jury was otherwise, as in this case, properly instructed.” However, *A.Y.* is inapposite.

A.Y. was not based on a challenge to the verdict slip; rather, it addressed a challenge to the jury instructions. In that case, the appellant had argued the jury charge should have included more detail, and, in rejecting that argument, the *A.Y.* opinion pointed out that the detail purportedly missing from the instruction had been clearly provided in the verdict sheet’s questions. See *id.* at 24-25 (rejecting appellant’s argument that jury charge should have included more explanation of who intended “recipient” was under duty to warn, finding obviated by verdict slip which had designated intended recipient, by name). To be clear, *A.Y.* did *not* hold that a legally erroneous verdict slip can be salvaged so long as the jury was properly charged.

This Court, however, has concluded that correct instructions did not mitigate a defective verdict slip. In *Commonwealth v. DeHart*, 650 A.2d 38, 48-49 (Pa. 1994), the Court held that, although the trial court had properly instructed the jury on

mitigating circumstances in a death penalty case, those instructions could not cure a defective verdict slip that improperly referred to “any mitigating circumstance” (singular). The verdict slip inappropriately allowed for the possibility that “the jury could have weighed the sole aggravating circumstance against each mitigating circumstance individually, rather than collectively,” resulting in a death sentence, even if mitigating circumstances, combined, would have outweighed the aggravating circumstance. *Id.* at 48.

DeHart analogized the verdict slip to written jury instructions (then disfavored), noting that where the jury is provided with written instructions, it is highly probable that the jury will interpret the written instructions without seeking clarification in case of a question, which they would be more inclined to do if the only instructions given were oral. *Id.* Although a criminal case, *DeHart’s* reasoning is equally applicable here and reinforced by this Court’s more recent *Fritz* opinion, discussed above, which acknowledges the jury’s tendency to treat the verdict slip as a roadmap.

DeHart and *Fritz* demonstrate the flaw in the Superior Court's reasoning here, that any error in the verdict sheet's inclusion of increased risk was harmless. See *Hagans*, 343 A.2d at 271. *DeHart* cautions that a jury may "ignore the court's general instruction and focus upon the written instructions supplied to them." See *DeHart*, 650 A.2d at 48. The same is true of a verdict slip, especially one that conflicts with a prior oral jury charge and omits a material instruction.

As this Court recognized in *DeHart*, the significance of the written word cannot be understated. The verdict slip here erroneously instructed the jury *in writing* that it could find for Plaintiff without finding factual causation. This is precisely the type of legal error that would have affected the verdict and thus cannot be deemed harmless. See *Harman v. Borah*, 756 A.2d 1116, 1122 (Pa. 2000) (error is not harmless if it results in prejudice).

Moreover, this case is unlike others in which Pennsylvania appellate courts have found harmless error. It is not, for example, a case involving a mere "clerical" error that could not

have amounted to any difference. *See, e.g., Com. v. Antidormi*, 84 A.3d 736, 754 (Pa. Super. 2014) (use of “felon not to possess a firearm” instead of “person not to possess a firearm” was harmless because Pennsylvania courts use the terms interchangeably). Nor is it a case where all harm can be readily ruled out. *See, e.g., Com. v. Williams*, 640 A.2d 1251, 1263 (Pa. 1994) (erroneous inclusion of torture as aggravating circumstance was harmless where jury did not find torture an aggravating circumstance). By contrast, because of the inaccurate wording of the verdict slip used here, the jury was erroneously permitted to base its liability finding on a showing of increased risk of harm, alone.

V. CONCLUSION

For the reasons set forth above, this Court should reiterate that even in medical malpractice cases asserting an increased risk of harm, factual causation remains a requisite element; and it should clearly and definitively instruct that a verdict sheet which fails to unambiguously reflect a jury’s finding on factual causation constitutes reversible error. That clarification will ensure the

integrity of jury verdicts and discourage the needless ambiguity that is bound to continue if the Court does not address it directly.

Such a holding would be consistent with Pennsylvania law and the truth-seeking function of courts, and in this case, it would prevent the manifest injustice that would arise from allowing a negligence verdict to stand without knowing whether the jury found the requisite element of factual causation had been satisfied.

Respectfully submitted,

SAXTON & STUMP, LLC

Dated: October 7, 2026

By: /s/ Matthew W. Rappleye
Matthew W. Rappleye
Attorney ID No. 81746
Jennifer S. Snyder
Attorney I.D. No. 89495
4250 Crums Mill Road, Suite 201
Harrisburg, PA 17112
(717) 216-5522
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I, Matthew W. Rappleye, certify that the foregoing Brief *Amici Curiae* of the American Medical Association and the Pennsylvania Medical Society, excluding the cover page, table of contents, table of authorities, proof of service, and signature block contains 6,827 words, as calculated by the word count function of the word processing system used to prepare the brief, and complies with Pa.R.A.P. 531(b)(3).

SAXTON & STUMP, LLC

Dated: October 7, 2026

By: /s/ Matthew W. Rappleye
Matthew W. Rappleye
Attorney ID No. 81746
100 Deerfield Lane, Suite 240
Malvern, PA 19355
(484) 328-8500
mwr@saxtonstump.com

Counsel for Amici Curiae

PUBLIC ACCESS POLICY CERTIFICATION

I, Matthew W. Rappleye, hereby certify that the foregoing Brief *Amici Curiae* of the American Medical Association and the Pennsylvania Medical Society complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that requires the filing of confidential information and documents to be performed differently than nonconfidential information and documents and Pa.R.A.P. 127.

SAXTON & STUMP, LLC

Dated: October 7, 2026

By: /s/ Matthew W. Rappleye
Matthew W. Rappleye
Attorney ID No. 81746
100 Deerfield Lane, Suite 240
Malvern, PA 19355
(484) 328-8500
mwr@saxtonstump.com

Counsel for Amici Curiae

PROOF OF SERVICE

I, Matthew W. Rappleye, certify that on this date, I cause a true and correct copy of the foregoing Brief *Amici Curiae* of the American Medical Association and the Pennsylvania Medical Society to be served upon the following via PACFile, which service satisfies the requirements of Pa.R.A.P. 121:

H. Briggs Bedigian, Esq.
E. Merritt Lentz, Esq.
Gilman & Bedigian, LLC
1515 Market Street, Ste 1200
Philadelphia, PA 19102

Shanin Specter, Esq.
Charles L. Becker, Esq.
Ruxandra M. Laidacker, Esq.
Kimberly M. Collins, Esq.
Kline & Specter, PC
1525 Locust Street
Philadelphia, PA 19102

Howard J. Bashman, Esq.
Law Offices of Howard J. Bashman
500 Office Ctr. Dr., Ste 400
Fort Washington, PA 19034

Counsel for Plaintiff Dajah Hagans, as Parent and Natural Guardian of J.H., a minor, individually and in her own right

Marcel S. Pratt, Esq.
Burt M. Rublin, Esq.
Facundo Bouzat, Esq.

Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

Maureen M. McBride, Esq.
Andrew P. Stafford, Esq.
Lamb McErlane PC
24 E. Market Street, P.O. Box 565
West Chester, PA 19381

Joe H. Tucker, Jr., Esq.
Hillary B. Weinstein, Esq.
Tucker Law Group, LLC
1801 Market Street, Suite 2500
Philadelphia, PA 19103

*Counsel for Defendant and Petitioner Hospital of the University of
Pennsylvania*

Karyn D. Rienzi, Esq.
Kathleen M. Chancler, Esq.
Post & Schell, PC
Three Logan Square
1717 Arch Street, 21st Floor
Philadelphia PA 19103

*Counsel for Defendants Kirstin Leitner, M.D., Whitney R. Bender,
M.D., Sarah Gutman, M.D. and Victoria Kroesche, R.N.*

Andrew R. Sperl, Esq.
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103

*Counsel for Amicus Curiae Hospital & Healthsystem Association of
Pennsylvania*

SAXTON & STUMP, LLC

Dated: October 7, 2026

By: /s/ Matthew W. Rappleye
Matthew W. Rappleye
Attorney ID No. 81746
100 Deerfield Lane, Suite 240
Malvern, PA 19355
(484) 328-8500
mwr@saxtonstump.com

Counsel for Amici Curiae

Filed 10/07/2026 02:26 PM Supreme Court Eastern District
30 EAP 2026

IN THE SUPREME COURT OF PENNSYLVANIA

Dajah Hagans, as Parent and Natural Guardian of : 30 EAP 2026
J.H., a minor, individually and in her own right :
v. :

Hospital of the University of Pennsylvania, University
of Pennsylvania Health System, Trustees of the
University of Pennsylvania, Kristen Leitner, M.D.,
Julie A. Sayama, M.D., Whitney R. Bender, M.D.,
Sarah Gutman, M.D., Denise Johnson, M.D.,
Jessica Peterson, M.D., and Victoria Kroesche, R.N.

Appeal of: Hospital of the University of Pennsylvania

PROOF OF SERVICE

I hereby certify that this 7th day of October, 2026, I have served the attached document(s) to the persons on the date(s)
and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Service

Served: Bashman, Howard Jonathan
Service Method: eService
Email: hjb@hjbashman.com
Service Date: 10/7/2026
Address: 500 Office Center Drive
Suite 400
Fort Washington, PA 19034
Phone: 215-830-1458
Representing: Appellee Hagans, Dajah

Served: Becker, Charles Lyman
Service Method: eService
Email: charles.becker@klinespecter.com
Service Date: 10/7/2026
Address: Kline & Specter, P.C.
1525 Locust Street, 19th Floor
Philadelphia, PA 19102
Phone: 215-772-1000
Representing: Appellee Hagans, Dajah

Served: Bouzat, Facundo
Service Method: eService
Email: bouzatf@ballardspahr.com
Service Date: 10/7/2026
Address: 1735 Market Street, 51st Floor
Philadelphia, PA 19103
Phone: 419-575-1799
Representing: Appellant Hospital of the University of Pennsylvania

Served: Collins, Kimberly M.
Service Method: eService
Email: kimberly.collins@klinespecter.com
Service Date: 10/7/2026
Address: Kline & Specter PC
1525 Locust Street 19th fl
Philadelphia, PA 19102
Phone: 215-772-1000
Representing: Appellee Hagans, Dajah

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Laidacker, Ruxandra Maniu
Service Method: eService
Email: andra.laidacker@klinespecter.com
Service Date: 10/7/2026
Address: 1525 Locust St.
Philadelphia, PA 19102
Phone: 215-772-1000
Representing: Appellee Hagans, Dajah

Served: Lentz, Earl Merritt
Service Method: eService
Email: mlentz@gblegalteam.com
Service Date: 10/7/2026
Address: 20 Ash Street, Suite 360
Gilman & Bedigian, LLC
Conshohocken, PA 19428
Phone: 215-561-4999
Representing: Appellee Hagans, Dajah

Served: McBride, Maureen Murphy
Service Method: eService
Email: mmcbride@lambmcerlane.com
Service Date: 10/7/2026
Address: 24 East Market Street
P.O. Box 565
West Chester, PA 19381
Phone: 610-430-8000
Representing: Appellant Hospital of the University of Pennsylvania

Served: Olson, Heather Reardon
Service Method: eService
Email: heather.olson@evernorth.com
Service Date: 10/7/2026
Address: Two Liberty Place
1601 Chestnut Street
Philadelphia, PA 19192
Phone: 215-761-1876
Representing: Appellant Hospital of the University of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Pratt, Marcel S.
Service Method: eService
Email: prattm@ballardspahr.com
Service Date: 10/7/2026
Address: Ballard Spahr LLP
1735 Market Street, 51st Floor
PHILADELPHIA, PA 19103
Phone: 215-864-8506
Representing: Appellant Hospital of the University of Pennsylvania

Served: Rienzi, Karyn Dobroskey
Service Method: eService
Email: krienzi@postschell.com
Service Date: 10/7/2026
Address: Post and Schell, P.C.
Three Logan Square, 1717 Arch Street, 24th Floor
Philadelphia, PA 19103
Phone: 215-587-1175
Representing: Appellee Victoria Kroesche, R.N., Sarah Gutman, M.D., Whitney Bender, M.D., and Kirsten Leitner, M.I

Served: Rublin, Burt M.
Service Method: eService
Email: rublin@ballardspahr.com
Service Date: 10/7/2026
Address: 1735 Market Street
51st Floor
Philadelphia, PA 19103
Phone: 215-864-8116
Representing: Appellant Hospital of the University of Pennsylvania

Served: Stafford, Andrew Philip
Service Method: eService
Email: astafford@lambmcerlane.com
Service Date: 10/7/2026
Address: Lamb McErlane PC
3405 West Chester Pike
Newtown Square, PA 19073
Phone: 610-353-0740
Representing: Appellant Hospital of the University of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Tucker, Joe H., Jr.
Service Method: eService
Email: jtucker@tlgattorneys.com
Service Date: 10/7/2026
Address: Tucker Law Group
1801 Market Street Suite 2500
Philadelphia, PA 19103
Phone: 215-875-0609
Representing: Appellant Hospital of the University of Pennsylvania

Courtesy Copy

Served: Sperl, Andrew Ronald
Service Method: eService
Email: arsperl@duanemorris.com
Service Date: 10/7/2026
Address: 30 S. 17th Street
Philadelphia, PA 19103
Phone: 215-979-7385
Representing: Amicus Curiae Hospital and Healthsystem Association of Pennsylvania

/s/ Matthew Walker Rappleye

(Signature of Person Serving)

Person Serving: Rappleye, Matthew Walker
Attorney Registration No: 081746
Law Firm: Saxton & Stump, LLC
Address: Saxton & Stump LLC
100 Deerfield Ln Ste 240
Malvern, PA 19355
Representing: Amicus Curiae American Medical Society & The Pennsylvania Medical Society