COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
SJC DAR No. _____

STEVEN LUPPOLD,
PLAINTIFF/APPELLEE

VS.

CARLOS FLORES, N.P.
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N., DEFENDANT/APPELLANT,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY ASSOCIATES, INC.
DEFENDANTS

ON APPEAL FROM A DECISION OF THE MIDDLESEX COUNTY SUPERIOR COURT
[C.A. No. 1681-CV-01287]

APPLICATION OF DEFENDANT-APPELLANT SUSAN HANLON, R.N., FOR DIRECT APPELLATE REVIEW

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1. Request for Direct Appellate Review.

Defendant/appellant Susan Hanlon, RN (hereinafter "Hanlon") requests direct appellate review with respect to the judgments entered in *Steven Luppold v. Carlos Flores, N.P., Charles Loucraft, P.A., Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N., and Merrimack Valley Emergency Associates, Inc.,* Civil Action No. 1681CV01287 respectively entered on March 28, 2023 and March 30, 2023, and all rulings adverse to Hanlon subsumed in such judgments, including:

(1) the trial judge's prohibiting her defense counsel from cross-examining a codefendant regarding bias inherent in a "high-low" settlement agreement entered into between the plaintiff and that codefendant, who continued to participate in the case after entering into that agreement, which was kept hidden from the jury by that ruling and order;

(2) the judge's instructing the jury with respect to causation-in-fact employing ambiguous language set forth in the "model" Superior Court Jury Instructions (October 8, 2021 ed.), rather than in manner set forth in Doull v. Foster, 487 Mass. 1, 12-13 (2021); and

(3) the judge's declining to enter a directed verdict and/or judgment notwithstanding the verdict ("JNOV") in favor of Hanlon where (a) the plaintiff's claim was grounded upon failure to take actions beyond the permitted scope of practice of registered nurses ("RNs") licensed in Massachusetts, and/or (b) by reason of that limited scope of practice, care of the patient shifted from Hanlon to a Physician Assistant ("PA") and Nurse Practitioner ("NP"), and negligent acts of that PA and that NP were found by the jury to have caused the plaintiff's harm, thereby discharging RN Hanlon's liability for lack of proximate cause.

Hanlon also requests direct review of the rulings by the trial judge and Order entered on the docket on November 27, 2023, denying her motion for judgment notwithstanding the verdict ("JNOV"), a new trial, or remittitur.[1] Appendix ("App.")153.

2. **Statement of Prior Proceedings.**

A. *General Proceedings*.

This malpractice action was filed on May 5, 2016. App.44. The plaintiff ("Luppold") asserted claims of medical negligence against PA Charles Loucraft, NP Carlos Flores, triage nurses Carla Crocker and Stefanie Busa, and discharge nurse Susan Hanlon, asserting that each had failed to satisfy the applicable standard of care with regard to the detection of and treatment for blood clots in his left leg, resulting in the need for an above-the-knee amputation. App.96, App.405-408. A jury awarded the plaintiff a verdict of $20 million against Loucraft, Flores, and Hanlon, upon which prejudgment interest was applied to yield a judgment in the amount of $28,870,400, which was docketed on March 30, 2023. App.65.[2] Hanlon served post-

[1] If this application is accepted, Hanlon requests that the Court also review such other issues as may be raised in this appeal.

[2] Judgment initially entered on March 28, 2023, and included an interest rate of 0.12 and reflected a Judgment Total of $36,568,440. App.89. An Amended Judgment entered on March 30, 2023, which reflected an interest rate of 0.0644. See G.L. c. 231, §60K. App.65. A notice of appeal from that judgment was also filed on April 27, 2023. App.65.

trial motions for JNOV, a new trial, and remittitur, on April 7, 2023. App.90-152. On November 27, 2023, the trial court docketed its rulings denying those motions. App.153-160; App.65. A notice of appeal from the judgments and these rulings was filed on December 20, 2023. App.161-162. Upon assembly of the record on January 18, 2024, the appeal was docketed on January 30, 2024. App.66

B. Creation of the high-low agreement and changes in testimony of Luppold and Loucraft.

At the hearing on post-trial motions, Luppold's counsel related that counsel for Loucraft had approached him about the possibility of a high-low agreement at some time before Loucraft took the stand for the first time at trial on 3/10/23. App.398-401. (As detailed below, Loucraft also testified on 3/21/23.)

On 3/10/23, Loucraft was questioned about a complaint by Luppold made to, and recorded by an administrative, not medical, staff-person on a registration form filled out on 3/7/15, which stated "LEFT FOOT PAIN AND TURNING PURPLE." App.178, App.187-188, App.407. On the 7th, Loucraft saw Luppold before the discharge nurse, Hanlon, did. App.327-330; App.408, App.414. After he took Luppold's history, assessed him, diagnosed him, and issued care instructions for him, App.314; App.332, Loucraft printed out a "depart summary" concerning the patient visit so that as discharge nurse Hanlon could review Loucraft's instructions with Luppold before she discharged him pursuant to Loucraft's order to do so. App.327-328; App.333-334; App.203-204; App.414. The registration information concerning

the complaint of the foot pain and discoloration "autopopulated" into a part of the "depart summary" within the Emergency Department ("ED") electronic medical record system. App.199-202, App.329-331, App.414.

During his first portion of testimony at trial on 3/10/23, which was before he entered into the high-low agreement with Luppold (see App.399-402), Loucraft testified that he "would expect" the triage nurse to leave her desk in the triage area and go through a locked door into the area where he was located to orally state to him Luppold's complaint about his foot being cool to touch that she had already entered in her triage note for his review. App.176-177, 207; App.411. He also testified that he did not recall whether he read the note himself. App.179-180. As to Hanlon, he testified that she "apparently" was aware of the information in the depart summary that was "autopopulated" from the registration form concerning the foot pain and discoloration when she was discharging him. App.187-190, App.199-200. Loucraft further testified that Hanlon and the other nurses bore "responsibility" for the "information" relating to Luppold. App.205-206. He also adamantly insisted, under extensive cross-examination, that even if Luppold's foot complaints were orally stated to him, that whether he would order an ultrasound test for Luppold's leg would depend on his own examination of Luppold, which he repeatedly stated did *not* indicate the need for an ultrasound. App.181-186, App.191 App.193.

On 3/13/23, the following Monday, Luppold testified that he specifically stated to Hanlon during his discharge on 3/7/15 that "[m]y foot's still swollen and purple, does that make a difference?" and that she specifically responded, "No, we're going to discharge you." App.215-216. Luppold had previously testified at his deposition that Hanlon did not say anything specific to him. App.217-218.

At the hearing on post-trial motions, Luppold's counsel represented that when Loucraft first took the stand on 3/10/23, there was no high-low agreement in place. App.399-400. At that hearing Luppold's counsel also represented that it was "when Mr. Loucraft went back up [to the stand] with [his counsel] Mr. Bello" on 3/21/23, see App.303, that Hanlon's counsel "learned of the high low" agreement. App.399-401.

With the agreement in place, Loucraft returned to the stand on 3/21/23. He then expanded upon his 3/10/23 testimony that Hanlon and the other nurses bore "responsibility" *for the "information*" concerning Luppold, App.205-206, further testifying that they bore "responsibility" "*for this [the blood clots] not being evaluated*." App.335-336 (emphasis supplied). Also, changing his prior testimony that he did not recall whether or not he reviewed the triage note, he testified that he did not review it, and further that this was contrary to his custom and practice. App.337-338. Additionally, he acknowledged that he "skipped a very important step" in failing to read the note, contrary to this "custom and practice." App.337-

339. Also, varying from his prior testimony on the 10th that even if he had been orally told of the foot complaints, he would have decided whether to order an ultrasound *based on his own examination findings, which did not indicate need for ultrasound*, see supra, on the 21st he testified instead that part of the reason why Luppold left the emergency department without evaluation of imaging for his leg was *because he was not told of the foot complaints by the nurses*. App.340-341.

C. *Ruling Precluding Evidence Concerning the High-Low Settlement*.

Counsel for Hanlon raised the issue of bias relating to the high-low agreement at sidebar while Loucraft was on the stand in anticipation of raising the subject before the jury:

> MR. KELLEY: The reason I asked to be seen, Your Honor, is that the original, more the prior testimony in getting [into] bias of this witness and giving those opinions against the nurses because of his circumstance with his [insurance] company and with a high-low agreement I'd like to be able to inquire of that.

App.342.

At the sidebar counsel for Loucraft conceded that "[t]here's a high-low agreement," and acknowledged that Loucraft's insurance company was in rehabilitation (rather than bankruptcy as thought by Hanlon's counsel). App.343. After counsel for Loucraft acknowledged the high-low agreement and began to state his position opposing questioning about it the judge immediately ruled "We're not going to get into any of that." App.343-344.

D. *Plaintiff's Closing Argument*.

i. Attack on Hanlon's credibility and praise for Loucraft in the absence of evidence regarding the high-low agreement.

In his closing, Luppold argued that Loucraft should be praised for the above changes in his testimony, without any mention of the high-low agreement or the compelling financial self-interest of Loucraft that would be served by his entering into it, which remained hidden from the jury because of the court's ruling:

> Nurse Hanlon…[t]he difficulty she has is telling the truth.…She … repeatedly lied to you.…
>
> That's what you have to decide. You have to decide where does the truth lie? …
>
> And *a large part of that is you have to assess credibility of witnesses*…
>
> - - -
>
> … I am going to say *something that I very rarely say* when I stand in front of juries in cases like this. I'm going to ask you to *give a lot of credit to Charles Loucraft, one of the defendants*. He is a defendant. He has been accused of medical malpractice. He has been accused of not doing what he was supposed to do causing somebody to lose his leg.
>
> And Mr. Loucraft, *to his credit*, told you he messed up. He told you, he agreed, I was negligent in not reading that triage note. I should have.
>
> - - -
>
> And he said, you're right. We should – – he never should have been discharged without an ultrasound because that is true testimony.

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> *… He didn't throw anybody under the bus as Mr. Kelley would suggest he wants to blame others*. That's I didn't do anything wrong but blame them. That's what that is. He took responsibility, but *to be fair to Mr. Luppold, he also said but it wasn't just me.*

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> … And Nurse Hanlon had a responsibility to tell him about a purple, cool foot. And he told you, if I had known about any of that, I would have gotten an ultrasound.… [H]e would have gotten a [vascular] consult.
>
> … It's refreshing because it's the truth. *He didn't try to hide from it.*

- - -

> …*Give Mr. Loucraft credit*.

App.366-375 (emphasis supplied).

ii. Absence of the nurses.

Hanlon moved in limine seeking an order that plaintiff's counsel not make reference "to the idea that the Defendant nurses were grossly negligent and/or outrageous in behavior." App.73-74. The judge who heard that motion (not the trial judge) endorsed it, stating "neither side anticipates this being an issue." App.58; App.71.

On March 9, 2023, the first day of the evidence, the issue of the court's notifying the jury that nurses would be excused for their absences from trial was raised:

> MR. KELLEY … I had raised with the Court earlier with respect to Nurse Busa and Nurse Crocker, if they could be excused tomorrow?
>
> THE COURT: *There's not a problem with that*. I'm just going to say that, you know, do you want me to say anything? Quite frankly, I don't think they're even noticing who's here and who's not here.
>
> MR. KELLEY: But I don't know that the jurors will not, so if the Court could simply say that Nurse Crocker and Nurse Busa have been excused from today's proceeding.
>
> MR. HIGGINS: Well, I object to that your Honor….*I won't raise that they're not here. I won't point to them. I won't do anything like that,* but *I don't want a comment that you've excused them* as if – I have no idea why they're not here. I don't know the reasons.
>
> THE COURT: *Why don't I leave it at this*, I can mention . . . in my instructions on the law. *You're not to consider ... for either party whether someone was able to be here for every second or something*.
>
> I can make a quick mention of that.
>
> MR . KELLEY: Yeah. The more generic is fine, Your Honor.

App.169-171 (emphasis supplied).

Hanlon's counsel followed up, reminding the judge on March 15, 2023 that "there was a discussion about putting [into this jury charge] some *comment about parties not being present on occasion*." The judge responded: "I'm not sure we want to point it out at this stage because … I don't really think they've been noticing….*But it's up to you*…if you want me to do it, I'm happy to figure it out." App.221-222. (Emphasis supplied).

Notwithstanding these statements plaintiff's counsel then argued in closing as follows:

> Exactly how she [Nurse Hanlon] and the other nurses in this case treated this case. Eh, they were here when they wanted to be here. Weren't here to listen to Mr. Luppold. Weren't here to listen to Mr. Loucraft. Nurse Hanlon came and went. I agree with Mr. Bello, Mr. Loucraft and Mr. Flores sat in the front row and listened to everything. Can't say the same for the three nurses.
>
> Maybe it's telling, kind of *the way they acted about this case is how they acted about Mr. Luppold in the ED…. If that's how emergency rooms operate, ladies and gentlemen, I would suggest to you that's frightening*.

App.376-377 (emphasis supplied).

Counsel for Hanlon requested a curative instruction, asking that the jury be specifically instructed to not draw any negative inferences from any absence of any party. App.378-382. The court refused, instead issuing an instruction that "A party's presence in the courtroom or lack thereof is not evidence." App.384.

E. *The Causation-In-Fact Instruction*

Hanlon had filed a memorandum with the court regarding the appropriate standard for causation-in-fact, explaining that in light of Doull v. Foster, 487 Mass. 1 (2021), "the Plaintiff must establish that, *but for* the alleged negligence of the Defendant nurses, the Plaintiff would not have suffered harm[,]" and that "[c]onduct is a factual cause of harm when the harm 'would not have occurred absent the conduct.'" App.73, App.78, App.82. The judge who conducted the 10/12/22 pretrial

conference endorsed this filing as follows: "Standard Trial Court instructions as to medical malpractice and causation. Any objection noted." App.84, App.57.

Counsel for Loucraft, Flores, and Hanlon and the other nurses joined at the charge conference in objecting to the reference in the model instruction to the term "impact" as being unduly vague and improperly altering the plaintiff's burden on causation by watering it down to the prejudice of the defendants. See App.267-270. At the instruction of the court counsel for Hanlon and Loucraft proposed "redlined" revisions to a draft jury charge prepared by the Court that was based on the "model" jury instructions. See App.256-258; see also App.423. The court had stated it intended to use the "model" instructions as a default in the event the parties could not agree upon language for the jury instructions.[3] App.167-168. The revision proposed by the defendants would have deleted the reference to negligence of a defendant having "had an impact on" the plaintiff's injuries as establishing causation. See App.266-269; see also App.429. The judge rejected this request. See App.266-271. Further, the defendants argued that the court should instruct the jury

[3] The model instruction is available online at https://www.mass.gov/model-jury-instructions. The text of the "model" instruction on cause-in-fact is as follows: "If you find that DFT was negligent, then you must decide whether PLF proved that, more likely than not, DFT's negligence caused PLF's injuries [caused PLF's injuries to get worse]. You must ask: 'Would the same harm have happened without DFT's negligence?' In other words, did the negligence make a difference? If DFT's negligence *had an impact* on PLF's injuries, then it caused those injuries. But if the negligence had *no impact* on PLF's injuries *and* the *same harm would have happened anyway*, then DFT did not cause the injuries." (Emphasis supplied).

in the alternative manner endorsed in the notes to the "model" instruction that "In order to find for the plaintiff, you must find that 'but-for' that defendant's negligence, the harm would not have occurred" without the reference to "impact." See App.266-269. The judge also rejected that joint request during the charge conference, thereby maintaining the "impact" component of the instruction. App.271-274.[4]

The judge thus instructed the jury as to causation-in-fact as follows:

> [Y]ou must decide whether Mr. Luppold proved that, more likely than not, the individual defendant's negligence caused Mr. Luppold's injuries.
>
> The defendant caused injuries if the injuries would not have occurred without, that is but for, that defendant's negligence. To decide this, you must ask would the same harm have happened without that defendant's negligence. In other words, did the negligence make a difference?
>
> If a defendant's negligence *had an impact* on Steven Luppold's injuries, then it caused those injuries. But if *the negligence had no impact* on Steven Luppold's injuries *and the result would have happened anyway*, then that defendant did not cause the injuries.

See App.364-365. (Emphasis supplied).

Following the jury charge, the defendants renewed their objection to the "impact" language. App.385-386. Hanlon also renewed her requests for instructions

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[4] At the hearing on the post-trial motions, stated to Hanlon's counsel with respect to the issue concerning the adequacy of the causation instruction that "Your rights are preserved on that. You can take that issue up. If my instruction was wrong, then it was wrong." App.396-397.

on causation–in-fact nos. 36 and 38 that she had previously submitted. See App.389.[5] The judge also implicitly declined to give the renewed requests. See App.385-393.

F. *The Directed Verdict/JNOV Arguments*.

The evidence was undisputed that nurses do not have any authority to make medical diagnoses. See e.g. App.231-232 ("…nurses don't do a diagnosis…") (Plaintiff's expert, Linda M. Harris, M.D. FACS); see also App.289 ("…[N]urses don't diagnose patients.") (Defendants' expert, Shelley Calder, DNP, RN, CEN), at App.290 ("…[N]urses don't diagnose in any department."); App.302 ("…wouldn't be the role of the nurse either to diagnose a patient's condition…that's not what a nurse does.") (Crocker). Likewise, the evidence was undisputed that nurses do not have authority to issue medical orders, including orders for tests and consultations. See e.g. App.233 ("Nurses don't order the tests.") (Plaintiff's expert Harris), App.234-235 (ordering consults is outside of nursing scope of practice); App.244-245 (nurses do not order tests, determine if a consult is required, or determine if patient should see a physician) (Plaintiff's expert, Susan Smith, DNP); see also App.287-288 ("The nurse does not create the discharge instructions.") (Defendants'

[5] Counsel for Hanlon had also submitted proposed instructions stating: "36. The Defendant's conduct is a cause of the event only if the event would not have occurred "but for" that conduct…. [and] 38. The Plaintiff has the burden of proving by a preponderance of the evidence that the Defendant was negligent and that but for the defendant's conduct, the plaintiff would not have been injured. Unless you find both of these elements, you must find for the Defendant." App. 452-453.

expert Calder); App.301 ("…nurses are not independent providers…we rely on doctor's orders.") (Crocker); App.211 ("That's not even in my scope of practice. I cannot order tests.") (Hanlon). In her motion for directed verdict at the close of the plaintiff's evidence Hanlon argued: (1) the evidence did not support a finding that she was negligent "*to the extent of [her] involvement* in the care of [the plaintiff]"; (2) the evidence did not warrant a finding that she "failed to comply with *the applicable standard of care* at the time, and *under the circumstances of [her] involvement* in the care of [the plaintiff]"; (3) the expert evidence did not "warrant a finding that [she] deviated from *the accepted and applicable standard of care* to *the extent of [her] respective involvement* in the care of [the patient]"; and (4) the evidence established "that *the standard of care of an emergency department nurse* was met by [her] as [she] provided appropriate care to [the plaintiff] *within the scope of nursing practice* during [Luppold's] emergency department visits." App.85-86 (emphasis supplied). The motion also argued that "the evidence [did] not warrant a finding that any act or omission of [Hanlon] caused or contributed to cause injuries to [the plaintiff]," and that the plaintiff had offered "insufficient expert testimony" to "warrant a finding that any action or omission of [Hanlon] proximately caused injury to the [the plaintiff]." App.86. The judge denied the motion. App.85; App.279-281. The motion was renewed and denied at the close of all evidence. App.359-361.

In her memorandum in support of her JNOV motion Hanlon similarly argued that (1) causation was lacking because of the "undisputed and exclusive role of the mid-level providers" as contrasted with Hanlon's scope of practice, App.97; (2) Loucraft's and Flores's "exclusive" responsibility for the plaintiff's care rendered the plaintiff's case against Hanlon a baseless attempt "to find [Hanlon's] scope of practice on par with the mid-level providers," App.105; (3) the evidence, including the testimony of the plaintiff's nursing expert, Smith, was insufficient to support liability of Hanlon, App.104-106; and (4) "[t]here was and could be no such evidence," as such a theory "was contrary to the evidence and standard of care applicable to Nurse Hanlon." Id.

The judge denied the motion for JNOV and new trial. App.153-160. With respect to the ruling precluding cross-examination of Loucraft for bias relating to the hidden high-low agreement, the judge based his decision on (1) Loucraft's statement at his deposition that he would "expect" a discharge nurse to mention the reference of pain or turning color in a foot contained within the administrative registration information that "autopopulated" into the "depart summary" that he had printed out, which the judge felt was "consistent with" his later trial testimony that the nurses, including Hanlon, bore "responsibility" for Luppold's "evaluation," and (2) incentive of Loucraft to shift blame to Hanlon. See App.159-160.

3. **Statement of Facts Relevant to the Appeal.**[6]

Luppold offered two theories of negligence on the part of the nurses through his nursing expert, Smith. The first was a failure on their part to inform the "mid-level" medical providers (the PA and NP) regarding complaints of Luppold regarding his foot that were recorded in the electronic records system ("ERS"). App.238-242. The second was failure on the part of the nurses to properly assess for the existence of clotting in Luppold's leg through a pulse evaluation. App.240-242.

Evidence regarding the theory of nurses' failure to provide patient foot complaint information.

With regard to the failure to inform theory, because of the set up and staffing of the ED, depending upon patient flow and volume, there would be either two or three types of notations of patient complaints entered into the ERS before a patient would be seen by a "mid-level" provider. App.283-286, App.298. First, upon arrival, a patient would check in with the registration desk, at which time an administrative, not medical, staff-person would inquire and make a notation as to the complaint of a patient within the registration document. App.283-284. Second, the triage nurse on duty in the ED would also take information and record patient complaints. App.285, App.291. Third, depending upon patient volume and flow, there might also be an

[6] Please also see testimony and other evidence recited in the Statement of Proceedings above.

assessment by the nurse located within the "ambulatory" section of the ED. App.285-286, App.295-298.

In his opening statement, counsel for Loucraft and Flores stated that they both took their own history of complaints from Luppold, and neither relied upon patient histories of complaints taken by other personnel. App.164.

On 3/7/15 PA Loucraft was the "mid-level" provider in the ED. App.174. On that date, the administrative person at the registration desk recorded Luppold's complaints as: "LEFT FOOT PAIN AND TURNING PURPLE." App.407. With regard to the complaint information in the registration document, Loucraft stated that this information was something he would not see, although it would be available to him through a different screen on the electronic medical record system. App.308-312.

The triage note on 3/7/15 documented Luppold's chief complaint as "low back pain with numbness to left lower extremity – left foot cool to touch." App.411. Loucraft acknowledged when he first testified on the 10th that this information was available to him, and that he was expected to review it. App.179-180. He also stated on that date that he didn't recall if he read the note during Luppold's visit, App.180-181, App.196, and that he "should have done a better job" with regard to review of the triage note. App.192. He also testified that on 3/7/15 he took his own history from Luppold, examined him, assessed him, diagnosed him, issued patient discharge

instructions for him, and discharged him. App.304-307; App.313-315; App.325-326; App.332.

On 3/13/15 Flores was the mid-level provider in the ED. App.223-224. He had "no idea that Mr. Luppold had foot pain as a complaint, when he arrived." App.228. The triage note recorded Luppold's complaint as "L[eft] ankle pain, atraumatic, [patient alert and oriented] x 3. [No Apparent Distress] skin [pink/warm/dry]. Reports seen here last week for sciatica. Reports pain in lower back and upper leg improved but continues to have severe L[eft] ankle pain. Ran out of pain killers/muscle relaxants that were [prescribe]d." App.415. Flores did not review that information, App.227, but unlike Loucraft stated he was "not sure" if he was obligated to review it. App.225-226. Like Loucraft, he testified that he took his own history of patient complaints from Luppold. App.225-226; App.348-351.

Evidence regarding the theory of nurses' failure to assess for clotting.

The LGH ED was set up so that patients entering the ED would first be seen by a triage nurse who would perform a preliminary assessment to determine the "acuity" level of the patient. App.282-285. Patients tracked "1" through "3" were sent to the "core" of the ED where they would be seen by physicians. App.292-294. Patients tracked "4" or "5" were referred to the "ambulatory" portion of the ED, id., which was staffed by a nurse and a "mid-level" provider such as himself. App.175. Patients tracked to the "ambulatory" area were placed into one of six patient rooms.

App.197-198; App.347. To enhance the promptness with which patients can be seen in an ED setting by such "mid-level" providers, PAs and NPs might go into a patient room at any time to see the patient without waiting for the nurse. App.295-298. This could all happen without the nurse working in that part of the ED, who could be occupied with another patient in another of the six rooms at any given moment, ever assessing the patient before discharge. App.295-298.

With regard to the 3/7/15 visit, Hanlon testified that as documented in the medical record she did not assess Luppold on that date, App.208-210, and that she therefore recorded that the assessment was done by the PA (Loucraft), and that she was with another patient at that time. App.208. As discharge nurse on that date, Hanlon reviewed the discharge instructions written by Loucraft and included in the "depart summary" that Loucraft had printed out, App.329-330; App.333-334, and discharged him pursuant to Loucraft's instruction to do so. App.204, App.212.

With regard to Luppold's visit on 3/13/15, Hanlon performed an assessment of Luppold, recording that he had reported to her that he had foot pain rated 4 out of 10. App.419. Like Loucraft, Flores testified that he performed his own assessment upon Luppold, entered his own diagnosis and prepared the treatment plan for Luppold. App.348-358; App.411-415. As she had done on the 7th as discharge nurse, Hanlon again carried out the education of Luppold with regard to the discharge

instructions (this time issued by Flores) and discharged him per the order of Flores. App.421-422.

4. Issues of Law Raised by the Appeal.

1. Does a trial judge who prohibits a non-settling defendant's counsel from cross-examining a codefendant who remains in a case about the existence of, and bias relating to, a high-low settlement agreement entered into between that codefendant and the plaintiff commit prejudicial error and/or abuse of discretion by doing so?

Hanlon preserved the issue concerning the admissibility of evidence of the high-low settlement agreement by raising it at sidebar and specifically apprising the judge of his intention to inquire into the subject of bias associated with it on cross-examination, whereupon the judge ruled that it could not be inquired into. See Massachusetts Guide to Evidence (MGE) § 103(a)(2); Mass. R. Civ. P. 46; See also Civitarese v. Gorney, 358 Mass. 652, 658 (1971) ("Since the excluded question was put on cross-examination, no offer of proof was necessary."); Stevens v. William S. Howe Co., 275 Mass. 398, 402 (1931) ("A trial attorney can hardly be expected to know in advance the answer to be made by an adversary witness called by his opponent with sufficient certainty to enable him to make an offer of proof, although he may be required by the judge to state his hope.").

2. Does the "Superior Court Model Jury Instruction" (October 8, 2021 ed.) concerning causation-in-fact relied upon by the trial judge in this action violate the holding in Doull v. Foster, 487 Mass. 1, 12-13 (2021), that "the focus [of a jury's determination of cause-in-fact]…is *only* on whether, in

the absence of a defendant's conduct, the harm still would have occurred" (emphasis supplied), by injecting ambiguity, vagueness, and confusing and misleading language suggesting that any "impact" a defendant's negligence might have upon a plaintiff's harm is sufficient to establish cause-in-fact?

Hanlon preserved the issue regarding the judge's failure to provide her requested but-for causation instruction that was consistent with this Court's holding in Doull by objecting after the trial judge specifically ruled at the charge conference that an instruction so limited would not be given, where, during the colloquy, the judge acknowledged his awareness of the issue, explicitly ruled on it, expressed his intention not to instruct as requested, and expressly noted the defendant's objection to the ruling. App.265-274; see Flood v. Southland Corp., 416 Mass. 62, 67 (1993); Rotkiewicz v. Sadowsky, 431 Mass. 748, 751-752 (2000). Hanlon also subsequently revisited the issue as to the denial of the requested instruction immediately after the charge by objecting, App.385, and by requesting causation instructions consistent with Doull. App.383. Mass. R. Civ. P. 51(b); see also Rotkiewicz, supra.

3. Does Massachusetts law permit a cause of action for negligence against RNs for not taking actions beyond their limited scope of practice so as to require that they supervise PAs or NPs by questioning whether their diagnoses and discharge orders are consistent with the history of symptoms or complaints given by a patient to nurses or other persons lacking licensure or authority to issue medical diagnoses or orders, and to confront such PAs and/or NPs about such perceived inconsistencies between their diagnoses, medical orders and such complaints?

Hanlon preserved this issue by arguing in her directed verdict and JNOV motions that the plaintiff's malpractice theories were grounded upon an erroneous conflation of the "scope of practice" of an RN with that of a PA or NP, contrary to the standard of care applicable to an RN, such as Hanlon, and by including the lower court's adverse rulings on those motions in her notice of appeal. See Mass. R. Civ. 50; Mass. R. App. P. 3, 4; App. 85-88, 90-162.

4. Does proximate cause with respect to harm to a patient caused by a negligent Massachusetts nurse exist after the shifting of care for the patient from such nurse to a subsequently negligent MD, NP, PA, or other person who, unlike a nurse, has authority and licensure to issue medical diagnoses and orders, where the latter's subsequent negligence causes the same harm as that caused by the nurse's prior negligence?

Hanlon preserved the issue by arguing in her motions for directed verdict and JNOV, App.359-361, App.85-88, App.90-152, that the plaintiff's expert testimony was insufficient to establish causation, and that proximate cause as to Hanlon could not exist where the mid-level providers (i.e., PA and NP), under their distinct "scope of practice," bore exclusive responsibility when they took over the care of Luppold from the nursing staff, and by including the lower court's adverse rulings on those motions in her notice of appeal. See Mass. R. Civ. P. 50; Mass. R. App. 3, 4, App. 85-88, 90-162.

5. Argument.

I. THE COMPLETE EXCLUSION OF *ANY* EVIDENCE REGARDING THE HIGH-LOW SETTLEMENT CONSTITUTED PREJUDICIAL ERROR AND/OR ABUSE OF DISCRETION.

The judge reasoned that his precluding *any* cross examination whatsoever regarding the high-low agreement, App.343-344, ("We're not going to get into any of that") could be justified as an exercise of discretion regarding admissibility of settlement agreements and insurance. App.153, App.157-158. This was error first because he completely failed to address the fundamental principle that where bias is concerned, reasonable cross-examination "*is a matter of right*" that "cannot be unreasonably restricted." MGE § 611(b)(2) (emphasis supplied). Contrast MGE §§ 408 and 411 (*permitting* admission of bias evidence relating to settlements and insurance, respectively). To reason that a judge has complete discretion to preclude cross-examination regarding bias, that exists "as a matter of right," is a contradiction in terms – a judge cannot have unfettered discretion to *completely* defeat such a right. Accordingly, where the bias concerns a "high-low" agreement it is baseless to suggest that the right does not include the entitlement to *at least* ask about the *existence* of the agreement, or else the right would be illusory.[7]

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[7] A judge has discretion to *limit, not eliminate* such cross examination. § 611 (b)(2) NOTE (while "the trial judge has considerable discretion to *limit* such cross-examination when it becomes redundant or touches on matters of tangential materiality," the "judge *may not restrict* cross-examination of a material witness *by foreclosing inquiry* into a subject that could show bias or prejudice on the part of the

Second, the ruling ignores the special protection that Massachusetts has always afforded cross-examination for bias that flows ineluctably from its "sacred" right to jury trial.[8] Completely concealing a bias issue from a jury disables jurors from performing their most important function of assessing witness credibility, and therefore the truth, in an informed manner, rendering the "jury trial" a charade.[9]

Reasonable cross-examination on the particular issues of bias pertinent to each witness is thus the quintessence of a fair trial. The judge's post-hoc rationalization for precluding *any* cross examination on the witnesses' bias created by the high-low agreement – that *he* did not see any bias concern because Loucraft (purportedly) only offered testimony at trial "consistent" with his deposition after entering the agreement, App.153, App.157-158,– misses the point. It was solely the

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witness") (emphasis supplied; internal citations omitted). See also Brodin and Avery, Handbook of Massachusetts Evidence, §6.15, at 339 (8th ed.) ("Cross-examination to show bias, prejudice, or motive to lie *is a matter of right* ...")(emphasis supplied). "If, on the facts, there is a possibility of bias, even a remote one, *the judge has no discretion* to bar *all inquiry* into the subject." Id. (emphasis supplied; internal citation omitted). "[W]here... facts are relevant to a showing of bias or motive to lie, any general evidentiary rule of exclusion *must give way to the constitutionally based right of effective cross- examination*." MGE, §611, NOTE (emphasis supplied).

[8] Farnham v. Lenox. Motor. Car. Co., 229 Mass. 478, 481 (1918) ("The essence of [the] right [to jury trial under article 15 of Part One of the Massachusetts Constitution] is that controverted facts *shall be decided by the jury*.") (emphasis supplied). Jury fact-finding regarding bias therefore lies at the core of that "sacred" right which must be "sedulously guarded against *every encroachment*." Orasz v. Colonial Tavern, 365 Mass. 131, 134 (1974) (emphasis supplied).

[9] Massachusetts law contemplates "thorough" jury deliberations, Comm. v. Chalue, 486 Mass. 847, 887 (2021). Deliberation concerning a bias issue cannot be "thorough" when the issue is hidden from the jury.

jury's, not his, role to assess the inconsistencies (of which there were several of importance – see pp. 4-7, supra) between what Loucraft, and for that matter, Luppold, said at their depositions and *intra* trial, and *whether the compelling financial motivations created by the high-low agreement contributed to those changes in testimony*.[10]

Cases from other jurisdictions require the same result that § 611(b)(2) does. Settlements creating the issue presented here include "Mary Carter"-type agreements,[11] and "high-low" agreements. Monti v. Wenkert, 287 Conn. 101, 122-123 (2008). Dealing specifically with the "high-low" settlement context, the court in Hashem v. Les Stanford Oldsmobile, Inc., 266 Mich. App. 61 (2005), held:

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[10] "[N]o safeguard for testing the value of human statements is comparable to that furnished by cross-examination," rendering it "the greatest legal engine ever invented for the discovery of truth." Wigmore, J.H., *Evidence in Trials at Common Law* (Chadbourn 1974 ed.) § 1367, p.32. Cross-examination is "the least questionable and most extensively efficient, if not *the most important of [the jury trial's] real merits*." Id. at 35 (emphasis supplied). When permitted to be properly conducted, cross examination contemplates that the witness's "*motives [] are all* severally scrutinized and examined." Id. at 34 (emphasis supplied). The *very reason confidence can be reposed in human testimony* in trials is that the witness is to be "subjected to a close and searching cross-examination; and… such an examination will expose… *any bias* that might operate to make him conceal the truth." It is, therefore "*the most indispensable test of the evidence* narrated on the witness stand." Id. at § 1367, p. 36 (emphasis supplied).

[11] "A Mary Carter agreement is most commonly described as a contract in which one or more defendants (1) agree to remain in the case, (2) guarantee the plaintiff a certain minimum monetary recovery regardless of the outcome of the lawsuit, and (3) have their liability reduced in direct proportion to the increase in the liability of the nonagreeing defendant or defendants." Kippenhan v. Chaulk Servs, 428 Mass. 124, 131 (1998). They also have an element of secrecy. Id.

> [t]he primary danger of such an agreement is that the settling defendant will fail to operate as an adversary. This is most significantly a danger in the traditional Mary Carter agreement … [H]owever, this distortion … may also be present, although in a more subtle form, when a defendant has reached a "high-low" agreement, yet remains involved in the litigation. See Dosdourian [v. Carsten], 624 So. 2d [241,] 247 [(Fla. 1993)]. With respect to these latter agreements, the distortion of the adversarial process is arguably less pronounced because, given the range of awards provided for in a "high-low" agreement, the settling defendants retain an interest in ensuring that the total amount of damages is as small as possible. *Nonetheless*, *the integrity of the judicial system is placed into question when a jury charged with the responsibility to determine the liability and damages of the parties is denied the knowledge that there is, in fact, an agreement regarding damages between a number of the parties. Consequently, wise judicial policy must favor disclosure of such agreements to the jury*.
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> [T]he trial court has both the duty and the discretion to fashion procedures that ensure fairness to all the litigants in these situations …. [Its] failure to so weigh the interests and fashion such a procedure *deprived the nonsettling defendants of a fair trial, i.e., one in which in which the true alignment of the parties is known to the trier of fact*. Dosdourian, supra, 624 So. 2d at 243. Consequently, should any similar agreements be reached between the parties on remand, the trial court *must craft a means of disclosure* that reasonably ensures fairness to each litigant.

Hashem, 266 Mich. App. at 85-87 (internal citations omitted; emphasis supplied).

Owing to sometimes countervailing policy considerations, see Hashem, 266 Mich. App. at 85-86; Gulf Indus. v. Nair, 953 So. 2d 590, 594-595 (Fla. 2007), courts have taken varying approaches on this issue, which are by and large consistent with § 611(b)(2)'s mandate that at least *some* cross-examination must be allowed. For example: (1) the nonsettling defendant may cross-examine as to both the existence

and terms of the agreement[12]; (2) the existence and "basic content" of the agreement are presumptively admissible[13]; or (3) admissibility of both the existence and terms of the agreement are left to the judge's discretion. See, e.g., Monti, 287 Conn. at 124-125. However, "[w]here failure to apprise the jury of the agreement would also mislead the jury by creating inaccurate impressions concerning the facts, there is the addition of affirmative harm to the fact-finding process. In these situations … *the court should apprise the jurors of the agreement.*" D.P. Leonard, Selected Rules of Limited Admissibility, The New Wigmore § 3.7.5, at 393 (1996).[14]

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[12] See, e.g., Chesler v. Trinity Indus., 2001 U.S. Dist. LEXIS 26329 at*33 ("a co-defendant of a settling defendant has the right to use the settlement agreement for cross-examination where the jury is otherwise left with the impression that the settling defendant is 'a real defendant'"), quoting Douglass v. Hustler Magazine, Inc., 769 F. 2d 1128, 1142-43 (7th Cir. 1985); General Motors Corp. v. Lahocki, 286 Md. 714, 722, 728-730 (1980) (finding it unnecessary to determine if agreement was "high-low" or "Mary Carter," noting the *"majority view"* that "*prejudice is shown warranting a new trial if [such secret agreements] have not been disclosed* upon proper motion and admitted into evidence. …. *[I]n judging the credibility of a witness the jury is entitled to know of his interest in the outcome …,"* and holding that "the procedure which should have been followed is to inform the jury *precisely as to exactly what the circumstances are between the parties*.") (emphasis supplied).

[13] Under this approach the existence and "basic content" of the agreement must be disclosed unless the court determines that undue prejudice or misleading or confusion of the jury will result. See, e.g., Slusher v. Ospital, 777 P.2d 437, 444 (1989). However, "[t]he court should also determine whether explanation [of the basic content] is sufficient, … or whether admission of the document into evidence is appropriate…." Id.; see also Moreno v. Sayre, 162 Cal. App. 3d 116, 125 (1984).

[14] In addition to depriving the jury of essential information and undermining the integrity of the judicial system with respect to jury trials, under Massachusetts' pro-rata contribution calculus high-low agreements also inherently implicate the further detriment of financial incentive to settling defendants that "Mary Carter" agreements entail. Once the "high" cap is achieved, in any given case the settling defendant stands to potentially gain by altering his testimony and inflaming the jury against

As to prejudice, undermining of the jury's role of bias evaluation by withholding essential evidence calls for "analogy" to the doctrine of "structural error," under which the destruction of such fundamental jury trial rights are deemed prejudicial as a matter of law.[15] In any event, the preclusion of any cross whatsoever concerning the inherent bias in the agreement caused pervasive actual prejudice:

First, Hanlon was precluded from showing that the agreement's cap on Loucraft's liability motivated Luppold to come up with new inflammatory testimony against defendants not protected by the cap, like Hanlon.[16] Second, such volatile evidence, unrebutted by the precluded bias evidence, may well have inflamed the

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selected other defendants to enhance the likelihood that they will be found negligent, potentially reducing his net liability *below* the cap through collection of contribution, see G.L. c. 231B, sec. 3, *without* incurring the risk that such inflammatory testimony or tactics will harm him as they would the non-settling defendants. See Noyes v. Raymond, 28 Mass. App. Ct. 186, 191 (1990).

[15] "Structural" error "so infringes on a defendant's right to the basic components of a fair trial that it can never be considered harmless". Comm. v. Johnson, 80 Mass. App. Ct. 505, 511 (2011); see also Comm. v. Petetabella, 459 Mass. 177, 183 (2011). Although "[t]he doctrine of structural error…' does not control civil issues [,] Adoption of Gabe, 84 Mass. App. Ct. 286, 293… (2013) [,] it may provide a 'useful analogy' where constitutional rights are at issue [.]" Adoption of Gabe, 99 Mass. App. Ct. 258, 270 (2020). See also Perkins v. Komarnyckyj, 172 Ariz. 115, 119 (1982) (applying structural error doctrine in medical malpractice case).

[16] Monti, 287 Conn. at 123 (with a high-low agreement "the plaintiff might more vigorously pursue liability against the non-settling defendant because there is no cap on a verdict against him"). As noted above, after testifying at his deposition that during discharge on March 7, 2015, Hanlon did not say anything specific to him, App.214-215, five years later at trial Luppold abruptly claimed that he specifically told Hanlon that "[m]y foot's still swollen and purple, does that make a difference?", and that Hanlon responded "No, we're going to discharge you." App.215-216. Had the jury known of Luppold's compelling financial motivation to offer such new and volatile testimony, which may well have been the jury's basis for finding against Hanlon, the jury very well may have rejected that testimony and his claim.

verdict, causing prejudice as to damages as well. Third, that financial motivation to alter testimony may well have caused the jury to question Luppold's credibility as to damages, so that hiding it constituted prejudice regarding damages in this respect as well. Fourth, hiding the agreement precluded Hanlon's using it to rebut Luppold's vilification of her, and his contrasting *praise for Loucraft*,[17] by showing that Loucraft's testimony and conduct garnering such praise were actually motivated by extreme self-interest.[18] Fifth, the "distortion of the adversarial process," Hashem, supra, and "affirmative harm to the fact-finding process," Wigmore, supra, is manifest in the substantive changes in testimony of Loucraft as well.[19]

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[17] Loucraft, who unlike the nurses, had the authority to diagnose in this negligent diagnosis case, would have realized immediately that he was a "main target." Therefore, the subject of a high-low agreement very well may have been the subject of serious discussion with Luppold early on, regardless of when it was entered into. The judge's ruling also destroyed Hanlon's ability to develop this point.

[18] "[I]t is improper for a lawyer, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented.'" State Farm. Mut. Ins. Co. v. Thorne, 110 So. 3d 66, 74 (2013). Such arguments are "disingenuous and misleading," and particularly objectionable when used to accuse defendants of "avoid[ing] responsibility" and "exhibit[ing] shameful conduct." Id. They "shift[] the focus of the case from compensating the plaintiff to punishing the defendant," suggesting that … its defense of the claim in court was improper." Id.

[19] The judge's missing the evolution in Loucraft's testimony as the high-low agreement was being negotiated was egregious error. While on the 10th Loucraft accused the nurses of "responsibility" for not verbally repeating "information" about Luppold that was already in the ERS and available to him, on the 21st he asserted that they bore "responsibility" for Luppold's ultimate "*evaluation*" where he, not the nurses, had authority and training to diagnose, and where his lawyer had represented that he did not rely upon histories of complaints taken by others. As Twain explained: "The difference between the *almost* right word & the *right* word is really a large matter - - it is the difference between the lightning bug and the lightning." Bartlett's Familiar Quotations, 17th ed (Little, Brown and Company 2002) at 561

II. THE "MODEL" CAUSATION-IN-FACT INSTRUCTION IS PREJUDICIALLY MISLEADING AND AMBIGUOUS.

"Impact" is defined as, among other things, simply "*the effect or impression* of one thing upon another." Webster's II New College Dictionary (Houghton Mifflin 2001) (emphasis supplied). With the added "impact" instruction a jury could easily find that a defendant's negligence may have *some* "effect" or "impression," such as making the harm "*more* likely," say 60% probable, while *without* that added instruction the same jury may well instead *only* have determined that it was "more likely than not," say 51%, that the harm would have occurred without that defendant's negligence. Thus, the instruction's ambiguity creates the risk that a jury might find for the plaintiff where it *should* find for the defendant.[20]

(emphasis in original).On the 10th, he did not recall if he reviewed the triage note, but on the 21st flatly admitted he did not review it, thereby "skip[ping] a very important step" that was contrary to his "custom and practice." On the 10th he said the reason for his not ordering the ultrasound was his examination findings, again where his lawyer represented he *did not rely* upon histories taken by others, yet on the 21st he reversed field, stating that part of the reason why he did not order the ultrasound was that he did not receive a verbal report about Luppold's history of foot complaints- - i.e. he *did rely* upon histories taken by others. See pp. 4-7, supra. His testimony was anything but "consistent."

[20] Employing the conjunctive "and," the model instruction also suggests that finding for the defendant on causation requires not only that the plaintiff's "harm would have happened anyway" without the defendant's negligence, but *also* that the negligence "had no impact" on that harm, thereby erroneously conveying that they are, of necessity, *two separate things*. Doull v. Foster, 487 Mass. 1 (2021) repeatedly emphasizes that the *only* question is whether the same harm would have occurred in the absence of the defendant's negligence. See id. at 12-13 ("The focus… remains *only* on whether, in the absence of a defendant's conduct, the harm still would have

III. THE UNDISPUTED EVIDENCE REGARDING THE LIMITATIONS UPON THE SCOPE OF PRACTICE THAT NURSES CANNOT ISSUE MEDICAL DIAGNOSES AND ORDERS REQUIRED JNOV ON BOTH LIABILITY THEORIES.

Luppold theorized that Hanlon should have (1) discerned that the diagnoses of the superiorly credentialed PA and NP were wrong, (2) assumed that they had each ignored, or failed to understand, the "inconsistency" of the patient complaint information available to them on the ERS with their diagnoses, (3) further concluded that they both failed to identify, properly address, and reconcile those patient complaints while they each personally took a history from and assessed Luppold, and (4) then confronted them on these shortcomings. This theory is grounded upon the anomaly that nurses should supervise medical undertakings that they have no authority or licensure to engage in, and at that *supervise those who do have such authority and licensure*. Accordingly, it should have been rejected.[21]

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occurred.") (emphasis supplied); id. at 8 ("the question is whether the defendant's conduct was necessary to bringing about the harm."); see also id. at 13, 14, 17.

[21] Not surprisingly, the result compelled by the undisputed evidence that nurses cannot issue medical diagnoses or orders also accords with Massachusetts statute and regulation, which impose the same limitations on RN scope of practice. See 244 CMR 4.05(3)(a)3b (graduate course requirements for NPs as opposed to RNs); id. at 4.05(3)(a)7 (training for prescriptive practice by NPs); 263 CMR 3.02(1)(d) and (e); 263 CMR 5.03-04; 263 CMR 5.06. RNs "shall *only perform acts within the scope of nursing practice* as defined in M.G.L. c. 112, § 80B, and 244 CMR 3.00." 244 CMR. 9.03(10) (emphasis supplied); see also 244 CMR 9.03 (12). Further, a nurse "shall act *within* his or her … education and experience to … assess health status of individuals …, and *record* the related health data," 244 CMR 3.02 (2)(a)(emphasis supplied), not supervise others who have more advanced training. For a nurse to take on supervisory responsibilities with respect to the "inconsistency" of higher-credentialed healthcare providers' diagnoses and content of medical records is

Hanlon's undisputed lesser scope of practice also mandated that her argument that proximate cause was lacking should have been allowed. When Loucraft and Flores took over, Luppold's care necessarily shifted to those providers *who could issue medical diagnoses and orders*, App.194-195; App.231-232; App.244-245, eliminating proximate cause because of superseding intervening causes in the form of their later negligence, extinguishing Hanlon's liability as to Luppold's alternative theory that she negligently assessed his circulation.[22]

6. **Statement of Reasons Why Direct Appellate Review is Appropriate**.

This appeal presents issues that meet the criteria for direct review by this Court under G.L. c. 211A, § 10(A), and Mass. R. App. 11(a) for the following reasons:

Issue 1. *Right to cross examination for bias relating to secret "high-low" agreements*.

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inherently to *engage in the practice of those more credentialed professionals*, which RNs are specifically prohibited from doing under Massachusetts law. See 244 CMR 9.03(2). Indeed, an RN can be disciplined for practicing beyond the scope of his/her license. G. L. c. 112, § 61, cl. 1; 244 CMR 4.05 (3)(e). One cannot be held responsible in tort to do that which the law prohibits her from doing.

[22] Solimene v. Grauel & Co., 399 Mass. 790, 795 n.8 (1987), quoting Restatement (Second) Torts § 452 (2) (1965). Kent v. Comm., 437 Mass. 312, 321 (2002). Smith's opinions as to scope of practice and causation do not change these results. Her opinions were grounded upon avoidance of the undisputed evidence as to scope of practice of RN's, not to mention assumptions contrary to Massachusetts law. Moreover, even if Smith had offered opinions adequate to justify either of her theories, a new trial would still be necessary. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 119 (2000), (if "we cannot ascertain on which theory the jury relied, the verdict … cannot stand") (citation omitted).

First, the issue is one of constitutional magnitude, specifically concerning the "sacred" right to a fair jury trial under article 15 of Part One of the Massachusetts Constitution.

Second, the issue is one of first impression for this Court. In Franklin v. Guralnick, 394 Mass. 753 (1985), the Court noted the issue here – whether a non-settling defendant would be "deprived … of the opportunity to offer evidence of [the] contents" of what was certainly a high-low (if not Mary Carter) agreement, but did not reach the issue because the non-settling defendant had not requested that the jury be informed about it. Id. at 755-775. In the present case, the non-settling defendant specifically sought to introduce evidence of the high-low agreement.

Third, the issue is one that currently arises frequently, and will likely arise yet more frequently in the future. One commentator estimated nearly two decades ago that high-low agreements were then considered in approximately 30% of cases tried and employed in approximately 10% of those cases. See McDonough, Molly, "'High-Lows' Ups and Downs," 91 A.B.A. J. 12 (2005). Such agreements have built-in incentives of risk limitation for parties in litigation, and therefore their consideration and use has likely increased significantly since that time. As those benefits are sought in more and more multi-defendant cases the potential prejudice to non-settling parties discussed in the legal argument section above, and how such

potential prejudice might be mitigated, are questions that all trial courts and litigants throughout the Commonwealth require guidance on from this Court.

Issue 2. *The conflict between the "model" causation instruction and this Court's holding in Doull regarding but-for causation*.

Review of this issue by the Court at this time is necessary because the issue pertains to the so-called "model" instruction that is frequently used by trial court judges with regard to the issue of causation in tort trials throughout the Commonwealth. The instruction as drafted contains vague and ambiguous language, presenting the potential for confusion and misleading of jurors for reasons similar to those that led the Court to abandon the "substantial contributing factor" test for causation-in-fact in favor of the "but-for" test set forth in the Restatement (Third) of Torts in most cases in Doull v. Foster, 487 Mass. 1 (2021). The problems inherent in the "model" instruction will continue to create such prejudice in virtually all tort actions tried in the Commonwealth until the use of the extraneous, vague and misleading language in it is specifically rejected by this Court.

Issue 3. *Interplay of limitation of "scope of practice" of nurses in Massachusetts with scope of legal duty and negligence in malpractice actions*.

The interplay of the concept of "scope of practice" of registered nurses as acknowledged under the undisputed evidence in this matter (and as defined and limited by Massachusetts statute and regulation) with the issue of legal duty and

negligence in the medical malpractice context is an issue of first impression. Resolution of it has important ramifications concerning a significant portion of the medical malpractice actions brought in the Commonwealth, where negligence of more highly credentialed and licensed healthcare providers with regard to medical diagnosis and orders concerning patients, neither of which functions registered nurses have authority or license to undertake, has caused harm. Without the Court's addressing this issue, nurses will continue to be subjected to liability for not taking actions they have no authority or licensure to engage in. The issue also has significant ramifications with respect to upholding the public policy objective underlying the Massachusetts statutory scheme concerning medical malpractice actions to combat increase in malpractice insurance premiums. See, e.g., Joslyn v. Chang, 445 Mass. 344, 349 (2005); Darviris v. Petros, 442 Mass. 274, 283-284 (2004).

Issue 4. *Interplay of Scope of Practice of RNs with proximate cause.*

The limitations imposed upon the scope of practice of nurses in Massachusetts logically govern the outer scope of proximate cause in negligence actions against them. Accordingly, in a failure-to-diagnose case such as this one, where care of a patient has been shifted to a healthcare provider with credentials and licensure superior to that of nurses, and the higher-licensed and credentialed provider has authority to issue medical diagnoses and orders while the nurse cannot, and is

negligent in that regard, the nurse is improperly subjected to liability unless it is recognized that it is the subsequent negligence of the provider with authority to issue medical diagnoses and orders that is the sole proximate cause of the patient's injury.

7. **Certified Copies of Docket Entries from the Superior Court Proceedings.**

A certified copy of the docket is attached as item 1 in the attached Appendix.

8. **Copies of Findings and Rulings Relevant to Issues on Appeal**.

The trial judge's decision on the post-trial motions begins at page 153 in the attached Appendix. The rulings on the issues raised in limine referred to above are found at 70 and 80 in the attached Appendix. Relevant colloquies and other rulings relevant to the issues set forth in the trial transcript citations above are collectively attached and identified in the Table of Contents of the portions of the trial transcripts collectively attached in the attached Appendix.

CONCLUSION

For the above reasons, defendant-appellant Hanlon requests that this Court grant her application for direct appellate review.

Respectfully Submitted
Defendant, Susan Hanlon, R.N.,
By her attorneys,

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Dated: February 13, 2024

RULE 11(B) CERTIFICATION

I, Victoria C. Goetz Berlyand, counsel for the Defendant/Appellee, certify that this application complies with the rules of court that pertain to the filing of applications for direct appellate review, including, but not limited to: Rule 11(b) (length of argument); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). Compliance with the applicable length limit of Rule 11b was ascertained by use of Microsoft Word, which indicates that the total number of pages of the Argument, appearing in 14-point Times New Roman font, is 10.

/s/ Victoria C. Goetz Berlyand
Victoria C. Goetz Berlyand

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2024, I served the attached document(s) through the Electronic Filing Service Provider (Provider) for electronic service insofar as the below counsel are registered users. Insofar as the below counsel are not registered users, I served the attached by conventional mail in accordance with the rules.

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- Malpractice - Other
- Status Date:
- 05/05/2016
- Case Judge:
- Next Event:

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  100 City Hall Plaza
  4th Floor
  Boston, MA 02108
- Phone Number
- (617)720-4447

More Party Information

Flores, N.P., Carlos

- Defendant

Alias

Party Attorney
- Attorney
- Bello, Esq., James A
- Bar Code
- 633550
- Address
- Morrison Mahoney LLP
  250 Summer St
  Boston, MA 02210
- Phone Number
- (617)439-7500
- Attorney
- Iverson, Esq., Kimberly Lauren
  Bar Cade
- 686062
- Address
- Morrison Mahoney LLP
  250 Summer St
  Boston, MA 02210
- Phone Number
- (617)737-8844

More Party Information

Loucraft, P.A., Charles
- Defendant

Alias

Party Attorney
- Attorney
- Bello, Esq., James A
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  250 Summer St
  Boston, MA 02210
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- Attorney
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More Party Information

Buse, R.N., Stefanie
- Defendant

Alias

Party Attorney
- Attorney
- Bowen, Esq., Susan Johnson
- Bar Code
- 561543
- Address
- Bruce and Kelley PC
  83 Cambridge St Suite 3B
  Burlington, MA 01803
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- (781)262-0690
- Attorney
- Kelley, Esq., J Peter
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- 559588
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  Burlington, MA 01803
- Phone Number
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More Party Information

Hanlon, R.N., Susan
- Defendant

Alias

Party Attorney

- Attorney
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More Party Information

Crocker, R.N., Carla
- Defendant

Alias

Party Attorney
- Attorney
- Bowen, Esq., Susan Johnson
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  Burlington, MA 01803
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  Burlington, MA 01803
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More Party Information

Merrimack Valley Emergency Associates, INC
- Defendant

Alias

Party Attorney
- Attorney
- Tingle, Esq., Brent A
- Bar Code
- 559974
- Address
- Morrison Mahoney LLP
  250 Summer St
  Boston, MA 02210
- Phone Number
- (617)439-7527

More Party Information

Judgments

Date	Type	Method	For	Against
03/30/2023	Judgment on Jury Verdict	After Jury Verdict	Luppold, Steven	Hanlon, R.N., Susan
03/28/2023	Judgment on Jury Verdict	After Jury Verdict	Luppold, Steven	Hanlon, R.N., Susan

Events

Date	Session	Location	Type	Event Judge	Result
12/01/2016 09:00	Civil A Rm 420		Malpractice Tribunal	Connolly, Hon.	Not Held

Date	Session	Location	Type	Event Judge	Result
AM				Rosemary	
12/01/2016 09:00 AM	Civil D Rm 620	Courtroom 620	Malpractice Tribunal	Kem, Leila R	Held as Scheduled
10/18/2018 02:00 PM	Civil L1 CR15	CTRM 16, 7th Floor-Lowell	Final Pre-Trial Conference		Held as Scheduled
10/18/2018 02:00 PM	Civil L1 CR15	CTRM 16, 7th Floor-Lowell	Trial Assignment Conference	Barrett, Hon. C. William	Not Held
12/17/2019 02:00 PM	Civil L1 CR15		Final Pre-Trial Conference		
nom ɛuonon no.nn PM	Civil LI CR15		Final Pre=Trial Conference		Rescheduled
03/23/2020 02:00 PM	Civil L1 CR15	CTRM 16, 7th Floor-Lowell	Pre-Trial Conference	Wall, Hon. Joshua	Rescheduled
03/24/2020 12:00 PM	Civil L1 CR15	CTRM 16, 7th Floor-Lowell	Pre-Trial Conference	Wall, Hon. Joshua	Rescheduled-Covid-19 emergency
06/03/2020 12:00 PM	Civil L1 CR15	CTRM 16, 7th Floor-Lowell	Trial Assignment Conference		Held via Video/Phone
06/10/2020 02:00 PM	Civil L1 CR15		Final Trial Conference		Rescheduled-Covid-19 emergency
06/15/2020 09:00 AM	Civil L1 CR15		Jury Trial		Rescheduled-Covid-19 emergency
02/11/2021 03:00 PM	Civil L1 CR15		Conference to Review Status	Barrett, Hon. C. William	Not Held
02/24/2021 02:00 PM	Civil L1 CR15		Final Trial Conference		Rescheduled
03/01/2021 09:00 AM	Civil L1 CR15		Jury Trial		Rescheduled
06/07/2022 02:00 PM	Civil L1 CR15		Final Pre-Trial Conference	Wall, Hon. Joshua	Held as Scheduled
10/12/2022 02:00 PM	Civil L1 CR15		Final Trial Conference	Campbell, Hon. Cathleen E.	Held as Scheduled
10/17/2022 09:00 AM	Civil L1 CR15		Jury Trial	Campbell, Hon. Cathleen E.	Rescheduled
10/18/2022 09:00 AM	Civil L1 CR15		Jury Trial	Campbell, Hon. Cathleen E.	Held as Scheduled
10/19/2022 09:00 AM	Civil L1 CR15		Jury Trial	Campbell, Hon. Cathleen E.	Held as Scheduled
10/20/2022 09:00 AM	Civil L1 CR15		Jury Trial	Campbell, Hon. Cathleen E.	Trial ends in a Mistrial
11/10/2022 02:30 PM	Civil L1 CR15		Trial Assignment Conference	Campbell, Hon. Cathleen E.	Rescheduled
11/15/2022 09:15 AM	Civil L1 CR15		Trial Assignment Conference	Campbell, Hon. Cathleen E.	Held via Video/Phone
02/21/2023 02:00 PM	Civil L1 CR15		Filing of Motions	Barrett, Hon. C. William	Canceled
03/01/2023 02:00 PM	Civil L1 CR15		Final Trial Conference	Barrett, Hon. C. William	Rescheduled
03/06/2023 02:00 PM	Civil L1 CR15		Final Trial Conference	Barrett, Hon. C. William	Held as Scheduled
03/06/2023 02:30 PM	Civil L1 CR15		Final Trial Conference	Barrett, Hon. C. William	Rescheduled
03/07/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/08/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/09/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled

Date	Session	Location	Type	Event Judge	Result
03/10/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/13/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/14/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Canceled
03/15/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/16/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/17/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/20/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/21/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/22/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/23/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
03/24/2023 09:00 AM	Civil L1 CR15		Jury Trial	Barrett, Hon. C. William	Held as Scheduled
10/27/2023 02:00 PM	Criminal 2 Rm 530		Motion Hearing	Barrett, Hon. C. William	Held - Under advisement

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	05/05/2016	08/03/2016	90	
Answer	05/05/2016	09/02/2016	120	
Rule 12/19/20 Served By	05/05/2016	09/02/2016	120	10/18/2018
Rule 12/19/20 Filed By	05/05/2016	10/03/2016	151	10/18/2018
Rule 12/19/20 Heard By	05/05/2016	11/01/2016	180	10/18/2018
Rule 15 Served By	05/05/2016	06/29/2017	420	10/18/2018
Rule 15 Filed By	05/05/2016	07/31/2017	452	10/18/2018
Rule 15 Heard By	05/05/2016	07/31/2017	452	10/18/2018
Discovery	05/05/2016	04/25/2018	720	03/24/2023
Rule 56 Served By	05/05/2016	05/25/2018	750	10/18/2018
Rule 56 Filed By	05/05/2016	06/25/2018	781	10/18/2018
Final Pre-Trial Conference	05/05/2016	10/22/2018	900	10/18/2018
Judgment	05/05/2016	05/06/2019	1096	03/24/2023
Under Advisement	10/27/2023	11/26/2023	30	11/27/2023

Docket Information

Docket Date	*Docket Text*	File Ref Nbr.	*Image Avail.*
05/05/2016	Original civil complaint filed.	1	0 Image
05/05/2016	Civil action cover sheet filed.	2	
05/05/2016	files Uniform Counsel Certification.	3	

Docket Date	Docket Text	File Ref N br.	Image Avail.
05/05/2016	Attorney appearance On this date Andrew C Meyer, Jr., Esq. added as Private Counsel for Plaintiff Steven Luppold		
05/05/2016	Case assigned to: DCM Track A - Average was added on 05/05/2016		
07/28/2016	Service Returned for Defendant Busa, R.N., Stefanie: Service through person in charge / agent; J. Peter Kelley 7/18/16	4	Image
07/28/2016	Service Returned for Defendant Hanlon, R.N., Susan:: Service through person in charge / agent; J. Peter Kelley 7/18/16	5	'mane
07/28/2016	Service Returned for Defendant Crocker, R.N., Carla: Service through person in charge / agent; J. Peter Kelley 7/18/16	6	Image
08/03/2016	Service Returned for Defendant Loucraft, P.A., Charles: Service accepted by counsel; on 7/26/16.	7	Image
08/03/2016	Service Returned for Defendant Flores, N.P., Carlos: Service accepted by counsel; on 7/26/16	8	Image
08/03/2016	Attorney appearance On this date BrentATingle, Esq. added for Defendant Charles Loucraft, P.A.		
08/03/2016	Attorney appearance On this date BrentATingle, Esq. added for Defendant Carlos Flores, N.P.		
08/04/2016	Attorney appearance On this date J Peter Kelley, Esq. added for Defendant Susan Hanlon, R.N.		
08/04/2016	Received from Defendant Loucraft, P.A., Charles: Answer with claim for trial by jury;	9	
08/04/2016	Received from Defendant Flores, N.P., Carlos: Answer with claim for trial by jury;	10	
08/04/2016	Attorney appearance On this date Kristen L. Clarke, Esq. added for Defendant Susan Hanlon, R.N.		
08/04/2016	Attorney appearance On this date J Peter Kelley, Esq. added for Defendant Carla Crocker, R.N.		
08/04/2016	Attorney appearance On this date Kristen L. Clarke, Esq. added for Defendant Carla Crocker, R.N.		
08/04/2016	Attorney appearance On this date J Peter Kelley, Esq. added for Defendant Stefanie Busa, R.N.		
08/04/2016	Attorney appearance On this date Kristen L. Clarke, Esq. added for Defendant Stefanie Busa, R.N.		
08/04/2016	Attorney appearance On this date Batool Raza, Esq. added for Defendant Charles Loucraft, P.A.		
08/04/2016	Attorney appearance On this date Batool Raza, Esq. added for Defendant Carlos Flores, N.P.		
08/04/2016	Request for medical malpractice tribunal filed by party for: Otheremergency Applies To: Loucraft, P.A., Charles (Defendant)	11	
08/04/2016	Request for medical malpractice tribunal filed by party for: OtherEmergency Medicine Applies To: Flores, N.P., Carlos (Defendant)	12	
08/05/2016	Received from Defendant Hanlon, R.N., Susan: Answer with claim for trial by jury;	13	
08/05/2016	Received from Defendant Crocker, R.N., Carla: Answer with claim for trial by jury;	14	
08/05/2016	Received from Defendant Busa, R.N., Stefanie: Answer with claim for trial by jury;	15	
08/05/2016	Request for medical malpractice tribunal filed by party for: Nursing Applies To: Busa, R.N., Stefanie (Defendant)	16	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
08/05/2016	Request for medical malpractice tribunal filed by party for: Nursing Applies To: Crocker, R.N., Carla (Defendant)	17	
08/05/2016	Request for medical malpractice tribunal filed by party for: Nursing Applies To: Hanlon, R.N., Susan (Defendant)	18	
08/22/2016	Attorney appearance On this date Kristen L. Clarke, Esq. dismissed/withdrawn for Defendant Susan Hanlon, R.N.		
08/22/2016	Attorney appearance On this date Kristen L. Clarke, Esq. dismissed/withdrawn for Defendant Carla Crocker, R.N.		
08/22/2016	Attorney appearance On this date Kristen L. Clarke, Esq. dismissed/withdrawn for Defendant Stefanie Busa, R.N.		
10/26/2016	ORDER for medical malpractice tribunal for Nursing, with Hon. Rosemary Connolly presiding, Judith Barrett, R.N., M.S. 64 Addington Road West Roxbury, MA 02132 and Brian E. Blackwood, Esq. Applies To: Clarke, Esq., Kristen L. (Attorney) on behalf of Busa, R.N., Stefanie, Crocker, R.N., Carla, Hanlon, R.N., Susan (Defendant); Meyer, Jr., Esq., Andrew C (Attorney) on behalf of Luppold, Steven (Plaintiff); Kelley, Esq., J Peter (Attomey) on behalf of Busa, R.N., Stefanie, Crocker, R.N., Carla, Hanlon, R.N., Susan (Defendant); Tingle, Esq., Brent A (Attorney) on behalf of Flores, N.P., Carlos, Loucraft, P.A., Charles (Defendant); Raza, Esq., Batool (Attorney) on behalf of Flores, N.P., Carlos, Loucraft, P.A., Charles (Defendant)		
11/23/2016	Plaintiffs Offer of Proof filed by Atty. Robert M. Higgins Applies To: Clarke, Esq., Kristen L. (Attorney) on behalf of Busa, R.N., Stefanie, Crocker, R.N., Carla, Hanlon, R.N., Susan (Defendant); Meyer, Jr., Esq., Andrew C (Attorney) on behalf of Luppold, Steven (Plaintiff); Kelley, Esq., J Peter (Attorney) on behalf of Busa, R.N., Stefanie, Crocker, R.N., Carla, Hanlon, R.N., Susan (Defendant); Tingle, Esq., Brent A (Attorney) on behalf of Flores, N.P., Carlos, Loucraft, P.A., Charles (Defendant); Raza, Esq., Batool (Attorney) on behalf of Flores, N.P., Carlos, Loucraft, P.A., Charles (Defendant)	19	
11/30/2016	Event Result: The following event: Malpractice Tribunal scheduled for 12/01/2016 09:00 AM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
12/01/2016	Event Result: The following event: Malpractice Tribunal scheduled for 12/01/2016 09:00 AM has been resulted as follows: Result: Held as Scheduled		
12/07/2016	The medical malpractice tribunal made up of Leila R Kern, Judith Barrett, R.N., M.S. and Brian E. Blackwood, Esq., having met on 12/01/2016 09:00 AM Malpractice Tribunal reports that there is sufficient evidence to raise a legitimate question as to liability appropriate for judicial inquiry. Tribunal findings are as to Defendants Stefanie Busa, R.N., Carla Crocker, R.N., Susan Hanlon, R.N., Charles Loucraft, P.A. and Carlos Flores, N.P. Applies To: Clarke, Esq., Kristen L. (Attorney) on behalf of Busa, R.N., Stefanie, Crocker, R.N., Carla, Hanlon, R.N., Susan (Defendant); Meyer, Jr., Esq., Andrew C (Attorney) on behalf of Luppold, Steven (Plaintiff); Kelley, Esq., J Peter (Attorney) on behalf of Busa, R.N., Stefanie, Crocker, R.N., Carla, Hanlon, R.N., Susan (Defendant); Tingle, Esq., Brent A (Attorney) on behalf of Flores, N.P., Carlos, Loucraft, P.A., Charles (Defendant); Raza, Esq., Batool (Attorney) on behalf of Flores, N.P., Carlos, Loucraft, P.A., Charles (Defendant)	20	
12/07/2016	The following form was generated to the Division of Professional Licensure: Notice of Tribunal Finding Sent On: 12/07/2016 13:59:30		
09/26/2017	Application of Defendants Steven Luppold for hospital records from Lahey Hospital & Medical Center, with affidavit of notice in compliance with SC rule 13. Applies To: Luppold, Steven (Plaintiff)	21	
09/26/2017	Affidavit of compliance with Superior Court Rule 9A Applies To: Luppold, Steven (Plaintiff)	21.1	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/28/2017	ORDER issued on application/motion (#21.0) to allow Brent A Tingle, Esq. to inspect hospital records regarding Steven Luppold from Lahey Hospital & Medical Center. Applies To: Luppold, Steven (Plaintiff)	21.2	
11/24/2017	Pleading titled, Application for hospital records re: Steven Luppold The Application and Order both refer to a defendant Nathan MacDonald, M.D. and Dr. MacDonald is NOT a defendant in this matter please review and resubmit, filed with the court on 11/16/2017, returned to		
12/04/2017	Application of Defendant Carlos Flores, N.P., Charles Loucraft, P.A. for hospital records from Lowell General Hospital, with affidavit of notice in compliance with SC rule 13. Applies To: Luppold, Steven (Plaintiff)	22	
12/04/2017	ORDER issued on application/motion (#22.0) to allow Brent A Tingle, Esq. to inspect hospital records regarding Steven Luppold from Lowell General Hospital. Judge: Tuttman, Hon. Kathe M	22.1	
02/08/2018	Application of Defendants Charles Loucraft, P.A. for hospital records from Massachusetts General Hospital, with affidavit of notice in compliance with SC rule 13. Applies To: Tingle, Esq., Brent A (Attorney) on behalf of Flores, N.P., Carlos (Defendant)	23	
02/08/2018	ORDER issued on application/motion (#23.0) to allow Brent A Tingle, Esq.Steven Luppold to inspect hospital records regarding Steven Luppold from Massachusetts General Hospital. Judge: Tuttman, Hon. Kathe M Applies To: Tingle, Esq., Brent A (Attorney) on behalf of Loucraft, P.A., Charles (Defendant); Raza, Esq., Batool (Attorney) on behalf of Loucraft, P.A., Charles (Defendant)	24	
02/08/2018	Affidavit of compliance with Superior Court Rule 9A Applies To: Luppold, Steven (Plaintiff)	23.1	
02/26/2018	Attorney appearance On this date Barrie E Duchesneau, Esq. added for Plaintiff Steven Luppold		
02/26/2018	Attorney appearance On this date Robert M Higgins, Esq. added for Plaintiff Steven Luppold		
02/26/2018	Plaintiff Steven Luppold's Motion to amend complaint to add Merrimack Valley Emergency Associates, Inc as a defendant	25	Image
02/26/2018	Affidavit of compliance with Superior Court Rule 9A Applies To: Higgins, Esq., Robert M (Attorney) on behalf of Luppold, Steven (Plaintiff)	25.1	Image
03/06/2018	Endorsement on Motion to add party party defendant, Merrimack Valley Emergency Associates, Inc. (#25.0): ALLOWED Without opposition, Allowed. The amended Complaint may be filed. Judge: Tuttman, Hon. Kathe M		
03/16/2018	Amended: amended complaint filed by Steven Luppold	26	
03/29/2018	Answer to amended complaint Applies To: Hanlon, R.N., Susan (Defendant)	27	p. 2 Image
03/29/2018	Received from Defendant Busa, R.N., Stefanie: Answer to amended complaint; and Jury demand	29	0 Image
03/29/2018	Answer to amended complaint Applies To: Crocker, R.N., Carla (Defendant)	28	Image
04/17/2018	Received from Defendant Flores, N.P., Carlos: Answer to amended complaint;	30	Image
04/17/2018	Received from Defendant Loucraft, P.A., Charles: Answer to amended complaint;	31	Image
04/17/2018	Received from Defendant Merrimack Valley Emergency Associates, INC: Answer to amended complaint;	32	Image
04/17/2018	Attorney appearance On this date Brent A Tingle, Esq. added for Defendant Merrimack Valley Emergency Associates, INC		
04/17/2018	Attorney appearance On this date Batool Raza, Esq. added for Defendant Merrimack Valley Emergency Associates, INC		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/11/2018	Service Returned for Defendant Merrimack Valley Emergency Associates, INC: Service accepted by counsel; on 4/24/18	33	Image
07/10/2018	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 07/10/2018 11:17:32		
10/04/2018	Plaintiff Steven Luppold's Joint Motion to Ciiiiiiert Pre-Trial COrifererice to Trial Assignment_ Conference	34	a Image
10/11/2018	Event Result:: Trial Assignment Conference scheduled on: 10/18/2018 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. C. William Barrett, Presiding Appeared: Staff: Brian F Burke, Assistant Clerk Magistrate Amanda Rowan, Assistant Clerk Magistrate		
10/11/2018	Endorsement on Motion to Convert Pre-Trial Conference to Trial Assignment Conference (#34.0): ALLOWED Judge: Barrett, Hon. C. William		
10/18/2018	Event Result:: Final Pre-Trial Conference scheduled on: 10/18/2018 02:00 PM Has been: Held as Scheduled Hon. C. William Barrett, Presiding Appeared: Duchesneau, Esq., Barrie E for Plaintiff Batool Raza, Peter Kelley for Defendants Staff: Brian F Burke, Assistant Clerk Magistrate Amanda Rowan, Assistant Clerk Magistrate, FTR Monitor Judge: Barrett, Hon. C. William Judge: Barrett, Hon. C. William		
12/06/2019	Plaintiff, Defendant Steven Luppold, Carlos Flores, N.P.'s Joint Motion to continue Joint motion to cont. P.T. C.	35	Image
12/10/2019	Endorsement on Motion to continue (#35.0): ALLOWED Judge: Barrett, Hon. C. William		a Image
12/16/2019	Attorney appearance On this date Batool Raza, Esq. dismissed/withdrawn for Defendant Carlos Flores, N.P.		0 Image
12/16/2019	Attorney appearance On this date Batool Raza, Esq. dismissed/withdrawn for Defendant Charles Loucraft, P.A.		0 Image
12/16/2019	Attorney appearance On this date Batool Raza, Esq. dismissed/withdrawn for Defendant Merrimack Valley Emergency Associates, INC		Image
12/17/2019	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 12/17/2019 13:40:46		
02/07/2020	Application of Defendant Carlos Flores, N.P., Charles Loucraft, P.A., Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N. for hospital records from Massachusetts General Hospital, with affidavit of notice in compliance with SC rule 13. Judge: Wall, Hon. Joshua Applies To: Luppold, Steven (Plaintiff)	36	0 Image
02/13/2020	ORDER issued on application/motion (#36.0) to allow J Peter Kelley, Esq.to inspect hospital records regarding Steven Luppold, from Massachusetts General Hospital . Judge: Wall, Hon. Joshua Applies To: Luppold, Steven (Plaintiff)	37	Image
02/14/2020	Event Result:: Final Pre-Trial Conference scheduled on: 02/19/2020 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Joshua Wall, Presiding		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Staff: Brian F Burke, Assistant Clerk Magistrate Amanda Rowan, Assistant Clerk Magistrate		
02/14/2020	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 02/14/2020 09:59:21		
02/14/2020	Defendant Carlos Flores, N.P.'s Joint Motion to Joint Motion Of Defendants To Continue P.T.C. 6..Without Opposition.	38	
02/14/2020	Endorsement on Motion to (#38.0): ALLOWED Judge: Wall, Hon. Joshua		Image 0 Image
03/10/2020	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 03/10/2020 15:10:46		
03/10/2020	Event Result:: Pre-Trial Conference scheduled on: 03/23/2020 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Joshua Wall, Presiding Staff: Brian F Burke, Assistant Clerk Magistrate Amanda Rowan, Assistant Clerk Magistrate		
03/24/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Pre-Trial Conference scheduled on: 03/24/2020 12:00 PM Has been: Rescheduled-Covid-19 emergency Hon. Joshua Wall, Presiding Staff: Brian F Burke, Assistant Clerk Magistrate Amanda Rowan, Assistant Clerk Magistrate		
03/30/2020	Steven Luppold's Memorandum Joint Pre-Trial Memorandum	39	Image
03/31/2020	Steven Luppold, Carlos Flores, N.P., Charles Loucraft, P.A., Stefanie Busa, **R.N.,** Susan Hanlon, R.N., Carla Crocker, R.N., Merrimack Valley Emergency Associates, INC's Memorandum Joint Pre-Trial Memorandum	40	Image
05/07/2020	Application for Conference Applies To: Luppold, Steven (Plaintiff)	41	Image
05/07/2020	Certificate of service of attorney Applies To: Duchesneau, Esq., Barrie E (Attorney) on behalf of Luppold, Steven (Plaintiff)	41.1	Image
05/28/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Jury Trial scheduled on: 06/15/2020 09:00 AM Has been: Rescheduled-Covid-19 emergency Hon. Kathe M Tuttman, Presiding Staff: Brian F Burke, Assistant Clerk Magistrate Amanda Rowan, Assistant Clerk Magistrate		
05/29/2020	Court orders rescheduling due to State of Emergency surrounding the Covid-19 virus.: Final Trial Conference scheduled on: 06/10/2020 02:00 PM Has been: Rescheduled-Covid-19 emergency Hon. Kathe M Tuttman, Presiding Staff: Brian F Burke, Assistant Clerk Magistrate Amanda Rowan, Assistant Clerk Magistrate		
06/03/2020	The following form was generated: Notice to Appear for Trial Sent On: 06/03/2020 15:12:59		
06/03/2020	Event Result:: Trial Assignment Conference scheduled on: 06/03/2020 12:00 PM Has been: Held via Video Conference ON ZOOM IN COURTROOM L1 ON FTR		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Hon. Kathe M Tuttman, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant Brent A Tingle, Esq., Defendant J Peter Kelley, Esq., Staff: Brian F Burke, Assistant Clerk Magistrate Arnanda Rowan, Assistant Clerk Magistrate		
06/17/2020	Application of Defendant Carlos Flores, N.P., Charles Loucraft, P.A. for hospital records from Massachusetts General Hospital, with affidavit of notice in compliance with SC rule 13. Applies To: Luppold, Steven (Plaintiff)	42	0 Image
06/17/2020	ORDER issued on application/motion (#42.0) to allow Brent A Tingle, Esq.Carlos Flores, N.P., Charles Loucraft, **P.A.** to inspect hospital records regarding Steven Luppold, from Massachusetts General Hospital Judge: Tuttman, Hon. Kathe M Applies To: Luppold, Steven (Plaintiff)	43	Image
02/11/2021	Event Result:: Jury Trial scheduled on: 03/01/2021 09:00 AM Has been: Rescheduled For the following reason: Lack of Jurors Hon. C. William Barrett, Presiding Staff: Arnanda Rowan, Assistant Clerk Magistrate		
02/11/2021	Event Result:: Final Trial Conference scheduled on: 02/24/2021 02:00 PM Has been: Rescheduled For the following reason: Lack of Jurors Hon. C. William Barrett, Presiding Staff: Amanda Rowan, Assistant Clerk Magistrate		
02/11/2021	Event Result:: Conference to Review Status scheduled on: 02/11/2021 03:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. C. William Barrett, Presiding Staff: Amanda Rowan, Assistant Clerk Magistrate		
02/11/2021	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 02/11/2021 15:27:40 Notice Sent To. Andrew C Meyer, Jr., Esq. Lubin & Meyer 100 City Hall Plaza 4th Floor, Boston, MA 02108 Notice Sent To: Barrie E Duchesneau, Esq. Lubin & Meyer 100 City Hall Plaza 4th Floor, Boston, MA 02108 Notice Sent To: Robert M Higgins, Esq. Lubin & Meyer, P.C. 100 City Hall Plaza, Boston, MA 02108 Notice Sent To: Brent A Tingle, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: J Peter Kelley, Esq. Bruce & Kelley, PC 20 Burlington Mall Rd Suite 225, Burlington, MA 01803		
02/12/2021	Scheduled: Event: Jury Trial Date: 10/17/2022 Time: 09:00 AM Result: Rescheduled		
02/12/2021	The following form was generated: Notice to Appear for Trial Sent On: 02/12/2021 13:34:21 Notice Sent To: Andrew C Meyer, Jr., Esq. Lubin & Meyer 100 City Hall Plaza 4th Floor, Boston, MA 02108 Notice Sent To: Barrie E Duchesneau, Esq. Lubin & Meyer 100 City Hall Plaza 4th Floor, Boston, MA 02108 Notice Sent To: Robert M Higgins, Esq. Lubin & Meyer, P.C. 100 City Hall Plaza, Boston, MA 02108 Notice Sent To: Brent A Tingle, Esq. Morrison Mahoney LLP 250 Summer St, Boston, MA 02210 Notice Sent To: J Peter Kelley, Esq. Bruce & Kelley, PC 20 Burlington Mall Rd Suite 225, Burlington, MA 01803		
10/14/2021	Attorney appearance On this date Kimberly Lauren Iverson, Esq. added as Private Counsel for Defendant Carlos Flores, N.P.		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/14/2021	Attorney appearance On this date Kimberly Lauren Iverson, Esq. added as Private Counsel for Defendant Charles Loucraft, P.A.		
10/14/2021	Attorney appearance electronically filed.		
04/07/2022	Attorney appearance electronically filed.		
04/07/2022	Attorney appearance On this date Barrie E Duchesneau, Esq. dismissed/withdrawn for Plaintiff Steven Luppold		Image
06/07/2022	Event Result:: Final Pre-Trial Conference scheduled on: 06/07/2022 02:00 PM Has been: Held as Scheduled Hon. Joshua Wall, Presiding Appeared: Plaintiff Andrew **H.** Miller, Esq. (in-person) Defendant Kimberly Lauren Iverson, Esq., Private Counsel (via videoconference) Susan J. Bowen, Esq. (via videoconference) Staff: Joshua Pakstis, Assistant Clerk Magistrate FTR Monitor		
09/01/2022	Attorney appearance electronically filed.		
09/01/2022	Attorney appearance electronically filed.		PP IF!!
09/06/2022	Attorney appearance On this date Susan Johnson Bowen, Esq. added for Defendant Stefanie Busa, R.N.		Image
09/06/2022	Attorney appearance On this date Susan Johnson Bowen, Esq. added for Defendant Susan Hanlon, R.N.		
09/06/2022	Attorney appearance On this date Susan Johnson Bowen, Esq. added for Defendant Carla Crocker, R.N.		
09/06/2022	Application of Defendants Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N. for hospital records from Massachusetts General Hospital, with affidavit of notice in compliance with SC rule 13. Applies To: Luppold, Steven (Plaintiff)	44	Image
09/12/2022	ORDER issued on application/motion (#44.0) to allow Susan Johnson Bowen, Esq.Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N. to inspect hospital records regarding Steven Luppold, from Massachusetts General Hospital .	45	0 Image
09/14/2022	Attorney appearance electronically filed.		
09/14/2022	Attorney appearance On this date Andrew H Miller, Esq. added for Plaintiff Steven Luppold		Image
09/19/2022	Defendants Charles Loucraft, P.A., Carlos Flores, N.P., Merrimack Valley Emergency Associates, INC's Joint Supplement to the Joint Pre-Trial Memorandum	46	0 Image
10/04/2022	Defendant Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N.'s Motion in limine to bar cumulative expert testimony	47	0 Image
10/04/2022	Defendant Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N.'s Motion in limine to preclude claims alleging lack of informed consent	48	Image
10/04/2022	Defendant Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N.'s Motion in limine to preclude hearsay statements and undisclosed "expert" opinions	49	0 Image
10/04/2022	Defendant Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N.'s Motion in limine with objection to jury of six	50	Image
10/04/2022	Defendant Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N.'s Motion to preclude "reptile" tactics	51	0 Image
10/04/2022	Defendant Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N.'s Motion in limine regarding various matters	52	0 Image
10/04/2022	Defendant Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N.'s Submission of trial brief Re: proximate cause	53	0 Image

Docket Date	Docket Text	File Ref N br.	Image Avail.
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine Regarding Insurance	54	
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine to Preclude Any Claim by the Plaintiff for Breach of Warranty	55	Image
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine to Preclude any Empanelment of Less than 12 Jurors	56	Image
10/04/2022	Opposition to Motion In Limine of Defendants' to Preclude any Empanelment of Less than 12 Jurors filed by Steven Luppold	56.1	Image
10 PO 472 0 2 2	ESFi0fliUd: Triai Trial Brief of the Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., regarding but-for causation Applies To: Flores, N.P., Carlos (Defendant); Loucraft, P.A., Charles (Defendant)	57	Image
10/04/2022	Opposition to Defendants' Trial Brief Regarding but-for causation filed by Steven Luppold	57.1	
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine to preclude Attempts to Appeal to Jury's Sense of Public Duty	58	Image
10/04/2022	Opposition to Defendants' Motions in Limine to Preclude Attempts to Appeal to Jury's Sense of Public Duty filed by Steven Luppold	58.1	0 Image
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion for a Precharge	59	0
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine to Order Plaintiff to Disclose "Amount of Damages Suggested" Prior to Closing Argument	60	Image
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine to preclude Testimony Beyond the Scope of the Plaintiffs Expert Disclosures, Including as to Causation and Injury	61	Image
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine to preclude any claim or testimony pertaining to lack of informed consent	62	Image
10/04/2022	Opposition to Defendants' Motion In Limine to Preclude Any Claim or Testimony Pertaining to Lack of Informed Consent filed by Steven Luppold	62.1	Image
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine to Require Plaintiff to Disclose the Names of Witnesses Forty-Eight (48) Hours Prior to their Anticipated Testimony	63	0 Image
10/04/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine to preclude Evidence of Other Lawsuits and Board Complaints	64	Image
10/04/2022	Affidavit of compliance with Superior Court Rule 9A Applies To: Iverson, Esq., Kimberly Lauren (Attorney) on behalf of Flores, N.P., Carlos, Loucraft, P.A., Charles (Defendant)	65	Image
10/05/2022	Pleading titled, Motion In Limine of the Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Preclude Hearsay, filed with the court on 10/04/2022, returned to James A Bello, Esq. Pleading was not signed.		0 Image
10/05/2022	Pleading titled, Motion of Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., for Attorney Conducted Individual Voir Dire and Suggested Voir Dire of the Defendants, filed with the court on 10/04/2022, returned to James A Bello, Esq. Pleading was not signed.		0 Image
10/06/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion in limine to preclude Hearsay	66	
10/06/2022	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion for Attorney Conducted Individual Voir Dire and Suggested Voir Dire of the Defendants	67	Image
10/11/2022	Plaintiff Steven Luppold's Submission of Proposed Voir Dire	68	0 Image
10/11/2022	Plaintiff Steven Luppold's Submission of Witness List	69	0 Image
10/11/2022	Opposition to Defendants' Motion in Limine to Bar "Cumulative" Expert Testimony filed by Steven Luppold	70	0 Image
10/12/2022	Attorney appearance On this date Adam Satin, Esq. added as Private Counsel for Plaintiff Steven Luppold		
10/12/2022	Event Result:: Final Trial Conference scheduled on: 10/12/2022 02:00 PM Has been: Held as Scheduled Hon. Cathleen E. Campbell, Presiding Appeared: Plaintiff		

Docket Date	Docket Text	File Ref N br.	Image Avail.
	Adam Satin, Esq., Private Counsel Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate Robin Petrucci, Assistant Clerk Magistrate Court Reporter: FTR		
	Dafandants Carlos Floras, N.P., Charlas Loucraft, P.A. 's Submission of Witness List		C_s) Image
10/12/2022	Endorsement on Motion in limine of Defendants Stefanie Busa R.N., Susan Hanlon R.N. and Carla Crocker **R.N.** to Bar Cumulative Expert Testimony (#47.0): No Action Taken		Image
10/12/2022	Endorsement on Motion in limine of the Defendants Stephanie Busa R.N., Susan Hanlon R.N., and Carla Crockers **R.N.** to Preclude Claims Alleging Lack of Informed Consent (#48.0): No Action Taken Moot		0 Image
10/12/2022	Endorsement on Motion in limine to Preclude Hearsay Statements and Undisclosed "Expert" Opinions (#49.0): No Action Taken		0 Image
10/12/2022	Endorsement on Motion in limine of the Defendant Stefanie Busa **R.N.,** Susan Hanlon R.N. and Carla Crocker R.N. with Objection to Jury of Six (#50.0): DENIED Judge: Campbell, Hon. Cathleen E.		0 Image
10/12/2022	Endorsement on Motion to Preclude "Reptile" Tactics (#51.0): No Action Taken Judge: Campbell, Hon. Cathleen E.		0 Image
10/12/2022	Endorsement on Submission of Trial Bried of the Defendants Stephanie Busa R.N., Susan Hanlon R.N. and Carla Crocker R.N. RE: Proximate Cause (#53.0): Other action taken Standard Trial Court instructions as to medical malpractice and causation. Any objection noted. Judge: Campbell, Hon. Cathleen E.		Image
10/12/2022	Endorsement on Motion in Limine Regarding Insurance (#54.0): Other action taken No references will be made to insurance. Judge: Campbell, Hon. Cathleen E.		Image
10/12/2022	Endorsement on Motion in limine of the Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Preclude and Claim by the Plaintiff for Breach of Warranty (#55.0): ALLOWED		0 Image
10/12/2022	Endorsement on Motion of Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Preclude and Empanelement of Less than 12 Jurors (#56.0): DENIED Judge: Campbell, Hon. Cathleen E		Image
10/12/2022	Endorsement on Submission of Opposition to Motion in Limine of Defendants to Preclude any Empanelement of Less than 12 Jurors (#56.1): ALLOWED Judge: Campbell, Hon. Cathleen E.		Image
10/12/2022	Endorsement on Submission of Trial Brief of the Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., Regarding But-For Causation (#57.0): Other action taken Court will use approved Sup. Ct. instruction on medical malpractice and causation. Objection noted for the record.		Image
10/12/2022	Endorsement on Motion in limine of Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Preclude Attemps to Appeal to Jury's Sense of Public Duty (#58.0): Other action taken Plaintiff agrees not to refer to general safety or community safety concerns. Judge: Campbell, Hon. Cathleen E.		0 Image
10/12/2022	Endorsement on Submission of Plaintiff's Opposition to Defendant's Motion in Limine to Preclude Attempts to Appeal to Jury's Sense of Public Duty. (#58.1): No Action Taken Judge: Campbell, Hon. Cathleen E.		0 Image
10/12/2022	Endorsement on Motion of Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., for Precharge (#59.0): Other action taken Parties informed standard Superior Court precharge will be used. Judge: Campbell, Hon. Cathleen E.		0 Image
10/12/2022	Endorsement on Motion in limine of The Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Order Plaintiff to Disclose "Amount of Damages Suggested" Prior to Closing Arguement. (#60.0): Other		0 mage

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	action taken Plaintiff indicates dollar value will not be referenced in closing. Judge: Campbell, Hon. Cathleen E.		
10/12/2022	Endorsement on Motion in limine of the Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Preclude Testimony Beyond the Scope of the Plaintiffs Expert Disclosures, Including as to Causation and Injury. (#61.0): Other action taken Will be brought to the attention of the Court at trial if necessary. Judge: Campbell, Hon. Cathleen E.		0 Image
10/12/2022	Endorsement on Motion in limine of Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Preclude Any Claim or Testimony Pertaining to Lack of Informed Consent (#62.0): Other action taken Moot.		0 Image
10/12/2022	Endorsement on Submission of Plaintiffs' Opposition to Defendants' Motion in Limine to Preclude Any Claim or Testimony Pertaining to Lack of Informed Consent (#62.1): Other action taken Moot		0 Image
10/12/2022	Endorsement on Motion in limine of the Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Require Plaintiffs to Disclose the Names of Witnesses Forty-Eight (48) Hours Prior to Their Anticipated Testimony (#63.0): ALLOWED Judge: Campbell, Hon. Cathleen E.		0 Image
10/13/2022	Endorsement on Motion of Defendants, Carlos Flores, N.P., and Charles Loucraft, P.A., for Attorney Conducted Individual Voir Dire and Suggested Voir Dire of the Defendants (#67.0): ALLOWED Yes- individual voir dire at side bar. Date of Decision: 10/13/2022		Image
10/13/2022	Endorsement on Motion in limine of the Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Preclude Evidence of Other Lawsuits and Board Complaints (#64.0): ALLOWED Date of Decision: 10/12/2022		0 Image
10/13/2022	Endorsement on Submission of Proposed Voir Dire (#68.0): Other action taken (See scanned image for Court's endorsement)		0 Image
10/13/2022	Endorsement on Motion in limine of the Defendants, Carlos Flores, N.P. and Charles Loucraft, P.A., to Preclude Hearsay (#66.0): Other action taken Parties agree to bring to the Court's attention during trial if an issue. Date of Decison: 10/12/2022 Judge: Campbell, Hon. Cathleen E.		
10/13/2022	Endorsement on Response in Opposition to Defendant's Motion in Limine to Bar "Cumulative" Expert Testimony (#70.0): No Action Taken No action not anticipated Date of Decision: 10/12/2022		0 Image
10/14/2022	Endorsement on Motion in limine of the Defendants Stephanie Busa R.N., Susan Hanlon, R.N. and Carla Crocker R.N. Regarding Various Matters (#52.0): Other action taken All rights of parties reserved. Neither side anticipates this being an issue. Will be address as necessary at the trial. Date of Decision: 10/12/2022		0 Image
10/14/2022	Event Result:: Jury Trial scheduled on: 10/17/2022 09:00 AM Has been: Rescheduled For the following reason: By Court prior to date Comments: Empanelment moved 1 day to accommodate jury selection in criminal case. Hon. Cathleen **E.** Campbell, Presiding Staff: Amanda Rowan, Assistant Clerk Magistrate		
10/14/2022	Scheduled: Judge: Campbell, Hon. Cathleen E. Event: Jury Trial Date: 10/18/2022 Time: 09:00 AM Result: Held as Scheduled		
10/14/2022	Medical Records received from Lowell General Hospital		
10/18/2022	Event Result:: Jury Trial scheduled on: 10/18/2022 09:00 AM Has been: Held as Scheduled - Day 1 Hon. Cathleen E. Campbell, Presiding Appeared:		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Plaintiff Robert M Higgins, Esq., Adam Satin, Esq., Private Counsel Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Robin Petrucci, Assistant Clerk Magistrate Amanda Rowan, Assistant Clerk Magistrate Court Reporter - Aiiyson Poilier. Court has determined that Ms. Poiiier wiii be the keeper of the official record. Any / all transcript requests should be made through Ms. Pollier.		
10/18/2022	Scheduled: Judge: Campbell, Hon. Cathleen E. Event: Jury Trial Date: 10/19/2022 Time: 09:00 AM Result: Held as Scheduled		
10/19/2022	Event Result:: Jury Trial scheduled on: 10/19/2022 09:00 AM Has been: Held as Scheduled - Day 2 Hon. Cathleen E. Campbell, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Adam Satin, Esq., Private Counsel Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Robin Petrucci, Assistant Clerk Magistrate Arnanda Rowan, Assistant Clerk Magistrate Court Reporter - Allyson Pollier.		
10/19/2022	Scheduled: Judge: Campbell, Hon. Cathleen E. Event: Jury Trial Date: 10/20/2022 Time: 09:00 AM Result: Trial ends in a Mistrial		
10/20/2022	Event Result:: Jury Trial scheduled on: 10/20/2022 09:00 AM Has been: Trial ends in a Mistrial - Day 3 Hon. Cathleen E. Campbell, Presiding Appeared: Plaintiff Robert M. Higgins, Jr., Esq., Private Counsel Adam Satin, Esq., Private Counsel Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Robin Petrucci, Assistant Clerk Magistrate Amanda Rowan, Assistant Clerk Magistrate Court Reporter: Allyson Pollier COMMENTS: All parties agreed to a new date for Jury Trial		
10/20/2022	The following form was generated: Notice to Appear Sent On: 10/20/2022 10:08:57		
11/10/2022	Event Result:: Trial Assignment Conference scheduled on: 11/10/2022 02:30 PM Has been: Rescheduled For the following reason: Not reached by Court- Court on Trial Hon. Cathleen E. Campbell, Presiding Staff: Arnanda Rowan, Assistant Clerk Magistrate		
11/15/2022	Event Result:: Trial Assignment Conference scheduled on: 11/15/2022 09:15 AM Has been: Held via Video/Teleconference		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Hon. Cathleen E. Campbell, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate Robin Petrucci, Assistant Clerk Magistrate FTR		
11/15/2022	Scheduled: Event: Jury Trial Date: 03/07/2023 Time: 09:00 AM Result: Held as Scheduled		
01/20/2023	The following form was generated: Notice to Appear Sent On: 01/20/2023 12:27:55		
02/13/2023	Event Result:: Filing of Motions scheduled on: 02/21/2023 02:00 PM Has been: Canceled For the following reason: By Court prior to date- Trial Motions filed Hon. C. William Barrett, Presiding Staff: Amanda Rowan, Assistant Clerk Magistrate		
02/13/2023	Event Result:: Final Trial Conference scheduled on: 03/01/2023 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. C. William Barrett, Presiding Staff: Amanda Rowan, Assistant Clerk Magistrate		
03/03/2023	Event Result:: Final Trial Conference scheduled on: 03/06/2023 02:30 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. C. William Barrett, Presiding Staff: Amanda Rowan, Assistant Clerk Magistrate		
03/06/2023	Event Result:: Final Trial Conference scheduled on: 03/06/2023 02:00 PM Has been: Held as Scheduled Hon. C. William Barrett, Presiding Appeared. Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate, Ftr		
03/06/2023	Plaintiff Steven Luppold's Submission of Voir Dire Questions	72	0 Image
03/07/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/08/2023 Time: 09:00 AM Result: Held as Scheduled		
03/07/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/09/2023 Time: 09:00 AM Result: Held as Scheduled		
03/07/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/10/2023 Time: 09:00 AM Result: Held as Scheduled		

Docket Date	Docket Text	File Ref N br.	Image Avail.
03/07/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/13/2023 Time: 09:00 AM Result: Held as Scheduled		
03/07/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/14/2023 Time: 09:00 AM Result: Canceled		
03/07/2023	Impanelment of jurors on this date Judge: Barrett, Hon. C. William		
03/07/2023	Event Result:: Jury Trial scheduled on: 03/07/2023 09:00 AM Has been: Held as Scheduled Comments: Day 1 - Jury Selection Hon. C. William Barrett, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate / FTR Robin Petrucci, Assistant Clerk Magistrate Meredith Pollier - Court Reporter (857-334-9355)		
03/08/2023	Impanelment of jurors on this date Impanelment continues from 3/7/2023		
03/08/2023	Event Result:: Jury Trial scheduled on: 03/08/2023 09:00 AM Has been: Held as Scheduled Comments: Day 2 Hon. C. William Barrett, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate Robin Petrucci, Assistant Clerk Magistrate / FTR Meredith Pollier- Court Reporter		
03/09/2023	Event Result:: Jury Trial scheduled on: 03/09/2023 09:00 AM Has been: Held as Scheduled Comments: Day 3 Hon. C. William Barrett, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate Robin Petrucci, Assistant Clerk Magistrate / FTR Meredith Pollier- Court Reporter		
03/10/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial		

Docket Date	Docket Text	File Ref N br.	Image Avail.
	Date: 03/15/2023 Time: 09:00 AM Result: Held as Scheduled		
03/10/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/16/2023 Time: 09:00 AM Result: Held as Scheduled		
03/10/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/17/2023 Time: 09:00 AM Result: Held as Scheduled		
03/10/2023	Event Result:: Jury Trial scheduled on: 03/10/2023 09:00 AM Has been: Held as Scheduled - Day 4 Hon. C. William Barrett, Presiding Appeared: Plaintiff Steven Luppold Robert M Higgins, Esq., Defendant Carlos Flores, N.P. James A Bello, Esq., Defendant Charles Loucraft, P.A. James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate, FTR Monitor Meredith Pollier- Official Transcriber for this trial		
03/13/2023	Event Result:: Jury Trial scheduled on: 03/13/2023 09:00 AM Has been: Held as Scheduled - Day 5 Hon. C. William Barrett, Presiding Appeared: Plaintiff Steven Luppold Robert M Higgins, Esq., Defendant Carlos Flores, N.P. James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate Meredith Pollier, court reporter		
03/13/2023	Event Result:: Jury Trial scheduled on: 03/14/2023 09:00 **AM** Has been: Canceled For the following reason: By Court prior to date- SNOW Hon. C. William Barrett, Presiding Staff: Amanda Rowan, Assistant Clerk Magistrate		
03/15/2023	Event Result:: Jury Trial scheduled on: 03/15/2023 09:00 AM Has been: Held as Scheduled - Day 6 Hon. C. William Barrett, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate Robin Petrucci, Assistant Clerk Magistrate / FTR Meredith Pollier - court reporter		
03/16/2023	Event Result:: Jury Trial scheduled on: 03/16/2023 09:00 AM Has been: Held as Scheduled - Day 7 Hon. C. William Barrett, Presiding Appeared: Plaintiff		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate Robin Petrucci, Assistant Clerk Magistrate / FTR Meredith Pollier - court reporter		
[illegible]	Ev JtJry Trial scheduled on: 03/17/2023 09:00 AM[A] Has been: Held as Scheduled - Day 8 *** Event held in Courtroom 16 to accommodate a witness by Zoom *** Hon. C. William Barrett, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Robin Petrucci, Assistant Clerk Magistrate / FTR Meredith Pollier- Court Reporter		
03/17/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/20/2023 Time: 09:00 AM Result: Held as Scheduled		
03/20/2023	Event Result:: Jury Trial scheduled on: 03/20/2023 09:00 AM Has been: Held as Scheduled - Day 9 Hon. C. William Barrett, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Robin Petrucci, Assistant Clerk Magistrate / FTR Maria Santos - Court Reporter		
03/20/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/21/2023 Time: 09:00 AM Result: Held as Scheduled		
03/20/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/22/2023 Time: 09:00 AM Result: Held as Scheduled		
03/20/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/23/2023 Time: 09:00 AM Result: Held as Scheduled		
03/20/2023	Defendants Carlos Flores, N.P., Charles Loucraft, P.A.'s Motion for Directed Verdict at the Close of the Plaintiffs Case	73	Image
03/20/2023	Defendants Stefanie Busa, R.N., Susan Hanlon, R.N., Carla Crocker, R.N.'s Motion for Directed Verdict at the Close of the Plaintiffs Case	74	PA Image
03/20/2023	Endorsement on Motion for Directed Verdict at the Close of Plaintiffs Case (#73.0): DENIED Denied for reasons stated on the record.		Image

Docket Date	Docket Text	File Ref N br.	Image Avail.
03/20/2023	Endorsement on Motion for Directed Verdict at the Close of Plaintiffs Case (#74.0): DENIED Denied for reasons stated on the record.		
			Image
03/21/2023	Event Result:: Jury Trial scheduled on: 03/21/2023 09:00 AM Has been: Held as Scheduled - Day 10 Hon. C. William Barrett, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Robin Petrucci, Assistant Clerk Magistrate / FTR Maria Santos - Court Reporter		
03/22/2023	Event Result:: Jury Trial scheduled on: 03/22/2023 09:00 AM Has been: Held as Scheduled - Day 11 Hon. C. William Barrett, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Defendant James A Bello, Esq., Defendant J Peter Kelley, Esq., Staff: Amanda Rowan, Assistant Clerk Magistrate Robin Petrucci, Assistant Clerk Magistrate / FTR Maria Santos - Court Reporter		
03/23/2023	Event Result:: Jury Trial scheduled on: 03/23/2023 09:00 AM Has been: Held as Scheduled Hon. C. William Barrett, Presiding Appeared: Plaintiff Steven Luppold Robert M Higgins, Esq., Defendant Carlos Flores, **N.P.** James A Bello, Esq., Defendant Charles Loucraft, P.A. Defendant Stefanie Busa, R.N. J Peter Kelley, Esq., Defendant Carla Crocker, R.N. Staff: Amanda Rowan, Assistant Clerk Magistrate		
03/23/2023	Scheduled: Judge: Barrett, Hon. C. William Event: Jury Trial Date: 03/24/2023 Time: 09:00 AM Result: Held as Scheduled		
03/24/2023	Event Result:: Jury Trial scheduled on: 03/24/2023 09:00 AM Has been: Held as Scheduled Hon. C. William Barrett, Presiding Appeared: Plaintiff Steven Luppold Robert M Higgins, Esq., Defendant Carlos Flores, **N.P.** James A Bello, Esq., Defendant Charles Loucraft, P.A. James A Bello, Esq., Defendant J Peter Kelley, Esq., Defendant Susan Hanlon, R.N. Defendant Carla Crocker, R.N. Staff: Amanda Rowan, Assistant Clerk Magistrate, FTR Monitor and Maria Santos Ct Reporter		
03/24/2023	Verdict of jury for party	75	0

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Judge: Barrett, Hon. C. William		
03/24/2023	Exhibits Returned ***ALL NUMBERED EXHIBITS RETURNED TO ATTORNEY ROB HIIGINS AFTER VERDICT. ALL IDENTIFICATION ITEMS (A-C) ARE IN THE CASE FILE.		
03/28/2023	JUDGMENT entered on this date.: Judgment on Jury Verdict After Jury Verdict Presiding: Hon. C. William Barrett Judgment For: Steven Luppold Judgment Against: Carlos Flores, N.P. Charles Loucraft, PA Susan Hanlon, R.N. Terms of Judgment: Interest Begins: 05/05/2016 Jdgmnt Date: 03/28/2023 Interest Rate: .12 Daily Interest Rate: .000329 Damages: Damage Amt: 20000000.00 Judgment Total: 36,568,440.00	76	Image
03/30/2023	AMENDED JUDGMENT entered on this date.: Judgment on Jury Verdict After Jury Verdict Presiding: Hon. C. William Barrett Judgment For: Steven Luppold Judgment Against: Carlos Flores, N.P. Charles Loucraft, P.A. Susan Hanlon, R.N. Terms of Judgment: Interest Begins: 05/05/2016 Jdgmnt Date: 03/30/2023 Interest Rate: .0644 Daily Interest Rate: .000176 Damages: Damage Amt: 20000000.00 Judgment Total: 28,870,400.00	77	
04/07/2023	Defendant Susan Hanlon, R.N.'s Notice of Motion for Judgment Notwithstanding the Verdict, to set aside the Verdict, to Order a New Trial and/or for Remittitur	78	0 Image
04/07/2023	Defendant Susan Hanlon, R.N.'s Motion for Judgment Notwithstanding the Verdict, to set aside the Verdict and/or to Order a New Trial, and for Remittitur	79	0 Image
04/07/2023	Susan Hanlon, R.N.'s Memorandum in support of her Motion for Judgment Notwithstanding the Verdict, to set aside the Verdict and/or to Order a New Trial, and for Remittitur	79.1	0 Image
04/26/2023	Opposition to Defendant Susan Hanlon, R.N.'s Motion for Judgment notwithstanding the Verdict, to set aside the verdict and/or to order a new trial, and for Remittitur filed by Steven Luppold	80	PA Image
04/26/2023	Exhibits/Appendix		0
04/27/2023	NOTICE OF APPEAL OF DEFENDANT, SUSAN HANLON. R.N.: hereby appeals the judgment entered on March 30, 2023 against her pursuant to Rule 3 of the Massachusetts Rules of Appellate Procedure. Dated: April 27, 2023 Applies To: Kelley, Esq., J Peter (Attorney) on behalf of Busa, R.N., Stefanie (Defendant)	81	FJ Image
05/09/2023	Certification/Copy of Letter of transcript ordered from Court Reporter STATEMENT REGARDING REQUEST FOR TRIAL TRANSCRIPTS	82	0 Image
10/27/2023	Matter taken under advisement: Motion Hearing scheduled on: 10/27/2023 02:00 PM Has been: Held - Under advisement Hon. C. William Barrett, Presiding Appeared: Plaintiff Robert M Higgins, Esq., Adam Satin, Esq., Private Counsel Defendant J Peter Kelley, Esq., Staff: Douglas Nagengast, Assistant Clerk Magistrate		
11/27/2023	MEMORANDUM & ORDER: MEMORANDUM OF DECISION AND ORDER ON DEFENDANT' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, TO SET ASIDE THE VERDICT AND/OR ORDER A NEW TRIAL, AND FOR REMITTITUR: CONCLUSION AND ORDER: For the reasons, Hanlon's Motion is DENIED. November 22, 2023	83	0 Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Judge: Barrett, Hon. C. William		
12/20/2023	NOTICE OF APPEAL OF DEFENDANT SUSAN HANLON, R.N. Please take notice that pursuant to Mass. R. App. P. 3 and Mass. R. App. P. 4, the Defendant, Susan Hanlon, R.N. ("Hanlon"), appeals to the Appeals Court for the Commonwealth of Massachusetts from the following: 1) The Judgment entered and docketed in this matter on March 28, 2023. This Judgment is appealed from in all respects insofar as it is adverse to Hanlon, including but not limited to the award of prejudgment interest relating to said judgment; 2) The Amended Judgment entered and docketed Ir. this matter on AA-,..-L. 30. 2023. This Amended Judgment is appealed from in all respects insofar as it is adverse to Hanlon, including but not limited to the award of prejudgment interest relating to said judgment; 3) All rulings and orders in the Court's Memorandum of Decision and Order on Defendant's Motion for Judgment Notwithstanding the Verdict, to Set Aside the Verdict and/or to Order a New Trial and for Remittitur, dated November 22, 2023, and entered and docketed on November 27, 2023; and 4) All other evidentiary, legal and all other rulings and orders made prior to, during, and after the final judgment in this action adverse to Hanlon. Applies To: Hanlon, R.N., Susan (Defendant)	84	0 Image
12/22/2023	Certification/Copy of Letter of transcript ordered from Court Reporter	85	
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01/22/2024	CD of Transcript of 10/27/2023 02:00 PM Motion Hearing received from Allyson Pollier. 1	89	Image
01/25/2024	CD of Transcript of 03/07/2023 09:00 AM Jury Trial, 03/08/2023 09:00 AM Jury Trial, 03/09/2023 09:00 AM Jury Trial, 03/10/2023 09:00 AM Jury Trial, 03/13/2023 09:00 AM Jury Trial, 03/15/2023 09:00 AM Jury Trial, 03/16/2023 09:00 AM Jury Trial, 03/17/2023 09:00 AM Jury Trial, 03/20/2023 09:00 AM Jury Trial, 03/21/2023 09:00 AM Jury Trial, 03/22/2023 09:00 AM Jury Trial, 03/23/2023 09:00 AM Jury Trial, 03/24/2023 09:00 AM Jury Trial, **10/27/2023** 02:00 PM Motion Hearing received from Meredith Pollier. 14	90	
01/25/2024	Notice of assembly of record sent to Counsel	91	
01/25/2024	Notice to Clerk of the Appeals Court of Assembly of Record	92	
01/25/2024	Appeal: Statement of the Case on Appeal (Cover Sheet). (RE-SENT WITH TRANSCRIPTS)	93	
01/31/2024	Appeal entered in Appeals Court on 01/30/2024 docket number A.C. No: 2024-P-0099	94	Image

Case Disposition

Disposition	Date	Case Judge
Judgment after Jury Verdict	03/24/2023	

Date Filed 10/4/2022 4:15 PM
Superior Court - Middlesex
Docket Number 1681CV01287

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 1681CV01287

STEVEN LUPPOLD,
Plaintiff,
V.
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY ASSOCIATES INC.
Defendants.

RECEIVED
10/4/2022

MOTION *IN LIMINE* OF THE DEFENDANTS STEFANIE BUSA R.N., SUSAN HANLON, RN. AND CARLA CROCKER R.N. REGARDING VARIOUS MATTERS

NOW COME the Defendants Stefanie Busa R.N., Susan Hanlon R.N. and Carla Crocker R.N. ("Defendant nurses"), by their counsel, move *in limine* and request that this Honorable Court enjoin the Plaintiff, his attorneys, experts and witnesses, from making reference to any of' the following during trial:

1. Any and all references to liability insurance;
2. Any and all references by Plaintiff's counsel, whether in the opening, closing or during trial, that imply or state directly or indirectly that the jury should "send a message" to the medical profession, and/or that the jury should "punish" or "teach a lesson to" the Defendants, and that they do so by reaching a verdict in favor of the Plaintiff or statements of a similar ilk;

3. Any and all references to other malpractice claims or cases brought by any patient against the Defendant nurses;

4. Any and all reference to the idea that the Defendant nurses were grossly negligent and/or Autrngeniis in be havinr•

5. Any and all reference to the fact that a medical malpractice tribunal convened under G.L. c. 231, §60B and from stating the determination of said tribunal;

6. Any and all reference, whether by way of opening, closing, questions, answers and/or content of objections and/or comments to witnesses or on the evidence, alluding to monetary amounts without any basis in the record;

7. Any and all reference, whether by way of opening, closing, questions, content of objections and/or comments to witnesses or on the evidence, to Plaintiff's counsel's first person opinions or observations as to the Plaintiff, Plaintiff's counsel, Defendants, Defendants' counsel, the evidence, the witnesses, and/or arguments of Defendants' counsel;

8. Any and all reference, whether by way of opening, closing, questions, answers and/or content of objections in the jury's presence, and/or comments to witnesses and/or comments on the evidence in the jury's presence, to the effect that the Defendant nurses "blame" or "accuse" the Plaintiff or a third party and/or that the Defendant nurses "do not have a defense", or words and phrases of like ilk.

9. Any and all reference to, and/or implications that there were and/or should have been, any peer review and/or peer review proceedings and/or that such are "secrets" or characterizations of such i I k and/or as to what was discussed in, or learned through, peer review.

All of the foregoing are matters not relevant to the case at bar and should be precluded from evidence for the reason that they are inflammatory and prejudicial.

The motion should be **ALLOWED.**

Respectfully submitted,
Defendants Stefanie Busa R.N., Susan Hanlon, R.N., and Carla Crocker R.N.
by counsel,

/s/ J. Peter Kelley
J. Peter Kelley, Esq. B.B.O. #559588
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DATED: October 4, 2022

Date Filed 10/4/2022 4:15 PM
Superior Court - Middlesex
Docket Number 1681CV01287

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 1681CV01287

STEVEN LUPPOLD,
Plaintiff,
V.
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY ASSOCIATES INC.
Defendants.

RECEIVED
10/4/2022

10/12/22
All rights of parties reserved.

MOTION *IN LIMINE* OF THE DEFENDANTS STEFANIE BUSA R.N., SUSAN HANLON, R.N. AND CARLA CROCKER R.N. REGARDING VARIOUS MATTERS

Neither side anticipates this being an issue, will be addressed as necessary at the trial

NOW COME the Defendants Stefanie Busa R.N., Susan Hanlon R.N. and Carla Crocker R.N. ("Defendant nurses"), by their counsel, move *in limine* and request that this Honorable Court enjoin the Plaintiff, his attorneys, experts and witnesses, from making reference to any of the following during trial:

not expected

1. Any and all references to liability insurance;

not expected

2. Any and all references by Plaintiff's counsel, whether in the opening, closing or during trial, that imply or state directly or indirectly that the jury should "send a message" to the medical profession, and/or that the jury should "punish" or "teach a lesson to" the Defendants, and that they do so by reaching a verdict in favor of the Plaintiff or statements of a similar ilk;

not going to be referenced

not an issue

3. Any and all references to other malpractice claims or cases brought by any patient against the Defendant nurses;

4. Any and all reference to the idea that the Defendant nurses were grossly negligent and/or outrageous in behavior;

5. Any and all reference to the fact that a medical malpractice tribunal convened under G.L. c. 231, §60B and from stating the determination of said tribunal;

6. Any and all reference, whether by way of opening, closing, questions, answers and/or content of objections and/or comments to witnesses or on the evidence, alluding to monetary amounts without any basis in the record;

7. Any and all reference, whether by way of opening, closing, questions, content of objections and/or comments to witnesses or on the evidence, to Plaintiff's counsel's first person opinions or observations as to the Plaintiff, Plaintiff's counsel, Defendants, Defendants' counsel, the evidence, the witnesses, and/or arguments of Defendants' counsel;

8. Any and all reference, whether by way of opening, closing, questions, answers and/or content of objections in the jury's presence, and/or comments to witnesses and/or comments on the evidence in the jury's presence, to the effect that the Defendant nurses "blame" or "accuse" the Plaintiff or a third party and/or that the Defendant nurses "do not have a defense", or words and phrases of like ilk.

9. Any and all reference to, and/or implications that there were and/or should have been, any peer review and/or peer review proceedings and/or that such are "secrets" or characterizations of such ilk and/or as to what was discussed in, or learned through, peer review.

All of the foregoing are matters not relevant to the case at bar and should be precluded from evidence for the reason that they are inflammatory and prejudicial.

The motion should be **ALLOWED.**

Respectfully submitted,
Defendants Stefanie Busa R.N., Susan Hanlon, R.N., and Carla Crocker R.N.
by counsel,

/s/ J. Peter Kelley
J. Peter Kelley, Esq. B.B.O. #559588
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DATED: October 4, 2022

Date Filed 10/4/2022 4:15 PM
Superior Court - Middlesex
Docket Number 1681CV01287

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 1681CV01287

STEVEN LUPPOLD,
Plaintiff,
V.
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY ASSOCIATES INC.
Defendants.

RECEIVED
10/5/2022

TRIAL BRIEF OF THE DEFENDANTS STEFANIE BUSA R.N., SUSAN HANLON R.N. AND CARLA CROCKER RN. RE: PROXIMATE CAUSE

NOW COME the Defendants Stefanie Busa R.N., Susan Hanlon R.N. and Carla Crocker R.N. ("Defendant nurses") by their counsel, and respectfully submit this trial brief addressing the need for certain instructions pursuant to recent decisions of the Supreme Judicial Court as well as the Third Restatement of Torts pertaining to the inapplicability of substantial contributing factor language in any determination or instruction as to causation in this matter. The instructions are needed as a result of the Supreme Judicial Court's decision in Doull v. Foster, 487 Mass. 1 (2021), holding that the substantial contributing factor test is an inappropriate causation instruction for all medical malpractice actions, as well as the position of the Third Restatement of Torts, which has abandoned and criticized the standard as a standard of proof used to determine causation.

Statement of Facts

In this wrongful death medical malpractice action, the Plaintiff Steven Luppold, seeks damages against the Defendant nurses alleging they deviated from the applicable standard of care when they encAmitered Steven T iippAld in the emergency depnrtment at **T "Well** General **11"**sp itn I on March 7, 2015 and March 13, 2015. The Plaintiff alleges that the Defendants failed to properly evaluate and treat Mr. Luppold which led to his above knee left leg amputation. The Defendant nurses deny the allegations and state that the care provided to Mr. Luppold complied with the applicable standard of care and that nothing that the Defendant nurses did or failed to do, caused or contributed to cause Mr. Luppold's injuries.

ARGUMENT

I. **Substantial** Contributing Factor **Language; Misapplication and its Consequences**

In all tort actions seeking recovery for alleged negligence, the issue of causation must be established. The issue is two-fold: a plaintiff must not only establish that the negligent conduct was *afactual cause* of the injuries, but also a *legal cause* of the injury. With respect to the "factual cause," the test requires examination of whether the negligence conduct actually resulted in the plaintiff's injuries. Thus, even if a defendant had been negligent, no liability exists unless the negligence caused the injuries. The gold standard for determining factual cause has long been the "but-for" test. Under this test, the Plaintiff must establish that, *but for* the defendant's negligence, the injury would not have occurred.

In some cases, litigants have encountered problems when dealing with claims involving multiple causes and tortfeasors claimed to have caused the injuries. The but-for test has proven somewhat difficult to apply in a number of these scenarios, especially when there are multiple causes, each of which having been sufficient to produce the resulting harm:

> The classic example involves two separate fires merging and destroying a house. If either fire could have independently destroyed the home, then neither fire could be a but-for cause of the harm (because the home would have been destroyed by the other regardless), thereby relieving each of liability under a but-for standard.

Doull v. Foster, 487 Mass. 1, 8-9 (2021), *citing* Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 146 Minn. 430 (1920).

The "multiple sufficient causes" scenario illustrated in the two-fires hypothetical above led to the development of an exception to the but-for test in the Restatement of Torts. Called the "substantial contributing factor" exception, the Restatement provided:

> If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

Restatement (Second) of Torts § 432(2). As such, the substantial contributing factor exception to the but-for test permits a finding that a defendant's negligence was a factual cause of the plaintiff's injury, even when, in light of the existence of additional causes, it would be impossible to establish that the injuries would not have occurred *but for* such negligence. Use of the term "substantial contributing factor" for determining causation has been accepted by some courts in cases where joint tortfeasors' actions indivisibly combine to produce harm and where application of the but-for test would otherwise allow each defendant to escape responsibility.'

I See Dan B. Dobbs, Robert E. Keeton, David G. Owen, Prosser And Keeton on Torts, (5th ed.1984). Anderson v. Minneapolis, St. Paul. & Sault Ste. Marie. Railway. Co., 179 N.W. 45 (Minn. 1920), is often credited as the first case to use substantial factor language. See Restatement (Third) of Torts § 26 cmt. J (Tentative Draft No.2, Mar. 25, 2002) (crediting Anderson as first adopting substantial factor test). In Anderson, two fires converged to destroy plaintiff's property. 179 N.W. 45 (Minn. 1920). Because each of the fires was sufficient to cause the plaintiff's injuries, a but-for jury instruction to evaluate causation was useless; but-for fire A, fire B would have destroyed the premises and but-for fire B, fire A would have destroyed the premises. *See also* Corey v. Havener, 182 Mass. 250 (1902). In Corey, two defendants on motorcycles, independent of each other, raced past either side of a horse drawn wagon, frightening the horse and causing an accident. Id. Since it was not possible to determine what portion of the accident either defendant had caused, the jury held both liable for the accident. Id. at 252. As in Anderson, the defendant's actions could not be separated and both were adequate causes of the accident on their own. The Massachusetts Supreme Judicial Court found the application of the substantial contributing factor test proper.

Despite its limited purpose and applicability, or perhaps because of the Restatement's ambiguous language, this exception to the but-for test *has not* been properly utilized and has been widely misapplied in many cases. Much of this misuse and misunderstanding stems from its treatment in the Restatement (Second) of Torts. Moreover, the substantial contributing factor language has improvidently been used interchangeably not only with the "but-for test," but also with the test for legal causation, also referred to as proximate cause, resulting in further confusion and additional misuse. The Second Restatement uses substantial factor as a synonym for the but-for test in § 432 (1), as well as part of an approach to the discrete issue of legal causation in §§ 431 and 433. *See* Restatement (Second) of Torts, (1965); *see also* Robertson, The Common Sense of Cause-In Fact, 75 Tex. L. Rev. 1765 (1997).

The result has been multiple meanings and usage of the substantial contributing factor *exception* far beyond its intended purpose, most fundamentally of which is its misuse in determinations of *both* cause in fact and legal or proximate cause.[2] This has led to confusion and misunderstanding in the courts and with juries, generating severe scholarly criticism. Indeed, in its most recent draft of the Restatement (Third) of Torts, the American Law Institute ("ALI") acknowledged and addressed this problem by *completely rejecting* substantial contributing factor

[2]The concept of the substantial factor was originally proposed by Jeremiah Smith as a guide for resolving legal (proximate) cause issues. *See* Jeremiah Smith, Legal Cause in Actions of Torts, (pts. 1-3) 25 Harv. L. Rev. 103, 223, 303 (1911-1912). As Richard Wright explains in his article, Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility, 54 VNLR 1071 (2001), Smith proposed that under substantial factor analysis "defendant's tort must have been a substantial factor in producing the damage complained of." Id. at 1079 (*citing* Smith, Legal Cause in Actions of Torts, 25 Harv. L. Rev. 303, 309 (1911-1912)). The accompanying explanation to this proposed analysis "clearly stated that defendant's tortious conduct could not be a substantial factor unless it not only satisfied the but-for test (with an exception for simultaneous, independently sufficient conditions), but also was an appreciable and continuously effective or efficient factor in producing the harm, up to the time of the occurrence." Id.

language for causation determinations. Restatement (Third) of Torts Proposed Final Draft No. 1, April 6, 2005.

Substituting the substantial contributing factor test for the but-for test in evaluating causation creates ambiguity in the standard of proof, if not a severe risk that the standard of proof may be altered. The ALI has found that the vagueness of the substantial contributing factor test may "unfairly permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm or may unfairly require some proof greater than the existence of but-for causation." Proposed Restatement (Third) of Torts § 26, Reporters Notes, Comment J (emphasis added). Substantial factor language was never intended to be used as a substitute for but-for causation.

In other words, use of substantial factor language obliges jurors to characterize the negligence of the defendant as a "possible" cause of injuries, rather than a "more probable than not" cause of injuries. This may appear to be a nuanced alteration in the standard of proof, but it is a fundamental alteration nonetheless. Consider the definitions of the two terms:

> **Possible**: *adj.* 1: being within the limits of ability, capacity, or realization; being what may be conceived, be done, or occur according to nature, custom, or manners. 2: being something that may or may not occur; being something that may or may not be true or actual possible explanation; 3: *having an indicated potential*.[3]
>
> **Probable**: *adj. 1: supported by evidence strong enough to establish presumption but not proof; 2: establishing a probability; 3: likely to be or become true or real*.[4]

Not only does the substantial contributing factor test create ambiguity in the burden of proof, the very language itself, is ambiguous. For example, one jury may be willing to accept that 10 is a substantial part of 100, while others may consider that figure insignificant. A court may

[3] "Possible." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/possible. Accessed 10 May. 2021.
[4] "Probable." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/probable. Accessed 10 May. 2021.

look to a dictionary, however, Merriam-Webster Dictionary contains five possible and accepted meanings of the word.[5] Even the MCLE Massachusetts Superior Civil Practice Model Jury Instructions offer several possible definitions of the term "substantial." See MCLE §4.3, 4-15.

The confusion and misapplication surrounding the substantial factor language has led the ALI to reject its use entirely.[6] The Third Restatement reaffirms that **the focal point of a causation inquiry remains the but-for test**. Restatement (Third) Torts, § 26 (Tentative Draft March 2008) ("Tortious conduct must be a factual cause of physical harm for liability to be imposed. Conduct is a factual cause of harm "when the harm would not have occurred absent the conduct.").

Where there are potentially multiple causes, the Third Restatement makes clear that the traditional *but-for* standard (without which the harm would not have occurred) remains the operative test. Section 27 states that "if multiple acts exist, each of which alone would have been a factual cause under § 26 of the physical harm at the same time, each act is regarded as a factual cause of the harm." Id. Comment A goes on to reiterate that § 27 applies whenever there are two or more competing causes, each of which is sufficient to cause the harm and each of which is in operation at the time plaintiff's harm occurs. Id. As such, the Third Restatement makes clear that even in the multiple cause case, each multiple cause must be a factual or a but-for cause of the harm in order for there to be liability. Substantial contributing factor test and language is fraught with problems and is unnecessary.

Accordingly, the substantial contributing factor exception was developed to address problems seen in a rare number of cases involving multiple causes, each of which were

[5]Substantial\adj. 1: consisting of or relating to substance; not imaginary or illusory; important, essential; 2: ample to satisfy and nourish; 3: possessed of means; considerable in quantity, significantly great; 4: firmly constructed; 5: being largely but not wholly that which is specified. "Substantial." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/substantial. Accessed 10 May. 2021.
[6]The new Restatement of Torts, under the section on multiple sufficient causes, has completely abandoned the substantial contributing factor test, even in the narrow category of cases to which it has traditionally been approved. *See* Restatement (Third) of Torts § 27,. *See* id. at Cmt. A.

independently capable of producing the resulting harm. However, in the years since, it has mutated into a vaguely understood and widely misapplied substitution for the traditional but-for test, instead of a very limited exception. Fortunately, the courts in this Commonwealth have prudently used caution not to overutilize this standard, and have even recently eliminated it altogether.

I. Applicability of the Substantial Contributing Factor Exception in Massachusetts

In this Commonwealth, the "substantial contributing factor" has been adopted in a very limited context, specifically with respect to toxic tort and asbestos litigation, when so many actors are engaging in the same type of harmful conduct that it would be impossible to precisely identify which defendant's conduct actually produced the injuries. These cases, as exemplified in O'Connor v. Raymark Industries, 401 Mass. 586 (1988), stand for the position that "since *two or more* wrongdoers negligently contribute[d] to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable," the application of the substantial contributing factor test in lieu of the but-for test was appropriate to determine factual causation. O'Connor, 401 Mass., at 589.

In O'Connor, a shipyard welder was exposed to numerous asbestos products manufactured by a number of different companies in the course of his employment. O'Connor, 401 Mass. at 587. He and his wife subsequently sued all of the manufacturers of the asbestos products to which he had been exposed. Id. at 586. Sixteen of the named defendant's settled out of court, leaving Raymark the sole defendant at trial. Id. at 587. The SJC decided that O'Connor case fell into the narrow category of cases, which are sometimes referred to as "combined force" situations[7] or "multiple sufficient causes,"[8] where the application of the substantial contributing factor test has been found to be useful. *See* id.

[7] Wex S. Malone. Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 60, 88-94 (1956).
[8] *See* Restatement (Third) of Torts, § 26 Cmt. j.

While the O'Connor decision may be seen as a just outcome, the very nature of the asbestos manufactured by Raymark and others did not allow for a evidentiary finding as to whether or not it was exposure to Raymark's asbestos in particular that actually caused harm to the plaintiff. The jurors did not have more evidence for or against Raymark's contribution to the plaintiff's injuries. *See generally* O'Connor, 401 Mass. 586. There were no exhibits of particles removed from plaintiff's lungs that could be linked to any one defendant, let alone Raymark. Rather, through the substantial factor language the jury was asked to consider merely the *possibility* of Raymark's contribution. *See* id, at 587. Accordingly, lacking any direct evidence, the jury was only required to determine whether it *could have been true* that Raymark's asbestos contributed to the plaintiff's injuries.

The substantial contributing factor exception is available for a narrow scope of cases, and the SJC has specifically limited the use of the exception on numerous occasions, expressing that the "substantial contributing factor" test is ***only***:

> useful in cases in which damage has multiple causes, including but not limited to cases with multiple tortfeasors *in which it may be impossible* to say for certain that any individual defendant's conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate, caused the harm.

Matsuyama v. Birnbaum, 452 Mass. 1, 30 (2008). In the Matsuyama decision, the SJC declined to extend the substantial contributing factor exception beyond the limited scenarios when a plaintiff is incapable of determining which of the multiple tortfeasor's harmful conduct was particularly responsible for the injuries suffered. *See* id. Specifically, the SJC concluded that even when there are multiple defendants and multiple alleged causes, the traditional but-for test is the appropriate standard for determining factual causation in medical malpractice cases.

In February 2021, the Supreme Judicial Court issued a landmark decision even further restricting the substantial contributing factor exception to determine "factual causation in

negligence cases involving multiple alleged causes of the harm." Doull v. Foster, 487 Mass. 1, 17 (2021). In light of the Third Restatement of Torts' abandonment of the "substantial contributing factor" exception altogether, the SJC effectively ***eliminated the exception*** from all medical malpractice actions. *See* id.

The Plaintiff in Doull alleged that the defendant nurse practitioner failed to obtain informed consent before prescribing the patient a topical progesterone cream in 2008, claiming that the N.P. defendant did not disclose the risk that the cream could cause blood clots. *See* Doull, 487 Mass., at 3. In 2011, the N.P. defendant saw the patient who diagnosed her new shortness of breath as symptoms of her long standing asthma and seasonal allergies. Later that year, the patient was diagnosed with a pulmonary embolism and chronic thromboembolic pulmonary hypertension ("CTPH"). *See* id, at 4. A lung scan revealed chronic blood clots, and surgery was attempted to remove the blockage. However, surgical intervention and medication proved unsuccessful, and the 43 year old patient died from complications related to her CTPH in 2015. *See* id.

In light of competing expert witness testimony, the jury in Doull found: 1) the defendants *had not* failed to obtain informed consent with respect to the progesterone cream; 2) the N.P. defendant *was negligent* in failing to diagnose the patient's pulmonary embolism in 2011; and 3) the physician defendant *was negligent* in supervising the N.P. defendant. *See* Doull, 487 Mass., at 5. However, the jury also determined, despite the negligence of the N.P. and physician defendants, their *negligence was not the cause* of the patient's injury or death. *See* id.

The Plaintiff in Doull appealed, claiming that the judge improperly used a "but-for" standard jury instruction and contending that the jury should have been asked whether the multiple defendants' respective negligent conduct were "substantial contributing factors." In acknowledging that "The terminology of the substantial factor standard also leads to confusion"

and provides virtually no clear guidance on its proper application, the SJC affirmed judgment, holding that the but-for test is necessarily required to determine factual causation in all medical malpractice cases, as well as most other negligence actions. Doull, 487 Mass., at 13.

The SJC decided that there was no error in the judge's use of a "but-for" test jury instruction on the issue of factual causation, which is the appropriate standard in all medical malpractice actions. Indeed, and based on the documented history of misuse of the substantial contributing factor exception throughout the courts, the Doull Court held that:

> we conclude that a *but-for standard*, rather than a substantial factor standard, is the appropriate standard for factual causation in negligence cases involving multiple alleged causes of the harm. We see no reason to depart from but-for causation in these cases. Thus, in the majority of negligence cases, the jury should be instructed on factual cause using a but-for standard as well as legal causation.

Doull, 487 Mass, 16-17. Further, the Court held that in cases with multiple alleged causes and defendants, the but-for test is appropriate because any injury can have numerous "but for" causes, essentially eliminating the substantial use factor exception in this Commonwealth from all medical malpractice cases. *See* id., at 19 ("Having thoroughly considered these standards now, *we conclude that the substantial contributing factor test should no longer be used* in most negligence cases.").

Wherefore, and based on the above, proper factual causation analysis in the Commonwealth of Massachusetts no longer includes the substantial contributing factor exception to the but-for test in medical malpractice actions. In this case, the Plaintiff must establish that, b*ut for* the alleged negligence of the Defendant nurses, the Plaintiff would not have suffered harm. This is now the *only* accepted standard for determining factual causation in cases like the present matter, even when the claims involve numerous causes of injuries by multiple defendants. Accordingly, the Defendant nurses respectfully request that the Court only instruct the jury on the

traditional but-for test to determine factual causation at the conclusion of evidence in the trial of this matter.

The motion should be **ALLOWED.**

Respectfully submitted,
Defendants Stefanie Busa R.N., Susan Hanlon, R.N., and Carla Crocker R.N.
by counsel,

/s/ J. Peter Kelley
J. Peter Kelley, Esq. B.B.O. #559588
Susan Johnson Bowen, Esq. B.B.O. #561543
Bruce & Kelley, PC
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DATED: October 4, 2022

Date Filed 10/4/2022 4:15 PM
Superior Court - Middlesex
Docket Number 1681CV01287

L1

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 1681CV01287

STEVEN LUPPOLD,
Plaintiff,
V.
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY ASSOCIATES INC.
Defendants.

RECEIVED
10/5/2022

10/12/22
Standard
SJC instructions
as to
medical malpractice
and causation.
Any objection
noted
Lee

TRIAL BRIEF OF THE DEFENDANTS STEFANIE BUSA R.N., SUSAN HANLON R.N. AND CARLA CROCKER R.N. RE: PROXIMATE CAUSE

NOW COME the Defendants Stefanie Busa R.N., Susan Hanlon R.N. and Carla Crocker R.N. ("Defendant nurses") by their counsel, and respectfully submit this trial brief addressing the need for certain instructions pursuant to recent decisions of the Supreme Judicial Court as well as the Third Restatement of Torts pertaining to the inapplicability of substantial contributing factor language in any determination or instruction as to causation in this matter. The instructions are needed as a result of the Supreme Judicial Court's decision in Doull v. Foster, 487 Mass. 1 (2021), holding that the substantial contributing factor test is an inappropriate causation instruction for all medical malpractice actions, as well as the position of the Third Restatement of Torts, which has abandoned and criticized the standard as a standard of proof used to determine causation.

74

Filed in Court 3/2/23

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 1681CV01287

STEVEN LUPPOLD,
Plaintiff,
V.
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY ASSOCIATES INC.
Defendants.

Barrett

3/2/23 Denied for reasons stated on the record.

MOTION FOR DIRECTED VERDICT
ON BEHALF OF THE DEFENDANTS STEFANIE BUSA R.N., SUSAN HANLON R.N. AND CARLA CROCKER R.N. AT THE CLOSE OF PLAINTIFF'S EVIDENCE

NOW COME the Defendants Stefanie Busa R.N., Susan Hanlon R.N. and Carla Crocker R.N. ("Defendant nurses"), and respectfully request that this Honorable Court enter a directed verdict based upon the evidence adduced by the Plaintiff during his case-in-chief. The Defendant nurses state that they are entitled to a directed verdict for the Plaintiff's failure to meet his burden in this case.

In further support of this request, the Defendant states:

1. Plaintiff's evidence does not support a finding that any Defendant nurse was negligent to the extent of their respective involvement in the care of Steven Luppold.
2. The evidence does not warrant a finding that the care provided to Steven Luppold by any Defendant nurse failed to comply with the applicable standard of care at the time and under the circumstances of their respective involvement in the care of Steven Luppold.

3. The evidence does not warrant a finding that any act or omission of any Defendant nurses caused or contributed to cause injuries to Steven Luppold.
4. There has been and will be no evidence of any causal relationship between any act or acts of any Defendant nurse and any injury to Steven Luppold.
5. There has been no expert testimony, or there has been insufficient expert testimony, based upon a reasonable degree of medical certainty and belief, which, if taken to be true, would warrant a finding that any Defendant nurse deviated from the accepted and applicable standard of care to the extent of their respective involvement in the care of Steven Luppold.
6. There has been no expert testimony, or there has been insufficient expert testimony, based upon a reasonable degree of medical certainty which, if taken to be true, would warrant a finding that any action or omission of any Defendant nurse proximately caused injury to Steven Luppold.

In further support of this motion, each Defendant nurse states the following:

Plaintiff's evidence established that Carla Crocker R.N. and Susan Hanlon R.N. had involvement in care provided to Steven Luppold at Lowell General Hospital on March 7, 2015 and that Stefanie Busa R.N. and Susan Hanlon R.N. had involvement in care provided to Steven Luppold at Lowell General Hospital on March 13, 2015. The evidence established, as well, that the standard of care of an emergency department nurse was met by each Defendant nurse as each provided appropriate care to Steven Luppold within the scope of nursing practice during his emergency department visits on March 7 and March 13th.

Specifically, with respect to the triage nurses Carla Crocker R.N. and Stefanie Busa R.N., the Plaintiffs own emergency medicine expert Dr Stolbach testified that each of their actions as triage nurse met the standard of care of triage nurses to the extent of their involvement in Plaintiff's care. Further, Plaintiff's counsel has made the argument that the triage nurses had an obligation in accord with the applicable standard of care to examine Mr. Luppold's foot during

the triage process. Mr. Luppold has testified that the triage nurses did, in fact, examine his foot at the time of triage — all within with the applicable standard of care. The evidence has also demonstrated that each triage nurse's documentation was appropriate and completed in accordance with the standard of care. As an example, PA Loucraft testified that on March 7th the complaint of foot "cool to touch" was properly in the triage note of Nurse Crocker and was available for him to review. Similarly, NP Flores testified to Nurse Busa completing her triage documentation appropriately and that it was available for his review and consideration.

With respect to Nurse Hanlon, there has been no testimony to establish that Nurse Hanlon's involvement in Mr. Luppold's care did not meet the standard of care. Plaintiff has claimed the notation of left foot turning purple is information that should have been provided to PA Loucraft on March 7th. However, it is clear and undisputed that this was information was in the patient's chart and reviewed and authenticated by PA Loucraft. There is no testimony that Nurse Hanlon had additional information that she failed to inform any provider of at the time of discharge; the information was in the chart and reviewed/authenticated by PA Loucraft and NP Flores.

Where the evidence offered by the Plaintiff in this matter fails to establish the actions or inactions of any Defendant nurse did not meet the standard of care, the case against each and all should be dismissed and a verdict directed in their favor. The motion should be ALLOWED.

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Respectfully submitted,
Defendants Stefanie Busa R.N., Susan Hanlon, R.N., and Carla Crocker R.N.
by counsel,

J. Peter Kelley, sq. B.B.O. #559588
Susan Johnso owen, Esq. B.B.O. #561543
Bruce & Kelley, PC
83 Cambridge Street - Suite 3B
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Dkelley@brucekelleylaw.com
sjbowenPbrucekelleylaw.com

3/30/2023

#76

JUDGMENT ON JURY VERDICT	Trial Court of Massachusetts S,. The Superior Court
DOCKET NUMBER 1681CV01287	Michael A. Sullivan, Clerk of Court Middlesex County
CASE NAME Steven Luppold vs. Carlos Flores, N.P. et al	COURT NAME & ADDRESS Middlesex Superior - Lowell 370 Jackson Street Lowell, MA 01852

JUDGMENT FOR THE FOLLOWING PLAINTIFF(S)

Steven Luppold

JUDGMENT AGAINST THE FOLLOWING DEFENDANT(S)

Carlos Flores, N.P.
Charles Loucraft, P.A.
Susan Hanlon, R.N.

This action came on for trial before the Court, Hon. C. William Barrett, presiding, the issues having been duly tried and the jury having rendered its verdict,

After Jury Verdict, it is **ORDERED AND ADJUDGED:**

That the plaintiff(s) named above recover of the defendant(s) named above, Jointly & Severally the "Judgment Total" with interest thereon as outlined below as provided by law, and the statutory costs of action.

1. Date of Breach, Demand or Complaint	05/05/2016
2. Date Judgment Entered	03/28/2023
3. Number of Days of Prejudgment Interest *(line 2 - Line1)*	2518
4. Annual Interest Rate of 0.12/365.25 = Daily Interest rate	.000329
5. Single Damages	$20,000,000.00
6. Prejudgment Interest *(lines 3x4x5)*	$16,568,440.00
7. Double or Treble Damages Awarded by Court *(where authorized by law)*	$
8. Statutory Costs	$.00
9. Attorney Fees Awarded by Court (where authorized by law)	$
10.JUDGMENT TOTAL PAYABLE TO PLAINTIFF(S) *(Lines 5+6+7+8+9)*	$36,568,440.00

DATE JUDGMENT ENTERED	CLERK OF CO RTS/ ST. LERK
03/28/2023	X i

Date/Time Printed: 03-28-2023 09:29:57 SCV084: 04/2017

Date Filed 4/7/2023 12:40 PM
Superior Court - Middlesex
Docket Number 1681CV01287

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
C.A. NO. 1681CV01287

STEVEN LUPPOLD,

v.

CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N., AND
CARLA CROCKER, R.N.,
Defendants

REcEiv

4/7/2023

NOTICE OF MOTION OF DEFENDANT, SUSAN HANLON, R.N., FOR JUDGMENT NOTWITHSTANDING THE VERDICT, TO SET **ASIDE THE VERDICT, TO ORDER A NEW TRIAL AND/OR FOR REMITTITUR**

NOW COMES the Defendant, Susan Hanlon, R.N. ("Nurse Hanlon"), by her counsel, and submits this Notice of Motion pursuant to Superior Court Rule 9E. Nurse Hanlon notes the Motion of Defendant, Susan Hanlon, R.N., for Judgment Notwithstanding the Verdict, to Set Aside the Verdict, to Order a New Trial and/or for Remittitur was served upon counsel for the Plaintiff on or about April *7*, 2023, via electronic and regular mail.

Respectfully submitted,
Defendant, Susan Hanlon, R.N.,
by counsel,

/s/ J. Peter Kelley
J. Peter Kelley, Esq., B.B.O. #559588
Susan J. Bowen, Esq., B.B.O. #561543
Bruce & Kelley, PC
83 Cambridge Street — Suite 3B
Burlington, MA 01803
Telephone: (781) 262-0690
Fax (781) 229-0383

DATED: April 7, 2023

CERTIFICATE OF SERVICE

I, J. Peter Kelley, Esq., hereby certify that on this date I served a copy of the enclosed:

1 NAtiee of MAtinn of nefendnnt, Susan Hnninn. RN fAr Judgment Notwithstanding the Verdict, to Set Aside the Verdict, to Order a New Trial and/or for Remittitur

upon:

Robert Higgins, Esq.
Lubin & Meyer, PC
100 City Hall Plaza
Boston, MA 02108

James Bello, Esq.
Kimberly Iverson Tufo, Esq.
Morrison Mahoney, LLP
250 Summer Street
Boston, MA 02210

By e-mailing a copy of the same to the above.

Signed under the pains and penalties of perjury.

/s/ J. Peter Kelley
J. Peter Kelley, Esq., B.B.O. #559588

Dated: April 7, 2023

Date Filed 4/7/2023 12:55 PM
Superior Court - Middlesex
Docket Number 1681CV01287

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
C.A. NO. 1681CV01287

STEVEN TT
Plaintiff,

v.

CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N., AND
CARLA CROCKER, R.N.,
Defendants

MOTION OF DEFENDANT, SUSAN HANLON, RN., FOR JUDGMENT NOTWITHSTANDING THE VERDICT, TO SET ASIDE THE VERDICT AND/OR TO **ORDER A NEW TRIAL, AND FOR REMITTITUR**

REQUEST FOR HEARING

The Defendant, Susan Hanlon, R.N. ("Nurse Hanlon"), respectfully requests that this Honorable Court take one or more of the following actions to prevent a gross miscarriage of justice in this case, all pursuant to Rule 59 of the Massachusetts Rules of Civil Procedure: (1) Enter judgment notwithstanding the verdict, (2) Order a new trial, and/or (3) Order a remittitur of the damages awarded by the jury. Nurse Hanlon states these actions are necessary to prevent a gross miscarriage of justice, as the evidentiary rulings, Court instructions, and arguments at trial were inappropriate, as the jury clearly entered a verdict which resulted from prejudice or dislike, and as the award entered by the jury was excessive. Nurse Hanlon submits herewith a Memorandum of Law in support of these requests. A notice of motion was timely filed with this Honorable Court on April 7, 2023, and service was completed upon Plaintiff's counsel on the same date.

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Request for Hearing

The Defendant, Susan Hanlon, R.N., requests a hearing on her motions for judgment nntwithgtAnding the verdint and fnr new triAl.

Respectfully submitted,
Defendant, Susan Hanlon, R.N.,
by counsel,

/s/ J. Peter Kelley

J. Peter Kelley, Esq., B.B.O. #559588
Susan J. Bowen, Esq., B.B.O. #561543
Bruce & Kelley, PC
83 Cambridge Street — Suite 3B
Burlington, MA 01803
Telephone: (781) 262-0690
Fax (781) 229-038

DATED: April 7, 2023

Date Filed 4/7/2023 12:55 PM
Superior Court - Middlesex
Docket Number 1681CV01287

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
C.A. NO. 1681CV01287

STF.VIN T .T TPPOT .1"),
Plaintiff,

v.

CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N., AND
CARLA CROCKER, R.N.,
Defendants

RECEIVED

4/7/2023

MEMORANDUM OF LAW OF DEFENDANT, SUSAN HANLON, R.N., IN SUPPORT OF HER MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, TO SET ASIDE THE VERDICT AND/OR TO ORDER A NEW TRIAL, AND FOR REMITTITUR

NOW COMES the Defendant, Susan Hanlon, R.N. ("Nurse Hanlon"), by her counsel, to request that this Honorable Court enter judgment for Nurse Hanlon notwithstanding the verdict rendered in this matter on March 24, 2023, pursuant to Rules 50 and 59 of the Massachusetts Rules of Civil Procedure. Nurse Hanlon states the requested judgment notwithstanding the verdict is necessary to prevent a failure of justice, as the verdict in this matter as against Nurse Hanlon was wholly and unquestionably against the weight of the evidence. In particular, Nurse Hanlon states Plaintiffs proffered evidence failed to establish his *prima facie* case for negligence and, further, the award of damages is grossly disproportional to the evidence submitted at trial. No reasonable jury could have returned a verdict for Plaintiff based on the evidence presented absent speculation, conjecture, being misled by improper argument, and confusion with the Court's erroneous instructions. As well, in light of Plaintiff's proffered evidence against Nurse

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Hanlon, it is plainly clear the jury was swayed by dislike of Nurse Hanlon, which Plaintiff's counsel improperly invited and directed the jury to consider in reaching a verdict.

Nurse Hanlon was denied a fair trial because of the inappropriate and misleading arguments made by Plaintiff's counsel in closing that knowingly invited the jury to consider matters beyond evidence at trial and because of the lack of proper admonishment and instruction by the Court. Nurse Hanlon was also prejudiced by the trial Court's inappropriate allowance of Plaintiff experts to opine on matters not disclosed for trial and the Court's denial of Nurse Hanlon's counsel's request to examine Defendant, PA Loucraft, to establish his clear bias and motivation for providing testimony against Nurse Hanlon in order to secure a so-called "high/low" agreement with Plaintiff as a *quid pro quo* that insulated PA Loucraft in the event of an adverse verdict.

Nurse Hanlon, in the alternative, asks this Honorable Court to set aside the verdict as excessive and punitive and/or order a new trial in order to prevent a shocking failure of justice. The Court instructed the jury improperly on the matter of Plaintiff's burden relating to causation when it failed to instruct the jury correctly on "but-for" causation as required by *Doull v. Foster*, 487 Mass. 1 (2021) and instead gave a muddled and misleading instruction that allowed the jury to consider whether Nurse Hanlon was "a cause" of Plaintiff's injury rather than the requisite standard of the "but-for" cause. This dilution of the Plaintiff's burden considering the facts of this matter misled the jury and allowed for a verdict against Nurse Hanlon. Finally, Nurse Hanlon seeks remittitur as the damages assessed were excessive and not in keeping with the evidence presented at trial. In support of this motion, Nurse Hanlon states as follows:

Summary of Case

Trial of this matter commenced on Tuesday, March 7, 2023, with jury selection, and ended on March 24, 2023 with the jury's verdict in Plaintiffs favor against Nurse Hanlon and the co-Defendants. PA Loucraft and NP Flores. The jury found in favor of Nurse Crocker **and** Nurse Busa. At the close of Plaintiff s case, Nurse Hanlon moved for a directed verdict and she renewed her motion for directed verdict at the close of all evidence. The Court denied both motions. The jury awarded Plaintiff $10 million dollars for past damages and $10 million for future damages calculated over 33 years. Based on the evidence at trial as discussed below, the verdict presents as a punishment verdict and against the weight of the evidence. In short, this jury, upon whom the system. places such great reliance, failed Nurse Hanlon.

In this case, Plaintiff claimed the conduct of the Defendants in March 2015 following his presentment to the Lowell General Hospital ("LGH") Emergency Department on two separate occasions (March 7 and March 13) caused delay in diagnosis of blood clots that diminished circulation to and perfusion of his left lower extremity. Plaintiff further asserted the alleged delay resulted in his left leg becoming unsalvageable such that it required amputation on March 18, 2015. He claimed amputation would have been unnecessary with an earlier diagnosis at either of the subject LGH visits.

The undisputed evidence at trial established the co-Defendant providers, PA Loucraft and NP Flores ("mid-level providers"), were the sole Defendants qualified and credentialed to diagnose Plaintiffs complaints and/or order testing or other intervention to facilitate a diagnosis and provide treatment. Nurse Hanlon's care was adjunct and secondary to the mid-level providers scope of practice as she had no ability to diagnose and/or treatment Plaintiffs condition_ The conduct that Plaintiff claimed resulted in his amputation were unequivocally the

actions of the mid-level providers and not Nurse Hanlon. The evidence at trial concerning the respective roles of and attendant scope of practice of the Defendants made the Court's instructions to the jury on Plaintiffs burden on causation particularly critical. Nowhere in the evidence could the jury find "but-for" Nurse Hanlon's conduct Plaintiff would not have required amputation of his leg. As noted, however, the Court failed to properly instruct the jury, which allowed jurors to weigh the evidence against Nurse Hanlon on a lesser and erroneous standard for causation.

Despite the undisputed and exclusive role of the mid-level providers concerning Plaintiff's care and outcome, Plaintiff offered testimony from his purported nursing expert, Nurse Smith, opining on alleged breaches of the applicable standard of care by Nurse Hanlon. It was undisputed Nurse Hanlon encountered Plaintiff on three occasions. Nurse Hanlon performed the discharge of Plaintiff as ordered by PA Loucraft on March 7, 2015 and she assessed Plaintiff on March 13th and then performed his discharge that day per order of NP Flores. The evidence established no other involvement of Nurse Hanlon in Plaintiff's care, nor did the evidence establish by direct or other evidence that Nurse Hanlon observed or had knowledge of any information regarding Plaintiff that was not known to or available to either of the mid-level providers. Quite simply, the evidence did establish Nurse Hanlon's conduct in, no way influenced or affected either mid-level provider's exclusive role and responsibility to Plaintiffs care decisions and outcome. A reasonable jury considering the evidence had no basis to fund "but-for" Nurse Hanlon's conduct the Plaintiff would not have required amputation of his leg. The verdict against Nurse Hanlon, therefore, could only have resulted from the jury being swayed by improper influences or instruction.

Considering the testimony of Nurse Smith, the expert called by Plaintiff to offer standard of care testimony against Nurse Hanlon, her opinions failed to provide the jury sufficient evidence to find Nurse Hanlon liable for Plaintiff's outcome as either the discharge nurse on both **visit dates fhr** the attending on March 13th_

According to Nm-se Hanlon's role as attending on March 13th, Nurse Smith opined that Nurse Hanlon was responsible for assessment of the patient, asking for pain levels, notifying the provider about the patient's presence (immediately if it is a potentially dangerous situation), and to document her findings. A copy of Nurse Smith's excerpted trial testimony is attached hereto as Exhibit A. Nurse Hanlon did each and every one of the actions required by Nurse Smith's testimony.Moreover, the contemporaneous documentation of the mid-level providers recording their respective evaluations and examination of the Plaintiff revealed findings supportive of proper circulation and perfusion. The evidence supported Nurse Hanlon's compliance with the standard of care as expressed by Plaintiff's nursing expert and for the jury to find negligence on this occasion is clearly contrary to the evidence. Nowhere in the evidence could the jury find a breach by Nurse Hanlon on March 13th in her capacity as attending nurse.

More specifically, Nurse Smith testified that Nurse Hanlon ought to have examined Plaintiff and documented a nursing assessment at the time of the March 13th encounter. The evidence at trial, however, established Nurse Hanlon in fact performed and documented a nursing assessment of Plaintiff on his second visit of March 13, 2015, approximately 10 minutes before NP [Flores' first of two encounters with the Plaintiff. This testimony was undisputed. Moreover,' Nurse Hanlon noted Plaintiff's complaint of pain (foot) and pain level (4/10). It was also established at trial that if Nurse Hanlon's assessment revealed abnormal pulses/circulation — such would be documented. This testimony was also undisputed. Finally, Nurse Hanlon's

assessment was documented contemporaneous to her assessment and available for NP Flores, who saw Plaintiff 10 minutes after Nurse Hanlon — testimony also undisputed.

Nurse Smith also offered testimony and opinions against Nurse Hanlon in her role as the discharge nurse for Plaintiff on both subject dates. To this end, Nurse Smith testified regarding the first discharge by Nurse Hanlon on March 7th that the Depart Summary included reference to the registration information wherein Plaintiff complained of left foot pain and turning purple and that Nurse Hanlon did not report the complaint to PA Loucraft. The evidence, however, clearly established the information was available equally to both PA Loucraft and Nurse Hanlon. Indeed, Nurse Smith offered nothing more than acknowledgement the left foot pain and turning purple notation from registration was autopopulated to the Depart Summary. See Exhibit A. Nevertheless, Nurse Smith concluded Nurse Hanlon "functioned" below the standard of care as a discharge nurse. In providing the conclusory statement, Nurse Smith provided no explanation or basis for her opinion. Nurse Smith offered no other standard of care opinion concerning Nurse Hanlon regarding events on March 7. Accordingly, this left consideration of Nurse Hanlon's compliance or lack of compliance with the standard of care on March 7th entirely to the jury's conjecture or speculation.

Nurse Smith next testified regarding events on March 13th and acknowledged Nurse Hanlon assessed Plaintiff's foot pain for which he reported on a pain scale of 1-10, a score of 4, and that she discharged Plaintiff. Nurse Smith was asked to assume Nurse Hanlon did not document pulses and did not discuss the information known to both Nurse Hanlon and NP Flores about Plaintiffs complaint of foot pain with the Nurse Practitioner. Ignoring the undisputed testimony and facts that Nurse Hanlon would document abnormal pulses if identified and NP Flores' acknowledgement of the Depart Summary documentation — as well as NP Flores' two

assessments of Plaintiff *after* Nurse Hanlon's assessment — Nurse Smith offered the opinion, without a basis, that the standard of care required Nurse Hanlon to evaluate pulses on discharge and evaluate Plaintiff's foot and ankle and leg "involving the 5 P's." As noted below, the introduction of testimony regarding "the 5 P's" was never disclosed and was permitted over objection. Incredibly, this opinion of Nurse Smith ignored NP Flores' documentation of circulation and examination of Plaintiffs foot and ankle. Nurse Smith also claimed without explanation the standard of care required "discussion with the provider," but she did not elaborate on what the discussion would concern or why such discussion was warranted. Nurse. Smith offered her opinions notwithstanding her agreement that NP Flores looked at the Depart Summary and it was NP Flores with responsibility for Plaintiffs care. In fact, Nurse Smith and Plaintiffs causation expert, Dr. Harris, unequivocally agreed there was no information Nurse Hanlon possessed concerning Plaintiff that was not also known and available to each of the mid-level providers on the respective dates of March 7th and March 13th. As well, Dr. Harris agreed without hesitation that each of the mid-levels had more information about Plaintiff than Nurse Hanlon since they each were responsible for examination, evaluation, and determining the care of Plaintiff. Excerpts of Dr. Harris' testimony is attached as Exhibit **B.** Acceptance of Nurse Smith's opinions rendered the verdict against Nurse Hanlon simply astounding and wholly against the weight of the evidence and supports fully that the jury based its verdict on matters outside of the evidence at trial.

Regarding both of Nurse Hanlon's encounters with Plaintiff, Plaintiff presented no evidence whatsoever for the jury to find that anything she did or did not do caused or contributed to cause injury to Plaintiff. Despite the absence of evidence, Nurse Smith offered the opinion Nurse Hanlon should have spoken with the mid-level providers when discharging Plaintiff, and

she predicated the opinion on Nurse Hanlon having a concern about Plaintiffs condition. There was no evidence before the jury, however, that Nurse Hanlon had any concern for Plaintiff's condition at discharge or with either mid-level provider's assessment, evaluation, or diagnosis of Plaintiff that warranted other action and Nurse Smith pointed to no such evidence.

The overwhelming evidence at trial revealed Nurse Hanlon's involvement in Plaintiff's care in no manner caused his left leg amputation and for the jury to find otherwise demonstrated a verdict soiled by conjecture, speculation, incorrect instruction, improper argument, and a dislike of Nurse Hanlon that outweighed the evidence at trial. There is no other explanation based on the evidence for the verdict against Nurse Hanlon and it is plainly against the weight of the evidence.

Despite the weight of the evidence demonstrating each mid-level's exclusive role in making care decisions for Plaintiff, PA Loucraft sought nevertheless to blame Nurse Hanlon. It was plainly evident PA Loucraft offered newly framed testimony motivated and targeted toward a finding against Nurse Hanlon as he gratuitously and repeatedly pointed to Nurse Hanlon having responsibility for Plaintiff's outcome on questioning from both his counsel and Plaintiff counsel. PA Loucraft's motivation and expressed bias warranted examination before the jury and Nurse Hanlon's counsel sought to reveal PA Loucraft's bias in and motivation for his testimony. Inexplicably, the Court denied Nurse Hanlon's request to explore these matters on cross-examination of PA Loucraft. It was made clear on the record at sidebar that PA Loucraft proffered his blame of Nurse Hanlon in return for insulation from an adverse verdict by way of a high/low agreement with Plaintiff, which was entered into *after* PA Loucraft's first day of testimony wherein he admitted his liability for Plaintiff's amputation and sought to blame Nurse Hanlon as well for the outcome. As was explained to the Court at sidebar, the insurer for PA

Loucraft's could not honor its coverage terms for PA Loucraft for an adverse verdict due to its financial standing that required rehabilitation. This situation rendered. PA Loucraft exposed personally for an adverse verdict. With the prospect of insufficient coverage, PA Loucraft sought to implicate Nurse Hanlon in the event of an adverse verdict in excess of his coverage for purposes of joint and several liability, in exchange for an executed high/low agreement that extinguished his personal exposure. As noted, in error, the Court denied Nurse Hanlon the relevant and proper inquiry of PA Loucraft's bias and motivation for offering new and damaging testimony against Nurse Hanlon. This exclusion of relevant and proper evidence proved exceptionally prejudicial to Nurse Hanlon and can in no manner be considered harmless error in light of the verdict. The testimony grossly misled the jury and was orchestrated among PA Loucraft, his counsel, and plaintiffs counsel.

In response to the Plaintiffs limited and weak claims against Nurse Hanlon, Nurse Calder testified in full and unreserved support of Nurse Hanlon. Nurse Calder explained Nurse Hanlon's role in Plaintiffs care and provided sound and specific bases for Nurse Hanlon's compliance with the applicable standard of care. Nurse Calder's testimony revealed and rendered the testimony of Nurse Smith baseless and contrary to the facts and evidence of the case.

In light of Plaintiff's insufficient evidence against Nurse Hanlon, his counsel set out in closing argument to distract the jury with claims and argument focused outside of the evidence. To this end, Plaintiffs counsel knowingly invited the jury to consider matters not in evidence. This strategy was permitted by the Court without repercussion. On two matters Plaintiff's counsel purposefully and in conscious betrayal of his responsibilities before the Court, directed the jury's attention to what he knew to be improper argument. First, counsel directed and implored the jury to consider Nurse Hanlon's absence during trial and argued that her absence

supported a finding she "ignored" the seriousness of trial in a manner similar to how she "ignored" Plaintiff. Counsel's argument invited the jury to consider and find that Nurse Hanlon *was* essentially a "bad person" for not attending every moment of every day of trial and this was a character flaw seen in her care of Plaintiff,. This arvment was OUtrageOUs and the Court rejected Nurse Hanlon's counsel's request for curative instruction. The circumstance was particularly egregious as Nurse Hanlon's counsel disclosed to the Court and counsel before trial commenced that the Nurse Defendants for personal reasons could not attend every day. Counsel asked the Court to excuse the parties as is customarily done, but the Court declined, offering instead that the Court thought best not to draw attention to their absence. The Court surmised that the jury would likely not notice an absence. No party indicated they would draw attention to a party's absence; clearly because it was not evidence and because it would be improper argument. Plaintiff counsel, however, abused the moment and spent considerable portion of his closing argument instructing the jury to consider what counsel knew to be improper argument to reach its verdict.

Counsel also argued to the jury on the matter of Plaintiffs Lowell General Hospital medical record in evidence at trial what counsel knew to be falsehoods. During trial, the jury heard evidence that the subject registration form, the only document that memorialized Plaintiff's claim to anyone of a discolored foot, and upon which Plaintiff relied for his claims of negligence on March 7th, was not part of the record made available, marked, and discussed at each Defendant's deposition. In response to this undisputed evidence, Plaintiff counsel in closing told the jury, without basis or fair inference, the registration form was available to Nurse Hanlon and others for deposition. This was nowhere in evidence and plainly outside of fair inference or

argument. Counsel sought to mislead the jury and entice consideration of matters not in evidence in a fabricated effort to cast Nurse Hanlon as untruthful.

ARGUMENT

X. Judgment Notwithstanding the Verdict

a. Standard of Review

The standard applied to a motion for judgment notwithstanding the verdict is well established: "taking into account all the evidence in its aspect most favorable to the plaintiff, ... whether, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could return a verdict for the plaintiff." Tosti v. Ayik, 394 Mass. 482, 494 (1985), *quoting* Rubel v. Hayden. Harding & Buchanan, Inc., 15 Mass.App.Ct. 252, 254 (1983). Further, "[t]he inferences to be drawn from the evidence must be based on probabilities rather than possibilities and cannot be the result of mere speculation and conjecture." McEvoy Travel Bureau. Inc. v. Norton Co., 408 Mass. 704, 706-707 n. 3 (1990), *quoting* *McNamara* v. Honeyman, 406 Mass. 43, 45-46, 546 N.E.2d 139 (1989). Absent sufficient evidence of liability, a motion for judgment notwithstanding the verdict should be allowed. Kelly v. Middlesex Corp., 35 Mass. App. Ct. 30, 31, 35 (1993).

b. The verdict was not reasonable and was not supported by the evidence.

Even viewing the evidence in the light most favorable to the Plaintiff, it is clear the jury's verdict against Nurse Hanlon was not reasonable and not supported by the evidence. As noted above, Plaintiff proffered opinions of Nurse Smith as to Nurse Hanlon's alleged negligence that resulted in Plaintiffs amputation. The evidence, however, was insufficient for a jury to find Nurse Hanlon liable for Plaintiff's amputation as the mid-level providers had exclusive

responsibility for Plaintiff's care decisions. To find Nurse Hanlon liable, the jury would need to find her scope of practice on par with the mid-level providers. There was and could be no such evidence at trial. Nurse Smith certainly offered no opinion Nurse Hanlon's scope of practice included diagnosing patients, ordering tests, consulting with physicians, or deciding on discharge instruction. In fact, all testimony in the case distinguished Nurse Hanlon's role from that of the mid-level providers. Thus, for the jury to render a verdict against Nurse Hanlon required the jury to employ conjecture and speculation as there was no information known to Nurse Hanlon that was unknown to the mid-level providers and it was the mid-level providers that performed full examination of the Plaintiff. Plaintiff presented no evidence and Plaintiff's experts provided no justification to hold Nurse Hanlon to the same or higher standard than the mid-level providers in Plaintiff's care. To do so, as the jury clearly did with its verdict, was contrary to the evidence and standard of care applicable to Nurse Hanlon. Taken in its entirety, the testimony of Nurse Smith (and Dr. Harris) established Nurse Hanlon's involvement in Plaintiffs care did nothing to either misdirect or impact each mid-level provider's ability to render appropriate care to Plaintiff. See Exhibit A.

All clinical signs and symptoms that Plaintiff raised as evidence and justification for a different course of treatment for Plaintiff— that course being performance of an ultrasound or referral to a physician for care or consultation — were signs and symptoms known to the mid-level providers based on their testimony about the examination of Plaintiff each conducted. Moreover, it was undisputed that Nurse Hanlon's scope of nursing practice prohibited her from ordering an ultrasound or referring Plaintiff to a physician. Accordingly, had the jury been instructed properly under a "but for" standard and had the jury considered only the evidence at trial and not extraneous matters as raised in Plaintiffs closing, the evidence was insufficient to

satisfy Plaintiffs burden and, in fact, fully supported either a directed verdict or a jury finding in Nurse Hanlon's favor. The outcome reached, therefore, must be reversed and judgment notwithstanding verdict entered in Nurse Hanlon's favor.

Further, the amount of the fury's award was not Rupported by, indeed it was contrary to, the evidence and demonstrates the jury did not contemplate the evidence presented to it, but rather sought to punish Nurse Hanlon and the mid-level providers. No special damages were presented to the jury. There was no evidence of medical bills, missed work, or other costs incurred by Plaintiff. **In** the course of this litigation, Plaintiff admitted to his being disabled prior to his amputation and leading a solitary and sedentary lifestyle. Plaintiff had no dependents and acknowledged under his own counsel's questioning that each year has seen improvement in adjustment to and enjoyment of daily activities. As explained below in Nurse Hanlon's request for a remittitur, none of the evidence presented by Plaintiff remotely warrants the amount of money which this jury awarded. This is underscored by the jury awarding identical amounts for past and future damages. The matching figures simply make no sense based on the evidence. The excessive award granted by the jury unequivocally demonstrates punishment of Defendants rather than compensation commensurate with the evidence.

II. Motion for New Trial

a. Standard of Review

In deciding a motion for new trial, the standard to be applied by a trial judge is whether the verdict is so markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law, failed to come to a reasonable conclusion. W. Oliver Tripp Co. v. American Hoechst Corp., 34 Mass. App. Ct. 744, 748 (1993). A judge may

assess credibility and weigh conflicting evidence and may grant a new trial if satisfied that the jury did not reach an honest and reasonable judgment in accordance with controlling principles of law. Smith and Zobel, Rules Practice, 8 M.P.S. §59.3. A motion for new trial may also be granted if (1) it is necessary to prevent a failure of justice; (2) an error occurred that affected the substantial rights of a party, (3) the verdict is against the weight of the evidence, (4) the damages are excessive, and/or (5) the Court committed an error of law. Graci v. Damon, 6 Mass. App. Ct. 160, 167 (1978); Galvin v. Welsh Manufacturing Co., 382 Mass. 340, 343 (1981); Turnpike Motors, Inc. v. Newbury Group, Inc., 413 Mass. 119, 127 (1992); Bartley v. Phillips, 317 Mass. 35, 40-44 (1944).

For the aforementioned reasons, Nurse Hanlon's motion should be allowed and the Court should order a new trial.

b. Argument

The errors of law affected the substantial rights of Nurse Hanlon such that a new trial is required to redress the error and prevent a failure of justice. Graci v. Damon, 6 Mass. App. Ct. 160, 167 (1978); Galvin v. Welsh Manufacturing Co., 382 Mass. 340, 343 (1981). In support of its motion for a new trial, Nurse Hanlon incorporates by reference her argument in favor of the motion for judgment notwithstanding the verdict as it relates to the jury verdict being against the weight of the evidence and to prevent a failure of justice and state further as follows:

1. The verdict was against the weight of the evidence.

As outlined above, the facts and evidence introduced at trial do not support Plaintiff's theory of liability presented through his experts. As such, the verdict and award issued by this jury was not supported by the evidence and indeed was clearly against the weight of the evidence. Moreover, the verdict against Nurse Hanlon can only be explained by the jury being misled and being prejudiced against Nurse Hanlon. Further, the Court failed to admonish

Plaintiff counsel for his closing argument and provide the necessary curative instruction to the jury. As well, the Court instruction on causation given to the jury allowed the jury to assess Nurse Hanlon's potential liability on a much diluted and erroneous standard. To allow such a verdict to stand would be a MSS injustice to Nurse Hanlon and must be remedied with an order for new trial.

ii. Plaintiff was permitted at trial to provide expert opinion appearing nowhere in Plaintiff's expert disclosures.

The Court committed error in allowing undisclosed opinions of Plaintiff's experts that affected the substantial rights of Nurse Hanlon. It is undisputed that Defendants filed pre-trial motions to bar Plaintiff from offering undisclosed opinions. Notwithstanding Defendants' motion and objection at trial to Plaintiff's offering previously undisclosed opinion, the Court in an abuse of discretion and in error, allowed the undisclosed opinion to the prejudice of Nurse Hanlon. More specifically, Plaintiff's expert Nurse Smith introduced the concept of the "5 P's" and inserted the concept into her opinions against Nurse Hanlon. The Court error severely prejudiced Nurse Hanlon as Plaintiff stressed and wholly relied on the opinions in his expert testimony and, most prejudicial, his closing argument. The Superior Court enacted Superior Court Rule 30B which mandates that all testifying experts must certify their expert disclosures, in part, so there will be no "surprise" or "ambush" tactics at trial. Contrary to applicable Court Rules and Orders, the allowance of Plaintiff expert's undisclosed opinion testimony served as precisely the type of surprise and ambush that ought not occur at trial and constituted grave error and prejudice to Nurse Hanlon such that a new trial is warranted.

iii. Plaintiffs' Closing Argument was inappropriate.

As noted above, Plaintiff counsel's closing argument was improper and inflammatory as it invited the jury to consider matters not in evidence and encouraged the jury to reach a verdict

on dislike of Nurse Hanlon rather than a weighing of and deliberation on the evidence. The prejudicial impact of this inappropriate closing argument was not properly addressed by the Court, resulting in great prejudice to Nurse Hanlon. See Teller v. Schepens, 25 Mass. App. Ct. 346, 352 (1988). It is the trial judge's duty to guard against improper argument. Evans v. Multicon Const. Corp., 6 Mass. App. Ct. 291, 295 (1978) *citing* O'Neill v. Ross, 250 Mass. 92, 96 (1924). The trial judge need not wait for opposing counsel's objection before preventing the unfair advantage that an improper argument seeks to obtain. Gath v. MIA-Com, Inc., 440 Mass. 482, 495 (2003) (improper, unprofessional, argument should be cut short at the earliest opportunity). Further, it is well within a trial judge's discretion to award a new trial for such improper conduct. *Id.* Rigorous and emphatic action by the Court was required, but it was not taken. Goldstein v. Gontarz, 364 Mass. 800, 811(1974); Harlow v. Chin, 405 Mass. 697, 703-06(1989). The totality of Plaintiff's Counsel's argument and the Court's failure to properly redress Counsel's conduct warrants an order for a new trial.

The closing argument given by Plaintiff counsel was inappropriate, improper in multiple respects, and violated well-defined Massachusetts law.[1] As stated by Judge Agnes, "... [i]t is important to differentiate between remarks made by lawyers in closing arguments that are improper because they infringe on a party's right to a fair trial or violate a standard of professional conduct applicable to lawyers, and those that are simply hyperbole." "An Ounce of Prevention is Worth a Pound of Cure: A Collaborative Approach to Eliminate Closing Arguments", Massachusetts Law Review, Vol. 87, n.1 (2002). While difficult to determine in some cases, it is important to distinguish between a crude or sarcastic remark that one might

[1] For an excellent discussion of closing arguments, please see Agnes, P., "An Ounce of Prevention is Worth a Pound of Cure: A Collaborative Approach to Eliminate Closing Arguments", Massachusetts Law Review, Vol. 87, n.1 (2002).

expect a jury to discount, and a comment that interferes with the jury's ability to engage in a `fair and calm consideration of the evidence' Id. In this case, counsel's closing argument contained the blatant effort to distract the jury from the evidence and weigh considerations that were outside of the evidence to portray Nurse Hanlon as a bad person. It cannot be disputed that Plaintiffs closing argument of counsel violated the following well-established rules of closing argument. First, counsel may only state and comment upon the evidence and any reasonable inferences to be drawn from the evidence; and Second, counsel may only refer to facts that are in evidence. The action of Plaintiffs counsel was intentional with counsel fully knowing he was directing the jury to matters they were not to consider in an effort to distract from Plaintiff s insufficient evidence; most notably, the evidence that Nurse Hanlon had no role in the care decisions made by the mid-level providers. The only fair recourse for such intentional and knowingly improper conduct is to grant Nurse Hanlon a new trial on the grounds that counsel's closing argument infringed upon her right to a fair trial, and a "fair and calm consideration of the evidence" by the jury. Counsel's purposeful violations of well-establish Massachusetts law adversely affected Nurse Hanlon's right to a fair trial. To compound Plaintiff counsel's violations, the Court declined to provide curative instruction, and the prejudicial effects remained uncorrected. While the details of the jury's deliberations remain unknown, it cannot be fairly claimed that this highly prejudicial, unfair, false and misleading argument did not impact the jury's deliberations. Simply, it is difficult to conceive of any scenario where the jury engaged in a "fair and calm consideration of the evidence" proffered against Nurse Hanlon, and that counsel's false and misleading argument did not, or could not, have deprived Nurse Hanlon of her constitutional right to a fair trial. This was compounded by the Court's improper instruction on causation, which mentioned the standard for "but for" causation and was quickly followed

with the wholly confusing and misleading instruction that Plaintiff could satisfy his burden if a Defendant's conduct was "a cause" of injury to Plaintiff. It is undeniable that this confusing and erroneous instruction dovetailed with Plaintiff counsel's improper closing argument to sway the jury to its verdict against Nurse Hanlon.

III. Motion for Remittitur

In view of the evidence.presented as to Plaintiffs damages, the jury's award was grossly excessive and should be reduced. "[A]n award of damages must stand unless to make it or to permit it to stand was an abuse of discretion on the part of the court below, amounting to an error of law." LaBonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997) *quoting* Mirageas v. Massachusetts Bay Transp. Auth., 391 Mass. 815, 822 (1984). An excessive award becomes an error of law if "the damages awarded were greatly disproportionate to the injury proven or represented a miscarriage of justice." *IA, quoting* DoConto v. Ametek. Inc., 367 Mass. 776, 787 (1975). The only practical test is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to come to the conclusion that the jury was influenced by partiality, prejudice, mistake, or corruption. *Id.*

At trial, Plaintiff presented no evidence of itemized medical bills and expenses, lost wages, or other special damages that the jury could rely upon in making an award. Rather, the Plaintiff testified to extensive co-morbidities that his own expert, Dr. Harris, acknowledged reduced life expectancy. As well, Plaintiffs medical records and testimony revealed an exceptionally sedentary and solitary lifestyle both before and after his amputation. The Plaintiff testified to no dependents or engaging life activities. Quite clearly, the amount awarded by the jury revealed an effort to punish rather than compensate. By any fair measure, the amount

awarded is untethered to reality and unjustified. For the jury to award matching amounts of $10 million dollars for past and future damages is unexplainable by any rational and reasonable consideration of the evidence.

A remittitur is required in this case as the award of $20,000,000.00 is grossly excessive compensation in light of the evidence introduced at trial in support of Plaintiff's claims.[2]

Conclusion

Based on the aforementioned matters, the jury verdict in favor of the Plaintiff was clearly against the weight of the evidence and judgment ought to enter for Nurse Hanlon. In the alternative, a new trial is required to prevent a gross failure of justice in this action. There was no evidence or there was insufficient evidence to support the jury's verdict and the damages awarded in this action. A fair reading of the testimony and evidence in this case mandates that the judgment should be reversed, the case should be retried or, at a minimum, the damages awarded should be reduced to an appropriate level. Nurse Hanlon's motion should be **ALLOWED.**

Request for Hearing

The Defendant, Susan Hanlon, R.N., requests a hearing on her motions for judgment notwithstanding the verdict, for new trial, or remittitur.

Nurse Hanlon also states an order for remittitur ought to provide interest from filing of the action to the original trial date of June 15, 2020. Nurse Hanlon should not be penalized for accumulation of interest due to reasons beyond her control; namely, the shut down of Court proceedings and delay reaching trial due to Covid-19 orders. As well, trial in October 2022 was derailed sorely on account of Plaintiff's expert witness purported illness.

Respectfully submitted,
Defendant, Susan Hanlon, R.N.,
by counsel,

/s/ J. Peter Kelley
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DATED: April 7, 2023

EXHIBIT A

Pages: 1-139
Exhibits: None

COMMuNwEAJaTti of MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD,

Plaintiff,

v.

*

CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY
ASSOCIATES, INC.,

*

Defendants.

* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

TESTIMONY OF SUSAN K. SMITH, DNP RN, CEN, CCRN
EXPEDITED

Friday, March 17, 2023
Courtroom: 15

THIS TRANSCRIPT HAS NOT BEEN PROOFREAD OR CORRECTED BY THE COURT REPORTER. DIFFERENCES WILL EXIST BETWEEN THE UNCERTIFIED DRAFT VERSION AND THE CERTIFIED VERSION.

Meredith Pollier
Court Reporter

1 Q When patients have come in with
2 potential problems with
3 circulation, why is it important
to assess the five Ps, if you
5 will?
The pain, pulses
paralysis, paresthesia, and
8 pallor or color?
9 MR. KELLEY: Objection.
10 MR. HIGGINS: Hang on,
11 hang on.
12 MR. KELLEY: Can I just
13 be seen?
THE COURT: Hang on for a
15 sec. We're going to have to go
16 -- there's an objection. So
we'll be back.
18 (SIDEBAR CONFERENCE NOT
19 TRANSCRIBED)
20 MR. HIGGINS: Okay, we're
21 back.
22 BY MR. HIGGINS:
23 Q Let me ask you this. We talked
24 about the 5 P's a moment ago.

1 Well let me break down each of
2 those just briefly.
3 When a nurse sees a
4 patient where there's a question
5 about circulation, is assessing
6 whether the patient has pain
7 important?
8 A Yes.
9 Q Is assessing whether the patient
10 has pulses and whether they are
normal or abnormal, is that
important?
13 A Yes.
14 Q Is it important to check and see
15 whether there is change in color?
16 A Yes.
17 Q Paresthesia. What does that term
18 mean in layperson's terms?
19 A Numbness and tingling.
20 Q And then, is that important to
assess if a patient comes in and
22 there's a question about
23 circulation?
24 A Yes.

1 has been happening for?
2 A Correct.
3 Q If we think of a leg and a patient comes in and has a leg that is cool to touch, would it
6 be important to ask questions about what brought that on and
8 how long it's been going on for
0 and questions like that?
10 A Yes.
17 Q The role of the primary nurse in
12 the E.D., so when the patient
13 actually gets back, are they
14 assigned typically to a does a nurse get assigned to them?
16 A Yes.
Q Well tell us what the role of the
18 nurse in back is?
L9 A The nurse in the back is
20 responsible for a complete
21 assessment of the patient and
22 that's a head to toe assessment.
23 Then they are responsible for
24 asking for pain levels, et

cetera.

Then they notify the physician about the presence of the patient. If it's someone that needs to be seen right away as a potential dangerous situation, they notify the physician immediately and they also document their findings during the assessment.

Q Are they also often involved in discharging the patient?

A Yes, they are. And in between, they follow the physician's orders and provide any care the physician deems necessary.

Q Nurse Smith, have you been acting in both of those roles, triage and primary nurse? Have you been acting in those roles in emergency departments going as far back as 1974?

A Yes.

Q Do you have the notebook that we

right back.
2 (SIDEBAR CONFERENCE NOT
3 TRANSCRIBED)
4 BY MR. HIGGINS:
5 Q Nurse Smith, I'm just going to
6 ask you that hypothetical. I'm
7 going to ask you to assume facts
8 again just so we have it for the
9 record.
10 I want you to assume that
11 in the depart summary that was
12 signed by and we'll go to the
13 signature in a little bit, but
14 performed by and authenticated
15 right on this page, right below
16 where it says that, it indicates
17 that his reason for visit --
among other things was left foot
19 pain and turning purple.
20 I'd like you to assume
21 that that information is
22 contained in Nurse Hanlon's
23 depart summary and that she
24 provided Mr. Luppold with

documentation on discharge for
2 back pain with sciatica.
3 I'd like you to further
4 assume that Nurse Hanlon was
aware that back pain with
6 sciatica will not cause left foot
pain, turning purple.
8 A Okay.
9 Q And I'd like you to assume she
10 did not communicate those
11 findings to Mr. Loucraft, the
12 P.A., at any point in time
13 MR. KELLEY: Well
14 objection, Your Honor. They were
15 findings.
16 THE COURT: No, those
17 findings.
18 MR. HIGGINS: Right.
19 THE COURT: They're not
20 her findings. It's those
21 findings.
22 MR. HIGGINS: Right.
23 BY MR. HIGGINS:
24 Q Do you understand Nurse Smith,

1 that when Mr. Luppold came in,
2 the first thing he told
registration was that he had left
4 foot pain and it was turning
purple? Yes?
6 A Yes.
7 Q Okay. Those are in Nurse
8 Hanlon's discharge summary. So
a with all the facts that I gave
10 you and assuming that she did not
11 tell Mr. Loucraft of the left
12 foot pain and turning purple, do
13 you have an opinion to a
14 reasonable degree of medical
iJ certainty, as to whether Nurse
16 Hanlon fell below the standard of
care of the average, qualified
18 emergency room nurse in 2015?
7.9 Do you have an opinion?
20 A Yes.
21 Q And what is -
22 A Yes.
23 Q -- what is that opinion?
24 A That opinion is that she

1 functioned far below the standard
2 of care as a discharge nurse.
3 Q Is a comment by a patient of left
4 foot pain, turning purple, is
5 that potentially very serious?
6 A Oh, yes.
Q Would you expect an emergency
8 room nurse to know that that was
9 very serious?
1^ A Yes.
11 Q I'm going to move on to the next
12 visit. There's a visit of March
13 13th and this is Tab C, Nurse
14 Smith. You have that?
15 A Yes.
16 Q And I want you to turn to page
75, please.
9 A Okay.
19 Q Are you there?
20 A Yes.
21 Q And at the very top of page 75,
22 this is a triage note by Nurse
23 Busa, and the chief complaint
24 there that day is left ankle

Q All right. want to ask you one
2 last series of question. This
3 relates to Nurse Hanlon.
4. I'd like You to assume
5 that Nurse Hanlon, like on the
6 13th, was the discharge nurse
7 like on the 7th, was the
8 discharge nurse on the 13th. And
9 have you seen that?
13 A Yes.
11 Q Okay. And I'd like you to assume
12 on this day, she did, in fact,
13 evaluate Mr. Luppold. And in
2_4 fact, evaluated, in part, his
foot or he told her he had foot
16 pain and it was assessed a
2_7 number.
18 And at the time, it was a
19 four.. But he indicated pain was
20 in his foot. I'd like you to
2 assume that Mr. Luppold was
22 discharged by Mr. Flores with
23 four diagnoses and I'm going to
24 read them for you in a second

when I *get* to them:
2 radiculopathy or sciatica;
3 hypertension, high blood
4 pressure; peripheral edema,
5 swelling; and chronic low back
pain.
So let me ask you this.
8 If you understand those are the
9 diagnoses and you're giving a
10 patient a pamphlet of sciatica,
11 hypertension, and edema, does
12 that explain severe ankle or foot
13 pain? Any of those?
14 A No.
15 Q I'd like you to assume that at no
16 point in time in this record are
17 there any pulses documented by
18 Nurse Hanlon. There are no
19 there's no documentation of
20 pulses.
I'd like you to assume
22 that Nurse Hanlon never talked to
23 Mr. Flores about what's written
24 on her depart summary on page 76

of left ankle pain and foot pain,
2 or that she discussed with Mr.
3 Flores the fact that his
4 complaints when she saw him
5 related to ankle -- foot pain.
6 Do you have all those?
7 A Yes.
8 Q And I'd like you to assume that
9 he was discharged with, in fact,
1C the materials that we have in
11 this book regarding edema, high
12 blood pressure, radiculopathy or
13 sciatica, and chronic low back
14 pain.
5 Based on those facts and
16 on your education, training, and
17 experience, do you have an
18 opinion to a reasonable degree of
19 nursing certainty as to whether
20 the care provided by Nurse Hanlon
21 on March 13th when she discharged
22 Mr. Luppold fell below the
23 standard of care of the average,
24 qualified emergency room nurse

practicing in 2015?

Do you have an opinion?

A Yes, I do.

Q And what is that opinion?

A It is that her performance in the care and discharge of Mr. Luppold was far below the acceptable standard of care.

Q And what's the basis of that, Nurse Smith? What do you say should have been done?

A A pulse evaluation and a further evaluation of the foot and the ankle and the left leg involving the 5 P's.

Q Does it also include a discussion with the provider?

A Yes, it does, and documentation in the medical record of same.

MR. HIGGINS: Thank you, Nurse Smith. That's all the questions that I have for you.

NURSE SMITH: Thank you.

MR. HIGGINS: Somebody

Q Yeah. And you understand that on
2 this date, March 13th, Mr. Flores
3 authenticated this document which
4 required him to go into the
document and see the document?
6 A I don't quite understand your
7 question.
8 Q Well you said you're familiar
9 with these documents and familiar
10 with an EMR. Didn't you tell the
jury earlier about that?
A Yes, I did.
13 Q Yeah. So authentication by a
provider of a document indicates
15 that they have looked at the
16 document and signed off on it,
right?
18 A Correct.
19 Q Yeah. And we *see* that Mr. Flores
20 signed off on this document that
21 contains the visit reasons, as
22 well *as* Nurse Hanlon signing off
23 on it, correct?
24 A Correct.

Q Yeah. And the same can be said
2 for the document on March 7th
that Attorney Higgins directed
4 you to, the depart summary
5 showing information from
registration and triage and the
diagnosis.
8 Mr. Loucraft
0 authenticated that as well,
10 right?
11 A Correct.
12 Q Which means the information
13 contained in that document was,
14 in fact, available to Mr.
15 Loucraft on March 7th, right?
16 A Yes.
17 Q Yeah. And you made or you agreed
18 with Mr. Higgins earlier this
19 morning with respect to what he
20 gave you as a proposition that
21 there was no communication,
22 nurses to the providers, on the
23 respective dates of March 7th and
9 March 13th, do you remember that?

1 A Yes, I do.
2 Q All right. That's not accurate,
3 is it?
4 A Well that was an accurate
5 statement.
Q Well the triage nurses did
7 communicate in the manner in
8 which triage nurses communicate.
9. They documented the chief
10 complaint of Mr. Luppold on both
March 7th and March 13th, right?
"!2 A Yes.
1 Q Yeah. Mr. Higgins, though,
14 directed you to a document and
15 *said,* is there any mention of
16 left foot cool to touch. Do you
remember that just a short time
18 ago?
19 A Yes.
90 Q Yeah. He directed you to a
21 document that omitted that
22 information, but he didn't direct
23 you to the document that the
L provider, Mr. Loucraft, had on

changes the care?

2 A Yes. It changes if the -- how
3 fast the patient is seen, and it
4 gives you an idea of how old the
5 patient is.

Q All right. But the care rests with the provider that ultimately
8 *sees* the patient, right?

9 A Correct.

0 Q And it doesn't prohibit, prevent
11 any level of care given to that
12 patient as determined by that
13 provider, correct?

14 A If it is incorrectly triaged,
15 yes, that would affect the care
16 that was provided.

17 Q Well, the care's provided by, in
is this instance, a PA on March 7th
12 and a Nurse Practitioner on March
20 13th, correct?

21 A Correct.

22 Q All right. Do you recall in
23 their testimony that they don't
24 pay much attention to the triage

it's proper for the nurse
2 certainly to go ahead and carry
out the discharge of the patient,
4 we can agree to that certainly,
right?
6 A Not in this case, no.
Q Well, you weren't there, correct?
8 A Correct, but I know what the
9 standard of care is when a
0 patient is discharged.
11 Q Right, and what I just described
12 is the standard of care for the
discharge, carrying out the
14 instruction of the provider?
,5 A Correct, but the standard also
16 includes, if there are questions
17 or concerns by the nurse, she
8 must present them to the provider
19 before discharging the patient.
20 Q And if there are no questions or
21 concerns for the nurse that was
22 present with the patient,
23 spending time with the patient
24 through discharge, then, it is

entirely proper for that nurse to
2 complete the discharge process,
3 true?
A Yes.
5 Q And now, Nurse Smith, back to
6 some of your background, you know
7 that we were provided with your
8 resume, CV, curriculum vitae?
9 A Yes.
10 Q When do you say you worked at
11 Temple?
12 A Yes.
13 Q No, when?
14 A Oh, when. That was when I was
15 employed by General Healthcare
16 Resources back in 2000 -- 2005.
17 Q And would there have been a
18 different entity listed on your
19 CV that would identify that time
20 at Temple?
21 A No, because I worked in multiple
22 hospitals in that area under
23 contract --
24 Q All right.

1 somebody else after her will pick up and catch that --
2 Q Nurse Smith --
4 A -- such as Hanlon could have done
5 those, as well. She didn't do
6 the pulses, but the PA did. And
7 that's not acceptable behavior. That's not acceptable
9 assessments. Neither one of
10 those nurses did an assessment of
11 his foot.
12 Q Nurse Smith, if you could try my
13 question, please.
14 A Sure.
15 Q What you're asserting to be the
16 action of the nurses in no way
17 prevented the provider with
13 decision making and knowledge of
19 the complaints of Mr. Luppold on
2C March 7th from carrying out their
21 role of care provider and
22 decision maker for Mr. Luppold,
23 correct?
24 A Correct.

1 Q All right. And whether it's back
2 to Nurse Hanlon again, moving
3 quickly through March 7th, you
L know her role was discharge,
right?
6 A Yes.
Q All right. And the information
8 that is recorded on the depart
9 summary was information you say
10 known to Nurse Hanlon and equally
11 known by Mr. Loucraft, correct?
12 A Correct.
13 Q All right. Now, on March 13th,
14 again, with respect to Nurse
15 Busa, we see her triage note, and
16 the information, and we were
17 looking at it earlier at page 65,
18 information from triage from
19 Nurse Busa appears in and was
20 available to Mr. Flores on that
21. date?
22 Do you need a second?
23 A Yes, it is re-populated by the
24 computer.

13th, Nurse Smith, performed an
2 assessment and noted 4 of 10 foot
pain?
A Yes.
Q Yeah. And again, that was
documented in the depart summary
for Mr. Flores to see?
A I'm sorry, I don't understand.
9 Q Sure.
10 A Could you repeat that, please?
11 Q We probably went over that
12 earlier, but you were asked to
13 look at the dep-art summary.
14 A Correct.
15 Q Do you recall that?
16 A Yes.
17 Q And that depart summary noted
18 foot pain, right? It's at page
19 76.
20 A Yes.
21 Q All right. And that was
22 available for Mr. Flores,
23 particularly where he
24 authenticated the document,

1 of the lack of documentation of
2 all of the nurses and all of the
3 providers really. Even though I
cannot address the standard for
5 nurse practitioners and physician
6 assistants.
I can say that the nurses
8 didn't document, so no one can
9 tell whether he got worse or he
10 got better, or pain relieved, et
11 cetera. If his pulses were
12 there, if they disappeared, if
13 his leg was numb, if it was ice
14 cold because there was no
15 assessment done.
16 So, all of those nurses
17 breached the standard of care for
18 assessments.
19 Q And certainly, again, you were
20 not there, Nurse Crocker, Nurse
21 Busa, Nurse Hanlon, Mr. Loucraft,
22 Mr. Flores; they all had
23 encounters, interaction with Mr.
24 Luppold, correct?

what the standards
Q And having
A -- of care are.
Q And having the information from the chief complaint on the 7th, from Nurse Crocker, and on the 13th from Nurse Busa. correct?
A Correct.
Q And the visit reasons on the 7th, the visit reasons on the 13th, were documented and authenticated by Mr. Loucraft and Mr. Flores, correct?
A Correct.
MR. KELLEY: One moment, Your Honor.
That's all I have. Thank you.
MS. SMITH: Thank you.
THE COURT: Mr. Bello, do you have anything?
MR. BELLO: I do have questions, Your Honor?
THE COURT: You have a

A True.
2 Q Okay. And they both assessed his
neuro function, correct?
4 A Correct.
5 Q All right. So, to the extent
that vou indicated that an
assessment wasn't done,
8 everything that I just went
0 through that represents an
10 assessment that was done of Mr.
11 Luppold by Mr. Loucraft and Mr.
_2 Flores respectively, true?
13 A Yes.
'4 Q You also indicated in response to
some of the questions from Mr.
16 Kelley that -- I believe the
11 statement was that providers make
18 diagnoses and decisions, and no
19 one is disputing that, right?
20 You agree with that statement?
21 A Correct.
22 Q All right. But the providers,
23 they rely upon information,
24 accurate, thorough, and complete

EXHIBIT B

Pages: 1-317
Exhibits: None

COMMONwt;A.LTH OF MASSACHUSETTS

MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD,
*
Plaintiff,
V.
*
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY
ASSOCIATES, INC.,
*
Defendants.
* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

TESTIMONY OF LINDA M. HARRIS, M.D., F.A.C.S.
EXPEDITED

Thursday, March 16, 2023
Courtroom: 15

THIS TRANSCRIPT HAS NOT BEEN PROOFREAD OR CORRECTED BY THE COURT REPORTER. DIFFERENCES WILL EXIST BETWEEN THE UNCERTIFIED DRAFT VERSION AND THE CERTIFIED VERSION.

Meredith Pollier
Court Reporter

A Yes.
9 Q Yeah. And fairly voluminous
3 records for Mass General?
A Yes.
Q Yeah. And for what years did you
review for Mass General?
7 A What year? I'd have to look back
at the records. I don't recall
a all the years that I saw, so -
10 Q Yeah. All right. And same for
11 Lowell General, fairly voluminous
12 records?
13 A The records were fairly
14 voluminous, yes.
15 Q And when I say that, I mean
thousands of pages.
17 A Yes.
Q Yeah. And you were directed by
19 Attorney Bello to page 10 and
20 there is the list of active
21 problems for Mr. Luppold. Do you
22 recall that testimony
23 A Yes, I do.
24 Q -- and being directed to that

1 page? Yeah. And I think you
2 identified Mr. Luppcld having
3 various chronic conditions?
ci A That's correct.
0 Q Yeah. In addition, he has, I
think you said, peripheral artery
disease, PAD? He's had that?
A That was not documented on that
9 page that he -
10 Q Not on that page, but among his
11 additional conditions?
12 A That's -- basically, he ended up
13 with peripheral arterial disease.
14 That's what caused his limb loss.
15 Q Yeah. And coronary artery
16 disease has been documented in
17 the Mass General records?
18 A Correct.
19 Q All right. And certainly
20 well, he also had the bypass
21 surgery in 2017 at Mass General,
22 correct?
23 A Yes.
24 Q Yeah. And those particular

circulatory diseases, those can
2 impact life expectancy -
A Yes.
Q -- for an individual?
A That's correct.
6 Q Yeah. And impact it negatively,
7 correct?
8 A I'm sorry, impact the --
9 Q Negatively, reducing -
10 A Yes.
11 Q -- life expectancy?
12 A That's correct.
13 Q Yeah. And you were asked
14 questions about -- from Mr.
15 Higgins about performance of an
16 ultrasound for Mr. Luppoid back
17 on the dates we were discussing.
18 A Correct.
19 Q And ordering an ultrasound you
20 understand to be something that
21 would be Mr. Loucraft or Mr.
22 Flores, their responsibility and
23 ability to order, correct?
24 A Correct.

1 Q Yeah. Not the nurses, right?
2 A That's correct.
3 Q And you were asked about assuming
4 certain things in regard to
5 questions Mr. Higgins posed to
6 you about the nurses; do you
7 recall that?
8 A Yes, I do.
9 Q Yeah. And one was doing an
10 assessment of the triage nurses
11 and Nurse Hanlon doing an
12 assessment of Mr. Luppold?
13 A Correct.
14 Q Yeah. And I'd ask you to assume,
15 or you may know, Mr. Luppold has
16 described, in fact, being
17 assessed by both Nurse Crocker
18 and Nurse Busa. Do you recall
19 that?
20 A Yes.
21 Q Each of them looking at and
22 examining his foot?
23 A Correct.
24 Q Yeah. And as well, we can see,

1 you know, to kind of move through
2 this, I believe it's page 69,
3 you'd see an assessment of Nurse
4 Hanlon on March 13th, correct?
5 A Correct.
6 Q Yeah. And as well, she notes on
that day, a report of foot pain
8
9 A Correct.
10 Q -- on Mr. Luppold, right?
11 A Correct.
12 Q You recall that?
13 A Yes, I do.
14 Q And she recorded a pain level on
15 the scale of 1 to 10 that we have
16 heard and the jury has heard
17 about, a pain level of 4 on that
18 occasion on March 13th, correct?
19 A I'd have to look. I'm recalling
20 numbers of 9 and 10, but I'm sure
21 that's
22 Yup.
23 A What page?
24 Q Then we can go to page 69.

A Yes. At that point, it says 4.
2 Q Yeah. And Mr. Higgins was asking
3 you only about the report of
4 pain, I think, another scale that
5 had 8 or 9 of 10, right?
6 A Correct.
7 Q Yeah. And if we do turn to Tab
8 A, we see other occasions that
9 Mr. Luppold, earlier in 2015, was
10 asked to rate his pain, at page 4
11 of the handbook. And just let me
12 know when you're there.
13 A I'm on page 4. I don't see
14 It's four lines up from the
15 bottom of the notation --
16 A Yes. Pain score 6.
Q Yeah. And pain site includes
18 lower back, neck and shoulders?
19 A Correct.
20 Q Yeah. And this is January 9 of
21 2015, correct, as we see at the
22 top of the page?
23 A Yes.
24 Q And you were referencing page 10

1 triage of Mr. Luppold, correct?
2 A Yes.
Q And as well, on March 13th,
4 certainly, Mr. Flores had available to him, the information that was obtained and recorded by
7 Nurse Busa, true?
8 A Correct.
9 Q And on March 13th, Mr. Flores
13 had, as the provider in the
11 emergency department, the
_2 responsibility for decision-making --
A Correct.
15 Q in regard to Mr. Luppold's
16 care that day, right?
17 A Correct.
18 Q And with respect to Nurse Hanlon,
19 on the respective dates of March
2C 7th, March 13th, Nurse Hanlon
71 discharging March 7th, assessing
22 and discharging on March 13th,
23 the information available and
24 obtained by Nurse Hanlon was all

available for both Mr. Loucraft
on March 7th and Mr. Flores in
3 March 13th. We can agree to
that, true?
A Correct.
Q And certainly, you know, we have
7 heard about care being provided
8 in an emergency department and
9 all expected to provide good care
10 to patients, right?
21 A Correct.
12 Q Yeah. There are, however,
13 distinct roles that are played by
14 providers in an emergency
department, can we agree?
16 A Yes.
17 Q Yeah. And, in fact, there are
18 what's called scope of practice
19 that attach to different
20 providers, right?
21 A Correct.
22 Q And a midlevel, as we're talking
23 about, a PA, an NP, their scope
24 of practice is, in fact,

different from nurses, right?
2 A That's correct.
3 Q Particularly in the essence of
4 caring for a patient, making
orders for a patient?
6 A Correct.
Q Determining whether a
8 consultation is required for a
9 patient?
10 A Correct.
11 Q The essence of that is the care
12 for a patient and that is outside
13 of the nursing scope of practice,
14 isn't it?
15 A That's correct.
16 Q So, there is nothing -- again
11 turning back to March 7th, there
18 is nothing that Nurse Crocker
19 knew, as far as what we see in
20 the record, about Mr. Luppold
21 that Mr. Loucraft didn't know or
22 should have known about him; is
23 that fair to say?
24 A If it was documented, he should

1 have known, yes.
Q And there's nothing that Nurse
2 Busa knew on March 13th that Mr.
Flores didn't know or that he
should have known; we can agree
6 to that as well, right?
7 A Again, if it was documented, he
8 should have known, yes.
0 Q And on March 7th, for Nurse
10 Hanlon as well, there is nothing
11 that Nurse Hanlon knew about Mr.
12 Luppold that Mr. Loucraft didn't
13 know or should have known, fair
14 to say?
15 MR. HIGGINS: I object.
16 I object.
17 THE COURT: Do you want
18 to be heard?
19 MR. HIGGINS: No. I
20 mean, I object.
21 THE COURT: Overruled.
22 MR. HIGGINS: Okay.
23 BY MR. KELLEY:
24 Q True?

1 A If it's documented, they should
2 have had access to the
3 information.
4 Q And there is nothing, again with
respect to Nurse Hanlon on March
6 13th, that Nurse Hanlon knew
7 about Mr. Luppold that Mr. Flores
8 didn't know about him or that Mr
0 Flores should have known about
1C Mr. Luppold, correct?
A Again, if they documented it and
12 it was available to review, they
1.3 should have known.
74 Q Right. And, in fact, again
15 considering back to the scope of
16 practice, Mr. Loucraft on March
17 7th, Mr. Flores on March 13th
18 should have had more information
19 about Mr. Luppold as they were
20 responsible for conducting
21 examination of him and making
22 care decisions for him, true?
23 A True.
24 MR. KELLEY: One moment,

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1681-CV-01287

STRVF.N I,I1PPOLD

vs.

SUSAN HANLON, R.N. & others'

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, TO SET ASIDE THE VERDICT AND/OR ORDER A NEW TRIAL, AND FOR REMITTITUR

In March 2023, a jury returned a verdict which found that Defendant Susan Hanlon, R.N.'s ("Hanlon") negligence caused Plaintiff Steven Luppold's ("Luppold") leg to be amputated and awarded Luppold $20,000,000. Hanlon now brings a Motion for Judgment Notwithstanding the Verdict, To Set Aside the Verdict And/Or to Order a New Trial, and for Remittitur, asking this Court to overrule, set aside, or otherwise alter the verdict. She asserts that the verdict was unreasonable, unsupported, and against the weight of the evidence. Hanlon also argues that the Court made several errors that tainted the verdict, including (1) improperly allowing Plaintiff's expert to testify to undisclosed opinions; (2) failing to provide a curative instruction to the jury after a closing argument that was unfairly prejudicial to Hanlon; (3) prohibiting Hanlon from cross-examining Defendant Charles Loucraft, P.A. ("Loucraft") about the high/low agreement he reached with Luppold; and (4) permitting Plaintiff's expert to rely on the incorrect standard of care. For the following reasons, Hanlon's motion is **DENIED.**

'Carlos Flores, N.P., Charles Loucraft, P.A., Stefanie Busa, R.N., Carla Crocker, R.N., and Merrimack Valley Emergency Associates, Inc.

DISCUSSION

As an initial matter, the Court notes that the merit of Hanlon's motion was difficult to evaluate because many of the factual assertions in defense counsel's memorandum in support of the mntinn are inaccurately &Refilled ac "urdiepliterl" Thece aRRerted facie are neither "undisputed" nor are they all consistent with the record. Counsel's imprecision not only diminished the weight of Hanlon's arguments, but it imposed upon the Court the burden of going back to the trial transcript and the audio of the three-week trial with little guidance as to where the purported information was located.

Whether the Verdict was Against the Weight of the Evidence

When ruling on a defendant's motion for judgment notwithstanding the verdict, the Court must "tak[e] into account all the evidence in its aspect most favorable to the plaintiff, to determine whether, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could return a verdict for the plaintiff." *Tosti v. Ayik*, 394 Mass. 482, 494 (1985), quoting *Rubel v. Hayden, Harding & Buchanan, Inc.*, 15 Mass. App. Ct. 252, 254 (1983). "Conflicting evidence alone does not justify judgment notwithstanding the verdict." *Tosti*, 394 Mass. at 494, citing *0 'Shaughnessy v. Besse*, 7 Mass. App. Ct. 727, 729 (1979). As such, a defendant will not succeed on their motion by arguing "that there was some or even much evidence which would have warranted a contrary finding by the jury." *Id* (citations omitted). The "jury [is] free to believe or disbelieve the evidence presented" and "the court may not substitute its judgment of the facts for that of the jury." *Id.*

A defendant is also required to meet a similarly high bar to succeed on a motion for a new trial. While the Court may use its own discretion to deny or grant a new trial on the grounds that the verdict is against the weight of the evidence, "a judge should exercise this discretion

only when the verdict `is so greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evidence, but that it was the product of bias, misapprehension or prejudice.'" *Turnpike Motors, Inc. v. Newbury Group, Inc.*, 41[1] Mace 119, 1[9]7 (199[9]), qi’’ting .ccnnnell *v.* [14]*ncinn Flovnted Ry.*, MnQQ. [51] [514] (1911):

Here, Hanlon argues that the weight of the evidence did not permit the jury to conclude that she was negligent. The Court has already twice rejected this argument, first, after the presentation of Luppold's evidence and again after the presentation of Hanlon's evidence. The Court incorporates by reference the reasons stated on the record for denying Hanlon's previous motions for directed verdict.

Additionally, the Court agrees with Luppold that there was sufficient evidence for the jury to find that Hanlon's conduct fell below the required standard of care for an average qualified registered nurse who was tasked with treating Luppold's symptoms and that her negligence was one of the "but for" causes of Luppold's injuries.[2] The jury heard testimony and reviewed documents indicating that although Hanlon knew that Luppold had reported left foot pain and that his left foot was turning purple, she failed to perform a proper vascular examination or inform mid-level providers or an Emergency Department physician about his symptoms.[3] Moreover, multiple witnesses testified that Luppold's amputation would have been prevented if Hanlon had followed the proper procedures, and Luppold's expert witness testified that her conduct fell below the required standard of care. The jury was well within their right to credit the testimony of these witnesses. In sum, a reasonable jury reviewing the evidence could conclude that Hanlon's negligence caused Luppold's injury.

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[2] To the extent that Hanlon argues that the Court provided an erroneous causation instruction to the jury, the Court disagrees. The Court relied on model jury instructions that have been used in numerous trials.

[3] Contrary to what Hanlon argues, the fact that mid-level providers had access to a record of Luppold's symptoms does not invalidate expert testimony that Hanlon had a duty to actually report these symptoms to those providers.

I. Purported Court Errors

A. Expert Disclosure

"[O]ur rules of civil procedure require a party... [to disclose] the identity of each expected expert witness as well as `the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.' *Kace v. Liang*, 472 Mass. 630, 636 (2015), quoting Mass. R. Civ. P. 26(b)(4)(A)(i). Hanlon argues that the testimony of Nurse Smith ("Smith"), Luppold's expert on the standard of care, regarding "The 5 P's"[4] was not in Luppold's expert disclosure and therefore the testimony unfairly prejudiced her at trial. Defendants Memorandum at 7. The Court disagrees.

Luppold disclosed that Smith was expected to offer testimony that the accepted standard of care in Massachusetts required the average qualified nurse "to recognize and appreciate signs and symptoms of decreased circulation/perfusion... [and] to evaluate and assess extremity pulses as part of their patient assessment." Joint Pre-Trial Memorandum, Docket No. 40 at 8. Smith's testimony regarding "The 5 P's," which play a part in that evaluation, are within the "substance of the facts and opinions" properly disclosed by Luppold. As such, Luppold's expert disclosure was sufficient.[5]

B. Plaintiffs Closing Argument

A trial judge is vested with extensive discretion to deal with alleged improper closing arguments and may "take whatever action he thinks is necessary to cope with and control the situation and to safeguard the rights of the parties." See *Fialkow v. DeVoe Motors, Inc.*, 359

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[4] "The 5 P's" (pain, paresthesia, paralysis, pulse, and pallor) is a mnemonic device that nurses use to evaluate patient symptoms when assessing extremity pulses.

[5] At no point did Hanlon challenge Nurse Smith's qualifications as an expert to offer a standard of care opinion in this case. Therefore, to the extent Hanlon now argues that Nurse Smith's testimony was "unsupported" or "without a basis," such argument is without merit.

Mass. 569, 572 (1971) (finding trial judge's instruction that "neither the arguments of counsel nor their extraneous statements or remarks made during the progress of trial are evidence" was sufficient to deal with alleged improper statements made by lawyers during trial and closing argurneptg), Tscning instructions to the jury are among the corrective actions a trial judge may take to assuage prejudice caused by improper argument without resorting to the rare solution of ordering a new trial. *Id.*

Here, Hanlon takes issue with the closing argument made by Luppold's counsel in which he asked the jury to consider Nurse Hanlon's absence during trial and her perceived apathy towards the legal process as evidence that she was not taking the trial seriously and therefore did not take her job as a nurse seriously. Defendant's Memorandum at 9-10. She argues that the Court erred in failing to provide a curative instruction. This argument is without merit. The Court, in fact, provided the jury with such an instruction, informing them that the presence or absence of a party is not evidence and that the opening statements or closing arguments of the lawyers are not evidence. This instruction was sufficient to address any prejudice that may have arisen from the closing argument.[6]

C. Cross-Examination of Loucraft

The Supreme Judicial Court has stated that "unless admission of [settlement] evidence is relevant for some other purpose, no evidence of a settlement or the amount of the settlement shall be admissible." *Morea v. Cosco, Inc.*, 422 Mass. 601, 603 (1996); See Mass. Guide to Evid. § 408 ("evidence of a settlement to prove either liability or the amount of a claim" should

[6] Hanlon also argued at the motion hearing that the Court's failure to inform the jury of the reason Hanlon was not present for parts of the trial amounted to structural error. This argument is waived as it was not raised in Hanlon's papers. Even if not waived, the Court would conclude the argument fails because such a failure is not a structural error.

generally be excluded). Additionally, even if "evidence of a settlement, or the amount of a settlement, will bear on some issue other than damages... [it is] in the judge's discretion [to determine whether] it may be fair" to admit that evidence. *Id.* Likewise, Rule 411 provides that evidence that a persnn was nr was not insnrpd ngninst liability is not mmissihle nn the issue of negligence. See *Carrel v. National Cord & Braid Corp.,* 447 Mass. 431, 449; See Mass. Guide to Evid. § 411. While proof of liability insurance may be admitted to show bias, "discretion is reserved to trial judges to oversee where needed the character and dimensions of the proof... [in order] to avoid undue prejudice or confusion." See *McDaniel v. Pickens,* 45 Mass. App. Ct. 63, 66-67 (1998) (citations omitted). Hanlon argues that the Court should have allowed her to cross-examine Loucraft about the high/low agreement that he and Luppold entered into during trial as well as Loucraft's insufficient insurance coverage to prove his bias against Hanlon and undermine his credibility. This argument is unavailing.

First, Loucraft's trial testimony was consistent with his 2019 deposition testimony, which was given well before he entered the high/low agreement. Loucraft Dep., Exhibit C, at 83:1-10, 85:3-86:2, 112:7-15. This consistency indicates that his testimony was not impacted by the high/low agreement. Second, even before he entered the high/low agreement, Loucraft, as is typical of a co-defendant, had an incentive to shift the blame on to Hanlon for what occurred to avoid liability, a point that was likely not lost on the jury. Accordingly, Hanlon provides no compelling reason to stray from the prevailing principle that evidence of settlement agreements or liability insurance should not be admitted at trial.

D. Hanlon's statutory argument

During the motion hearing, Hanlon argued that the jury could not find her negligent as a matter of law because Nurse Hanlon's duty and standard of care are specifically defined by

statute/code and are different from the standard of care relied upon by Luppold's expert at trial. This argument is denied. Nurse Hanlon only raised this issue orally at the hearing of this motion rather than in her written motion nor did she reference any trial testimony pertaining to the "controlling statute or code_ Accordingly, this argument is considered waived,

II. Request for Rem ittitur

Finally, Hanlon argues that "in view of the evidence presented as to Plaintiff's damages, the jury's award was grossly excessive and should be reduced." Defendant's Memorandum at 18. Hanlon believes that the fact that Luppold did not present itemized medical bills and acknowledged having co-morbidities and a sedentary lifestyle proves that the amount awarded by the jury was "untethered to reality" and was "an effort to punish [Hanlon] rather than compensate [Luppold]" for his injuries. *Id.* Once again, the Court is unpersuaded.

It is well-settled that a jury award must be preserved unless "the damages awarded were greatly disproportionate to the injury proven or represented a miscarriage of justice." *Labonte* v. *Hutchins & Wheeler,* 424 Mass. 813, 824, quoting *doCanto v. Ametek, Inc.,* 367 Mass. 776, 787 (1975). A jury award will be considered excessive if the award is "so great... that it may be reasonably presumed that the jury, in assessing [the damages], did not exercise sound discretion... [but was] influenced by passion, partiality, prejudice or corruption." *Reckis v. Johnson,* 471 Mass. 272, 299 (2015) (citations omitted).

Here, the jury was tasked with determining the value of a leg to a thirty-five-year-old man. The Court agrees with Luppold that his self-admitted sedentary lifestyle or the current state of his health does not make the jury award greatly disproportionate to the injury proven or a miscarriage of justice. Whether Luppold was less active than the average individual or had co-

morbidities that may or may not impact his life expectancy, does not diminish the fact that he will never be able to walk on his own two legs again. Additionally, besides the physical trauma Luppold suffered, Luppold suffered and continues to suffer immense psychological trauma from 1';s injury While anv tvr of trauma is haul to cn lni m^net.rily, the rourt is c^rwinceti that the jury's award in this case was commensurate with Luppold's injuries. As such, Hanlon's request for remittitur is denied.

CONCLUSION AND ORDER

For these reasons, Hanlon's Motion is **DENIED.**

C. William Barrett
Justice of the Superior Court

November 22, 2023

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 1681CV01287

CTPVPN ᵀᵀ Tppnr
Plaintiff,
V.
CARLOS FLORES, N.P.
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N., AND
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N.,
MERRIMACK VALLEY EMERGENCY ASSOCIATES, INC.
Defendants.

12/20/2023

NOTICE OF APPEAL OF DEFENDANT SUSAN HANLON. R.N.

Please take notice that pursuant to Mass. R. App. P. 3 and Mass. R. App. P. 4, the Defendant, Susan Hanlon, R.N. ("Hanlon"), appeals to the Appeals Court for the Commonwealth of Massachusetts from the following:

1) The Judgment entered and docketed in this matter on March 28, 2023. This Judgment is appealed from in all respects insofar as it is adverse to Hanlon, including but not limited to the award of prejudgment interest relating to said judgment;
2) The Amended Judgment entered and docketed in this matter on March 30, 2023. This Amended Judgment is appealed from in all respects insofar as it is adverse to Hanlon, including but not limited to the award of prejudgment interest relating to said judgment;
3) All rulings and orders in the Court's Memorandum of Decision and Order on Defendant's Motion for Judgment Notwithstanding the Verdict, to Set Aside the Verdict and/or to Order a New Trial and for Remittitur, dated November 22, 2023, and entered and docketed on November 27, 2023; and

4) All other evidentiary, legal and all other rulings and orders made prior to, during, and after the final judgment in this action adverse to Hanlon.

Respectfully Submitted
Defendant, Susan Hanlon, R.N.,
Ry her attorney c%

/s/ J. Peter Kelley
J. Peter Kelley, Esq., BBO 559588
Susan J. Bowen, Esq., B.B.O. #561543
Bruce and Kelley, PC
83 Cambridge St., Suite 3B
Burlington, MA 01803
(781) 262-0690
pkelley@brucekelleylaw.com
sjbowen@brucekelleylaw.com

DATED: December 20, 2023

CERTIFICATE OF SERVICE

I, J. Peter Kelley, Esq., hereby certify that on this date I served a copy of the enclosed Notice of Appeal of Defendant Susan Hanlon, R.N. upon:

Robert Higgins, Esq.
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250 Summer Street
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jbello@morrisonmahoney.com
KIversonTufo@morrisonmahoney.com

By e-mailing a copy of the same to the above.

Signed under the pains and penalties of perjury this 20th day of December, 2023.

is/ J. Peter Kelley
J. Peter Kelley, Esq., B.B.O. #559588

Pages: 1-99
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD, *
*
Plaintiff, *
v. *
*
CARLOS FLORES, N.P., *
CHARLES LOUCRAFT, P.A., *
STEFANIE BUSA, R.N., *
SUSAN HANLON, R.N., *
CARLA CROCKER, R.N., AND *
MERRIMACK VALLEY EMERGENCY *
ASSOCIATES, INC., *
*
Defendants. *

* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Wednesday, March 8, 2023
Courtroom: 15

Meredith Pallier
Court Reporter

1 registration desk again Mr.
2 Luppold's report to that
3 individual that he has ankle
4 pain.
5 But when Mr. Flores
6 assessed Mr. Luppold, as is the
7 case with Mr. Loucraft, he takes
8 his own history, right, sits down
9 with a patient, tell me why
10 you're here, didn't rely upon the
11 history of others.
12 And once again, the focus
13 is on back pain. Mr. Luppold
14 says that he has chronic back
15 pain to Mr. Flores that has
16 persisted for years, two years.
17 He reports pain down his left leg
18 that is made worse with movement
19 and with bending over.
20 In addition, he also
21 reports that the muscle relaxant
22 that he had been given a week
23 earlier and had taken six days
24 had helped the back pain. And

1 **CERTIFICATION**

2

3 **I, MEREDITH POLLIER, A PER DIEM COURT**
4 **REPORTER, DO HEREBY CERTIFY THAT THE**
5 **FOREGOING IS A TRANSCRIPT FROM THE RECORD**
6 **OF THE COURT PROCEEDINGS IN THE ABOVE-ENTITLED**
7 **MATTER.**
8 **I, MEREDITH POLLIER, FURTHER CERTIFY**
9 **THAT I NEITHER AM COUNSEL FOR, RELATED TO**
10 **NOR EMPLOYED BY ANY OF THE PARTIES TO THE**
11 **ACTION IN WHICH THE HEARING WAS TAKEN AND**
12 **FURTHER THAT I AM NOT FINANCIALLY NOR**
13 **OTHERWISE INTERESTED IN THE OUTCOME OF THE**
14 **ACTION.**
15
16 **MEREDITH POLLIER, PER DIEM COURT REPORTER**
17 **PROCEEDINGS RECORDED BY STENOMASK.**
18
19 **TRANSCRIPTS PRODUCED FROM COMPUTER.**
20
21 *WeA..g.e2.¼* 7 g 1 10,ea&A, 8/30/2023
22 **MEREDITH POLLIER** **DATE**
23
24

Pages: 1-368
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD, *
*
Plaintiff, *
v. *
*
CARLOS FLORES, N.P., *
CHARLES LOUCRAFT, P.A., *
STEFANIE BUSA, R.N., *
SUSAN HANLON, R.N., *
CARLA CROCKER, R.N., AND *
MERRIMACK VALLEY EMERGENCY *
ASSOCIATES, INC., *
*
Defendants. *

* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Thursday, March 9, 2023
Courtroom: 15

Meredith Pollier
Court Reporter

1 know more.
2 MR. HIGGINS: Yup.
3 THE COURT: But I just
4 thought I'd let you all know.
5 And then another one needs to be
6 gone by 1 today, right?
7 MR. BELLO: On Friday.
8 THE COURT: On Friday,
9 and we don't have a problem with
10 that.
11 MR. HIGGINS: That's
12 easy.
13 THE COURT: All right,
14 good. Let's bring them in.
15 I got the instructions.
16 Did you all see the instructions?
17 MR. BELLO: I have not
18 had a chance to go over it yet,
19 Your Honor.
20 THE COURT: Okay. So,
21 these are like your first draft
22 to them?
23 MR. BELLO: Yeah.
24 MR. HIGGINS: Yeah.

1 THE COURT: Okay.
2 MR. KELLEY: I actually
3 had a wake myself last night,
4 so --
5 THE COURT: Oh, well, I'm
6 sorry for that.
7 MR. KELLEY: Yeah.
8 THE COURT: So, these are
9 basically based after the model.
10 MR. KELLEY: Yup.
11 THE COURT: If you guys
12 disagree on anything, I'm going
13 to use the model. That's your
14 default, anyway, if you guys
15 don't --
16 MR. HIGGINS: There was a
17 verdict slip that was submitted
18 as well by Mr. Kelley. I do have
19 issues with the verdict slip. We
20 can talk about it at some point.
21 MR. KELLEY: Okay, all
22 right.
23 THE COURT: Well, you
24 know, let's make sure we get that

THE COURT: Okay. Anything else you *guys* need to address with me now?

MR. KELLEY: Just one item, Your Honor, and it's in the context of the juror's situation makes it a little delicate, I guess, but I had raised with the Court earlier with respect to Nurse Busa and Nurse Crocker, if they could be excused tomorrow?

THE COURT: There's not a problem with that. I'm just going to say that, you know, do you want me to say anything? Quite frankly, I don't think they're even noticing who's here and who's not here.

MR. KELLEY: But I don't know that the jurors will not, so if the Court could simply say that Nurse Crocker and Nurse Buss have been excused from today's proceeding.

1 MR. HIGGINS: Well, I
2 object to that, Your Honor. You
3 know what, Mr. Luppold probably
4 wouldn't like to be here some
5 days too, but he is.
6 My feeling is you come,
7 you don't come, that's not for
8 the Court to comment on why
9 they're not here. They're not
10 here.
11 I won't raise that
12 they're not here. I won't point
13 to them. I won't do anything
14 like that, but I don't want a
15 comment that you've excused them
16 as if -- I have no idea why
17 they're not here. I don't know
18 the reasons.
19 THE COURT: Why don't I
20 leave it at this, I can
21 mention -- I can somehow mention
22 it and you're not -- in my
23 instructions on the law. You're
24 not to consider any *issues* with

respect to outside source of -- you know, sympathy, this, that, and the other thing, for either party whether someone was able to be here for every second or something.

I can make a quick mention of that.

MR. KELLEY: Yeah. The more generic is fine, Your Honor.

THE COURT: Yeah, I agree.

THE COURT: All right. So, why don't I just do something like that and you'll remind me to do it when we get to that time.

MR. KELLEY: Great. Thank you, Your Honor.

THE COURT: All right.

THE COURT OFFICER: Your Honor, Juror 4 would like to speak with you also.

THE COURT: All right. Bring her in. Him in. Whatever

1 **CERTIFICATION**

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17 **PROCEEDINGS RECORDED BY STENOMASK.**
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19 **TRANSCRIPTS PRODUCED FROM COMPUTER.**
20
21 _____ 9/30/2023
22 **MEREDITH POLLIER** **DATE**
23
24

Pages: 1-297
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD,
*
Plaintiff,
v.
*
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY
ASSOCIATES, INC.,
*
Defendants.
* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Friday, March 10, 2023
Courtroom: 15

Meredith Pollier
Court Reporter

1 BY MR. HIGGINS:
2 Q Good morning, sir.
3 A Good morning.
4 Q Can you introduce yourself to the
5 Court and members of the jury and
6 spell your last name, please?
7 A Sure. Charles Loucraft, L-O-U-C-
8 R-A-F-T.
9 Q Mr. Loucraft, you are one of the
10 defendants in this case, correct?
11 A Yes.
12 Q You are a physician assistant,
13 right?
14 A Yes.
15 Q And we have heard that referred
16 to as a midlevel provider, right?
17 A Yes.
18 Q And you were working in the
19 emergency department as a
20 midlevel provider on March 7th,
21 2015, when Mr. Luppold presented
22 to Lowell General, correct?
23 A Yes.
24 Q And that was -- Lowell General

1 Q And then there's another side
2 called the ambulatory care,
3 right?
4 A Yes.
5 Q And the core side is staffed by
6 nurses and physicians, correct?
7 A Yes.
8 Q And the ambulatory care side,
9 where you were, is staffed by at
10 least one nurse and a midlevel
11 provider like yourself, right?
12 A One or two, yes.
13 Q One or two. There are not
14 doctors in the ambulatory care
15 side?
16 A Not usually.
17 Q But they are available to you if
18 you have any questions, right?
19 A Yes.
20 Q And not only are they available
21 to you, but you, as a physician,
22 assistant have been encouraged by
23 providers, doctors, that if you
24 have any questions, please do let

they're there, right?
A Yes.
Q And that allows you to say, hey, you know, you complained of this when you arrived, let's talk about that. That's kind of how it would go, right?
A Sometimes.
Q Okay. If a triage nurse *sees* something that *is* concerning, you, as the provider, would expect that nurse to get up and come in and tell you, right?
A Yes.
Q No question about that, right?
A Correct.
Q It's not a very far walk from the triage desk to where you are, right?
A No.
Q And the proper way to do things in an emergency room is to communicate and if there is a serious condition, come back and

say you got a patient coming in
but they have X condition, I just
want you to be aware of that.
That's how it should work, right?
A Yes.
Q That's what's expected, right?
A Yes.
Q That's what you as the provider
would expect, right?
A Yes.
Q And in this case, that triage
nurse was Carla Crocker, right?
A Correct.
Q You knew Ms. Crocker, right?
A Yes.
Q And if you have a patient like
Mr. Luppold who comes in with a
complaint, either by exam or by
report, that his left foot is
cool to the touch, that is
information you would expect to
be told, right?
A Yes.
Q Is there any question about that,

"back pain," do you see that?
A Yes.
Q Now, that's written in your note. You understand, do you not, that when Mr. Luppold came in, he told the first person that he saw that his left foot -- he had left the reason for his visit was left foot pain, turning purple. You understand that, do you not?
A That is a registration person.
Q Sure.
A That is not a healthcare provider.
Q Understood. My only question is, he came to the emergency department for a reason, right?
A Correct.
Q And when he walked in and they said why are you here, he told them "foot pain, turning purple," right?
A Yes.
Q Okay. So, you, as a provider,

1 record no doctor ever saw him,
2 right?
3 A Most likely no.
4 Q Well, you know from this record
5 there is no reference to a doctor
6 seeing him, right?
7 A Correct.
8 Q Okay. And so, this is your note
9 and right in it is contained that
10 complaint of left foot cool to
11 touch, right?
12 A Correct.
13 Q Mr. Loucraft, there is no
14 question, you have already told
15 us, that triage nurses have an
16 obligation to tell you certain
17 things, right, if they're
18 serious?
19 A Yes.
20 Q But you also have an independent
21 obligation as the provider,
22 right?
23 A Yes.
24 Q And one of those obligations is,

1 you're obligated to look at the
2 triage note, are you not?
3 A Yes.
4 Q Did you do that?
5 A I don't recall if I did or not.
6 Q Well, let's assume for a second
7 you didn't.
8 A Okay.
9 Q That was below the standard of
10 care expected of you, wasn't it?
11 A Yes.
12 Q No question about that, right?
13 A Correct.
14 Q And if you did, then you would
15 have been aware of cool to touch,
16 right?
17 A If I looked at the note, yes.
18 Q And that would have required you
19 to get an ultrasound, right?
20 A Most likely. I examine the
21 patient first. I have to examine
22 the patient and see.
23 Q Understood.
24 A Because things happen and

1 scenarios. If you didn't look at
2 it, you fell below the standard
3 of care expected of you. You've
4 agreed to that, right?
5 A Yes.
6 Q Okay. If you did look at it,
7 then you fell below the standard
8 of care in not getting an
9 ultrasound, right?
10 A I didn't examine the patient
11 before this note.
12 Q Sir, I asked you earlier --
13 A Yes.
14 Q -- very clearly, that if a
15 patient complains of a foot that
16 is cool to touch, if that's their
17 complaint, that requires an
18 ultrasound, right?
19 A Most likely.
20 Q Because, Mr. Loucraft, let's just
21 use patients can say my foot is
22 cool to touch, but because they
23 have perfusion, they still have
24 blood flow, _-

A Correct.
Q -- it may wax and wane, right? It may be cool and then other times it may be warmer, it may be cool, it may be warmer. That's not uncommon, right?
A That is what's in the body of my chart, is normal peripheral perfusion, which means that.
Q Just try to stick with me on this.
A I am.
Q Okay. It can fluctuate, right?
A Yes.
Q But that doesn't mean that there's not a clot, right?
A It doesn't mean that there is, it doesn't mean that there isn't.
Q Right. You have to work it up to see if there is?
A Yes.
Q Okay. So, let me go back to my question, sir. If, in fact, you did look at the triage note or

1 if, in fact, your note that's
2 contained right here, --
3 A Yeah.
4 Q where it says left foot cool
5 to touch in your note, if you
6 were aware of that either by
7 reading the triage note or
8 reading your own note, you would
9 agree that not getting an
10 ultrasound fell below the
11 standard of care expected of you?
12 A Like I said, I am not sure if I
13 read the note -- if I read the
14 nurse's chief complaint.
15 Q Okay. I'm going to just try to
16 -- I'll grant you that you're not
17 sure.
18 A Okay.
19 Q I'm giving you two scenarios, Mr.
20 Loucraft. One is you didn't read
21 the note. One is you didn't read
22 it. There is a triage note
23 there, you didn't read it. We
24 have talked about this, you're

1 obligated to read it, right?
2 A Yes.
3 Q Okay. So, that's one scenario,
4 you didn't read it. That was
5 wrong, right?
6 A Correct.
7 Q The second scenario is you did
8 read it. You were wrong in not
9 getting an ultrasound for that
10 complaint, weren't you?
11 A I wouldn't say wrong. Again, I
12 have to examine the patient. You
13 have to examine the patient.
14 Q I understand that, sir. And what
15 you know as a PA is that if you
16 examine a patient and their foot
17 at that moment feels warm, it
18 does not, under any circumstance,
19 rule out rule out what they
20 complained of, that it was cool
21 to touch.
22 A And the foot was warm.
23 Q Yeah. If your exam -
24 A That's what I found in my -- you

1 triage note.
2 A No, I --
3 4 Except the triage note is
4 contained in your note, isn't it?
5 A Correct.
6 Q It's there, signed off by you,
7 right?
8 A Right.
9 Q When you sign off on a record,
10 sir, it means that you are
11 agreeing to the information in
12 the record, right?
13 A Correct.
14 Q Mr. Luppold needed an ultrasound
15 that day, didn't he?
16 A I don't -- not by my examination,
17 no, he did not, or else I would
18 have gotten it.
19 Q Well, you certainly should get
20 it, right?
21 A In hindsight, absolutely, but not
22 by my note. Again, his
23 complaints were not consistent
24 with a clot.

that can have devastating consequences, right?

A Agreed.

Q Losing a leg would be a devastating consequence, wouldn't it?

A Yes.

Q In this case, sir, you know that, for whatever reason, there was not proper communication between you and the nurses that day, such that Mr. Luppold was allowed to leave without an ultrasound, right?

MR. KELLEY: Well, objection.

THE COURT: Overruled.

BY MR. HIGGINS:

Q You'd agree with that, right?

A I'd agree with -- based on my exam, I did not think he needed an ultrasound.

Q You've said that now several times, sir.

1 Q -- and you follow along.
2 A Okay.
3 Q So, let me just take it. So, on
4 page 112 --
5 A Yes.
6 Q -- you were asked a question.
7 And it *says* -- question at line
8 seven.
9 Question: "You're not
10 suggesting --"
11 MR. KELLEY: For
12 completeness, Your Honor,
13 beginning at line 21 of 111?
14 MR. HIGGINS: I'll read
15 the whole deposition, if they
16 want.
17 MR. KELLEY: No, just
18 that portion.
19 THE COURT: Why don't we
20 let him ask the question first,
21 and then I'll understand whether
22 it's complete or not.
23 MR. HIGGINS: Of course.
24 BY MR. HIGGINS:

Q Tell me if I'm reading this correctly. Starting on page 111, line 21.

A Okay.

Question: "Do you have any knowledge, from looking at this record, when it was that Mr. Luppold complained of left foot pain and left foot turning purple?"

Answer: "I don't. Again, it wasn't -- by my note, there was no indication that he spoke to me at all about his feet. And by my records, I did pulses and skin checks and that would indicate to me if there was a problem with color in his feet."

Did I read that correctly?

A Yes.

Question: "You're not suggesting by that answer that

what is listed here in all caps, left foot pain and turning purple, you're not suggesting that that wasn't -- that was -- that that information wasn't known by somebody that day?"

Your answer was: "Somebody did know that information."

Question --

MR. KELLEY: Well, apparently. You're reading --

THE COURT: No, no, no. Just an objection. Just an objection. And I'm happy to see you at sidebar if you'd like.

MR. HIGGINS: I left out a word and I didn't mean to.

THE COURT: Okay. Okay.

MR. HIGGINS: He's right.

BY THE WITNESS:

A Apparently.

Q Somebody did know that apparently.

1 Question: "Can you tell
2 from this note who that was?"
3 Answer: "Susan Hanlon."
4 A Okay.
5 Q Did you answer directly in your
6 deposition under oath who was
7 apparently aware of that
8 information?
9 A Yes.
10 Q Miss Hanlon?
11 A Yes.
12 Q That's what you *said,* right?
13 A Yes.
14 Q And you said that, sir, because
15 that is true, isn't it?
16 A Yes.
17 Q Okay. Did Ms. Hanlon come to you
18 in the emergency room and say to
19 you he's got a left foot pain and
20 turning purple?
21 A No.
22 Q Are you sure of that?
23 A By my note, I'm sure of that.
24 Q If that had been brought to your

1 an example we have right in front
2 of us, of inflammation that is
3 serious and concerning about a
4 patient that was never followed
5 up, in large part, because the
6 communication was not there
7 amongst the providers, right?
8 A It could have been better.
9 Q Well, it needed to be better,
10 right?
11 A Yes.
12 Q All three of you; you, Ms. --
13 Nurse Crocker, and Nurse Hanlon,
14 all three of you failed Mr.
15 Luppold, didn't you?
16 A I didn't say that.
17 Q I know you didn't say that. I'm
18 asking you.
19 A No. I told you, by my
20 examination, back to that, when I
21 discharged him, I believe that
22 what I did was the right course
23 of action for him.
24 Q Let me break it down then --

1 you?
2 A I again, I wouldn't say failed
3 because the -- hindsight, if you
4 want to say failed, it's -- it's
5 a tough word.
6 Q No, I'm not -- I'm not suggesting
7 in hindsight. Prospectively, at
8 the time -- and I don't want to
9 keep going over it, sir.
10 A Yeah.
11 Q But each one of you -- you told
12 me each one of you fell below the
13 standard of care. You not
14 looking at the triage note,
15 right?
16 A I should have done a better job
17 at that.
18 Q When you say "should have done a
19 better job," that is a critical
20 part of this case because that
21 triage note gives information
22 that he has a vascular problem,
23 right?
24 A Yes.

1 Q Ms. Crocker had information that
2 he had a vascular problem, right?
3 A Yes.
4 Q Nurse Hanlon had information that
5 he had a vascular problem, right?
6 A Yes.
7 Q All of those -- if any one of
8 those had done their job, most
9 likely Mr. Luppold would have had
10 an ultrasound and a clot would
11 have been diagnosed. That's
12 true, isn't it?
13 A Again, it goes back to my -- my
14 findings for him were not for a
15 clot.
16 Q Your findings, sir, are not an
17 ultrasound, are they?
18 A I'm sorry?
19 Q Your findings are not an
20 ultrasound, are they?
21 A Correct.
22 Q You don't get to substitute your
23 findings for a patient that needs
24 an ultrasound. They get an

Q And so far as the role you have the role the nurses have, nurses do not enter medical orders for patient treatment, correct?
A No, not usually.
Q Yup. And nurses do not order or request medical consults, vascular surgery consult for a patient, correct?
A No. They make the phone calls, sometimes, to do that.
Q They facilitate --
A Correct.
Q -- they don't decide it's needed and order it?
A Correct.
Q Those orders are in the province of your obligation and responsibility to the patient, correct?
A Correct.
Q In fact, you are the decision maker for the care that a patient will receive in the emergency

1 department, correct?
2 A Yes.
3 Q All on you to make those
4 decisions?
5 A Yes.
6 Q And included in that as well is
7 you make a decision for a patient
8 that you're seeing in ambulatory
9 care whether that patient
10 requires to be seen by a
11 physician, an M.D.?
12 A Yes.
13 Q Something you do from time to
14 time?
15 A Yes.
16 Q Yup. Your decision whether
17 that's necessary, true?
18 A Yes.
19 Q And no inability in the instance
20 of Mr. Luppold that you could
21 have sought out a medical doctor,
22 a physician, to evaluate him,
23 correct?
24 A I'm sorry. Would you repeat that

1 right?
2 A Yes.
3 Q And we know the timeline we're
4 speaking of here, that
5 information was available to you
6 within about a half hours time of
7 when you saw the patient, right?
8 A Correct.
9 Q Nurse Crocker took the
10 information, chief complaint,
11 available to you, and within half
12 an hour you're seeing the patient
13 with the obligation to know what
14 she took is the chief complaint,
15 right?
16 A Correct.
17 Q And you didn't do it or you don't
18 remember doing it?
19 A I don't remember.
20 Q And I think you've told the jury,
21 you have no particular memory of
22 Mr. Luppold that evening of March
23 7th, correct?
24 A Correct.

with creation of a medical record is on the screen at the time of the visit, true?

A Correct.

Q All right. And as well, there are certain documents that only a provider physician, PA, NP can access?

A Yes.

Q And certain other documents that only a nurse can access, correct?

A (Nonverbal response).

Q And I was asking you before we took the short break about the triage process and that you weren't in triage for Mr. Luppold, don't know what was going on in triage for Mr. Luppold's encounter with Nurse Crocker, true?

A True.

Q All right. And, as well, in terms of, you know, workflow within the emergency department,

1 how many different rooms or bays
2 were available in the ambulatory
3 care side at Lowell General
4 Hospital?
5 A There's six -- six beds and there
6 is a sitting area for two
7 providers, a nurse and a tech or
8 a nurse and -- or two nurses.
9 Q And I think you told the jury
10 earlier this morning that to your
11 memory, there was one nurse on
12 the shift that you were working
13 when you encountered Mr. Luppold,
14 true?
15 A I don't recall that, but --
16 Q All right.
17 A -- if I said it.
18 Q Okay. But in any event, you're
19 oftentimes with a patient, a
20 nurse may be with another
21 patient, you then go in to see
22 the patient the nurse was with as
23 the nurse goes off to see a
24 different patient, true?

1 MR. KELLEY: I apologize,
2 Your Honor. Yes, 49.
3 THE COURT: I think I
4 just didn't hear it right.
5 MR. KELLEY: Forty-nine,
6 yes.
7 THE COURT: Forty-nine.
8 Okay. Thanks. I'm sorry.
9 MR. KELLEY: Yup. Are we
10 all there?
11 BY MR. KELLEY:
12 Q And so, you were directed to that
13 visit reason?
14 A Yes.
15 Q So that's not a new clinical
16 assessment, correct, as you have
17 told the jury
18 A No, it's not.
19 Q -- part of the information came
20 from the registration?
21 A That auto-populated from the
22 original registration.
23 Q In fact, we know that from
24 turning back to page 38. And let

me know when you're there.
A Sure.
Q All set?
A Yes.
Q Yeah. We *see* at the top "admit *date/time*" and we have "03/07/2015 17:26," military for 5:26 p.m.?
A Yes.
Q And then just below the midpoint on the left margin, "left foot pain and turning purple?"
A Yes.
Q And then again on 49, it appears all caps --
A Yes.
Q -- as it does in the registration page. And just briefly, Mr. Loucraft, when you had your deposition taken, as you have been directed to by Mr. Higgins, you had certain documents that were marked as an exhibit for your deposition. Do you recall

1 uppercase?
2 A Yes.
3 Q And then if we turn just one page
4 from 76 forward to page 75, do
5 you see for chief complaint,
6 "left ankle pain, atraumatic?"
7 A I do.
8 Q And then turning back to 76,
9 again that entry from triage
10 A Yes.
11 Q -- appears, "left ankle pain?"
12 And then just one other
13 reference. At page 65, "Patient
14 presents with back pain," under
15 the history of present illness at
16 the bottom of page 65.
17 A Yes.
18 Q And then again, turning back to
19 76, "visit reason," back pain
20 appears?
21 A Yes.
22 Q All right. So, again, we see the
23 carryover from registration
24 reason for visit, chief complaint

from triage, and then history of present illness complaint, correct?

A Yes.

Q And that supports, in your consideration and familiarity with the EMR, that these visit reasons are drawn and populated into the depart summary?

A Yes.

Q And so, in testimony earlier, you were not suggesting to the jury that Nurse Hanlon learned of that complaint to registration on March 17th, independent of the registration, in other words, she made an observation of her own, you're not suggesting that to the jury, correct?

A Would you repeat that question one more time, I'm sorry?

Q Sure. As we have just gone through the documentation --

A Right.

1 Q -- and we see where the
2 information comes from, and I'm
3 drawing your attention
4 particularly to March 7th,--
5 A Right.
6 Q -- in that notation, you're not
7 suggesting to the jury that it
8 was Nurse Hanlon that made an
9 observation of foot turning
10 purple when she discharged the
11 patient, correct?
12 A No, I'm not making that
13 observation.
14 Q Or you're not making that
15 statement to the jury?
16 A The statement of?
17 Q I can redo it if there's any
18 confusion. In other words,
19 you're not saying to the jury,
20 after you decided in your role as
21 the decision-maker to discharge
22 Mr. Luppold, --
23 A Right.
24 Q -- that it was then observed by

A No, they -- it's -- they're trying to get patients out of a busy emergency room, so sometimes time can be an issue with that, but, ultimately, we put in the paperwork for this, and the discharge instruction goes to the nurse, and then the nurse has the patient sign it, and the patient leave.

Q All right. And that's what we *see* on page 40 and page 64, right?

A Yes.

Q That it was done in the proper and usual course with respect to Mr. Luppold's discharge?

A Yes.

Q So far as nursing responsibility on your order that he may be discharged?

A Yes.

MR. KELLEY: If I may have a moment, Your Honor?

1 THE COURT: Okay.
2 MR. KELLEY: That's all I
3 have. Thank you.
4 THE COURT: All right.
5 Thank you. Anything? Anything
6 else?
7 (REDIRECT EXAMINATION OF CHARLES
8 LOUCRAFT, P.A.)
9 BY MR. HIGGINS:
10 Q Mr. Loucraft, at any point --
11 MR. HIGGINS: Well,
12 strike that.
13 BY MR. HIGGINS:
14 Q You have sat on that stand today,
15 and as the PA in this case, you
16 have accepted some of the
17 responsibility for not knowing
18 the information about Mr.
19 Luppold, have you not?
20 A Yes.
21 Q But is it all on you?
22 A No.
23 MR. KELLEY: Well,
24 objection, Your Honor, to that

1 form.
2 THE COURT: Overruled.
3 BY MR. HIGGINS:
4 Q It's not, is it?
5 A Nope.
6 Q There are nurses that work with
7 you, correct?
8 A Correct.
9 Q They are medical providers
10 trained, are they not?
11 A Correct.
12 Q They've gone to school, they've
13 got a degree, they've taken a
14 licensing test, and they've been
15 hired to work in an emergency
16 department, right?
17 A Correct.
18 Q They have responsibility along
19 with you, correct?
20 A Yes.
21 Q And you told us earlier, all of
22 you had a responsibility to Mr.
23 Luppold, right?
24 A Yes.

1 by you, but that is -- it says
2 performed by Susan Hanlon,
3 correct?
4 A Yes.
5 Q Sir, how far, physically, is it
6 from the triage desk to where you
7 did your work in the ambulatory
8 care?
9 A 20 feet.
10 Q 20 feet. Maybe from me to you?
11 A Separated by doors. Yes.
12 Q So, if I walk, I get about
13 halfway there, there's some doors
14 to go through?
15 A You have to go through a locked
16 door.
17 Q Right.
18 A You buzz in.
19 Q Whatever it is.
20 A Correct.
21 Q But it's 20 feet?
22 A Correct.
23 Q This far probably?
24 A Yes.

1 A I did not *assess* him. I was the
2 only nurse over in the ED. I,
3 obviously, was with other
4 patients because of my DA(R)P
5 note under the -- I don't have
6 the handbook. I think it's page
7 60 in my DA(R)P note, I said that
8 he was assessed by the PA, so
9 that means that I didn't see him
10 until discharge.
11 Q Ms. Hanlon, you were assigned to
12 be his nurse, were you not?
13 A Yes, but I did not see him when
14 he first got there.
15 Q We're going to get to whether you
16 saw him --
17 A Okay.
18 Q -- and what you did, but my
19 question simply, every patient
20 that comes to the emergency
21 department sees a triage nurse,
22 right?
23 A Yes.
24 Q Every patient gets assigned a

1 A Right.
2 Q And you know, Ms. Hanlon, from
3 working in the emergency room,
4 that if there's any concerns of
5 lack of blood flow, the first
6 test that one gets is an
7 ultrasound. I know you don't
8 order it, but you've seen it many
9 times?
10 A Yes.
11 Q And especially if you talk about
12 a change in color, you know, Ms.
13 Hanlon, that in any of those
14 complaints, that patient gets an
15 ultrasound to look for a clot,
16 right?
17 A Not always. Sometimes they have
18 other reasons that their foot is
19 purple or discolor.
20 Q Did Mr. Luppold have any of those
21 reasons?
22 A I don't know because I didn't
23 assess him, I just discharged. I
24 went over his discharge

instructions with him.
Q You --
A So, I never -- I didn't see him that first day.
Q You know that there are no other reasons for his foot to be purple in this case, don't you?
A Well, now that I know it happened, yes, but before, no, I --
Q Okay.
A I wouldn't know.
Q Well, you know from looking at the records in this case, Ms. Hanlon, that, when you say there could be other reasons, he didn't have those other reasons, right?
A According to the assessment, no.
Q So, going back, this is a patient, Mr. Luppold, who needed an ultrasound, right? We can agree to that?
A That's up to the physician assistant, that would not be

my --

Q Okay. Well, -_

A That's not even in my scope of practice. I cannot order tests. It's up to the provider.

Q I'm not suggesting you order them, but you are in emergency departments and you're aware of when tests are ordered for patients of yours, right?

A Yes.

MR. KELLEY: Can we be seen briefly, Your Honor?

THE COURT: Sure.

(SIDEBAR CONFERENCE)

MR. KELLEY: Your Honor, the form of the question, the nature of the question, is asking for a medical opinion from the nurse.

THE COURT: Well, I think it was -- I don't know if it's a medical opinion. I think the last question was a good question

1 A Right.
2 Q This is a document that you had,
3 right?
4 A Right.
5 Q No question about that, right?
6 A Depart summary, yeah, it's when I
7 -- he's on the tracking board,
8 and I have to -- when I have to
9 take him off the tracking board
10 that's called the depart summary.
11 It just means that I gave him his
12 instructions and then I
13 discharged him.
14 Q You authenticated this record
15 which means -- that means that
16 you signed off on it, that you
17 had done this, right?
18 A On the discharge, yes.
19 Q Yeah?
20 A Yeah.
21 Q Okay. And on this depart
22 summary, we can all look at it
23 right here. Right there it says,
24 "Left foot pain and turning

1 **CERTIFICATION**

2

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Pages: 1-160
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD, *
*
Plaintiff, *
v. *
*
CARLOS FLORES, N.P., *
CHARLES LOUCRAFT, P.A., *
STEFANIE BUSA, R.N., *
SUSAN HANLON, R.N., *
CARLA CROCKER, R.N., AND *
MERRIMACK VALLEY EMERGENCY *
ASSOCIATES, INC., *
*
Defendants. *

* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Wednesday, March 13, 2023
Courtroom: 15

Meredith Pallier
Court Reporter

1 A No.
2 Q Did you ask or request for a
3 second opinion?
4 A No.
5 Q After being evaluated by Mr.
6 Loucraft, you then saw Nurse
7 Hanlon and it was Nurse Hanlon
8 who discharged you?
9 A Yes.
10 Q And you told us on direct
11 examination that now, having seen
12 Nurse Hanlon in the courtroom,
13 you recognize that she was the
14 individual that gave you the
15 discharge papers, reviewed the
16 discharge papers and then
17 essentially sent you home?
18 A Yes.
19 Q And is it your testimony that you
20 recall telling Nurse Hanlon
21 during that evaluation that your
22 foot had been purple? Do you
23 recall discussing that with her?
24 A Yes.

Q All right. What do you recall in that regard?
A Because when she had gone over the discharge paperwork and she said there was no testing done, I had said, you know, "My foot's still swollen purple, does that make a difference?" And she said, "No, we're going to discharge you."
Q Okay. Did you have any discussions with Nurse Hanlon about whether she had conveyed that information to anyone else?
A No.
Q Let me ask you a little bit about testing. Mr. Higgins asked you a question about a note in the record that makes reference to there having been an ultrasound done. Have you seen that record?
A I haven't.
Q Okay. Are you aware of the fact that the record references you

the transcript. Did I read that correctly?

A Yes.

Q And at page 38 of the deposition, and let me know if I misread it, "So, after you were seen by this physician, what happened after that?"

"He gave me medication, I went to the pharmacy, filled it and went home."

Did I read that correctly?

A Yes.

Q Reading on, "Was there a different person who discharged you?"

"I believe so," was your answer, correct?

A Yes.

Q "Do you remember who it was?"

"Answer: I don't remember specifically."

"Question: Was it a man

or a woman?

"A woman, I believe."

Next question, "And did she say anything specific to you?"

"Answer: No."

Did I read that correctly?

A Yes.

Q You didn't say I don't recall, didn't, on further reflection, change that answer?

A No.

Q Your sworn testimony, she said nothing specific to you, correct?

A Not that I recall.

Q Yet, today, eight years later, you gave some very specifics about that interaction on discharge, didn't you?

A Yes.

Q Now, Mr. Luppold, with respect to triage, do you recall the questions earlier this morning

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Pages: 1-247
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD,
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Plaintiff,
v.
*
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY
ASSOCIATES, INC.,
*
Defendants.
* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

TRIAL TRANSCRIPT

Wednesday, March 15, 2023

Meredith Pollier
Court Reporter

1 deposition stuff.
2 The verdict slip looks
3 fine. I don't know where -- but
4 again, I'm always open to
5 criticisms on those.
6 MR. KELLEY: And I don't
7 know if it's in there, Your
8 Honor, there are some other
9 issues, but one that comes
10 immediately to mind is there was
11 a discussion about putting in
12 some comment about parties not
13 being present on occasion.
14 THE COURT: Yeah. Yeah.
15 I mean, honestly, I think -- I'm
16 not sure we want to point it out
17 at this stage because the people
18 have been coming and going, and I
19 don't really think they've been
20 noticing whether people have been
21 coming and going.
22 And also the weather and
23 the scheduling, I've gone over
24 things at nauseum with them about

1 it's the court's issues and
2 things like that. So, I'm not
3 even sure they've noticed. But
4 it's up to you --
5 THE COURT OFFICER: All
6 rise.
7 THE COURT: -- if you
8 want me to do it, I'm happy to
9 figure it out.
10 THE COURT OFFICER: Jury
11 in.
12 (JURY ENTERS)
13 THE COURT OFFICER: Watch
14 your step. Watch your step. And
15 watch your step.
16 THE COURT OFFICER: Thank
17 you. You may be seated.
18 Resume case on trial.
19 THE COURT: All right.
20 Good morning, everybody. Thank
21 you all for being here on time.
22 I hope you got here okay.
23 Some of you who live
24 inside of 495 may have had no

this case from the very beginning, right?

A Yes.

Q Can you just make sure you pull the microphone

A Oh, sure.

Q No, that's okay. It's just -- I want to make sure that everybody back here can hear you.

And if we were to think of, and we haven't really talked a lot about March 13th. We talked a little bit about it in this case, but you were the provider on March 13th, 2015 working in the emergency department when Mr. Luppold came in, right?

A That is correct.

Q Okay. And if we think of that role, you were the mid-level provider assigned that night, right?

A Yes.

Q And you were providing the same role and acting in the same role and providing the same type of care that Mr. Loucraft was six days before, right?
A I was.
Q In fact, both of you worked for the same group that assigns you to Lowell General, right?
A Yes.
Q Merrimack Valley Emergency -
A Associates.
Q -- Associates.
So, you both worked for the exact same group, right?
A Yes.
Q Okay. And if we think about that day, the 13th, you were working most likely a 1:00 in the afternoon to 1:00 in the morning shift, right?
A Actually, I confirmed. It's 12:00 to 12:00.
Q Okay. In your deposition you

Q Well, it's why the patient is there, that's what they are saying, why I'm coming to your emergency department, right?
A So, just because the patient is telling the triage nurse doesn't mean when they get out to our side that they say something else. That's happens a lot.
Q Well, it doesn't mean that their information that they told the triage nurse is wrong, right?
A Sometimes, it is.
Q Well, the only way to know that is to ask about it, right?
A If I knew about it, yes.
Q Well, no, you just said sometimes it is. The only way to know whether their complaint is just made up is to ask them, hey, you told the triage nurse X and is that true? That's how you figure out whether what they're saying is true or not, right?

A No, I think. So, again, personally, the way I practice, is I would get that information from the patient.

Q Okay. So, sir, there is a triage note that you know, you know you are obligated to read, right?

A I'm not sure that I'm obligated to read it.

Q You don't think that you are obligated to read the triage note?

A So, again, I'm not sure if I am or I am not.

Q Well, sir, you've now told me on three or four occasions you're not sure what the standard of care requires of you. How can you possibly practice in an emergency department if you don't know what the standard of care requires of you?

Answer that. How can you possibly do that?

A It's Flores.
Q -- I mean, Mr. Flores, I'm sorry. Mr. Flores, are you telling us that sometimes you skip the part of reading a triage note from a nurse?
A Yes.
Q Skip right over it sometimes?
A It's not that I skip over it. It's that I don't look at those notes.
Q Yeah. So if you don't look at triage notes, then you -- at least from a written standpoint, you have no way of knowing what the patient told the triage nurse when he came in, right?
A That is correct.
Q Okay. And we heard about, in this case, can we agree that at no point in time did Ms. Buss, the triage nurse, ever come back and talk to you about Mr. Luppold's atraumatic, severe left

right?
A Yes.
Q And you had no idea that Mr. Luppold had foot pain as a complaint when he arrived that day, right?
A Correct.
Q So let's just talk about that. If a patient complains of left ankle pain and foot pain, those are serious complaints, are they not?
A They could be.
Q Especially add to that when asked, he hadn't suffered any trauma. Right, he hadn't twisted his ankle. He hadn't banged it. He hadn't dropped something on it, whatever that may be. When you add in atraumatic to foot pain and left ankle pain that's severe, that is concerning, is it not?
A It could be.

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Pages: 1-352
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD,
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Plaintiff,
v.
*
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
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SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY
ASSOCIATES, INC.,
*
Defendants.
* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Thursday, March 16, 2023
Courtroom: 15

Meredith Pollier
Court Reporter

1 patient on the day. So, yes,
2 this is hindsight. That's any
3 review.
4 Q So, as of the time that you first
5 looked at the case, Mr. Luppold
6 underwent an examination, an
7 ultrasound, and a CT and,
8 frankly, his amputation at that
9 point that diagnosed the clot,
10 true?
11 A Correct. Absolutely.
12 Q And can we agree that the three
13 nurses who treated the patient at
14 the time, obviously they didn't
15 think that he had a clot?
16 A They what?
17 Q They did not think that he had a
18 clot?
19 A The nurses?
20 Q Yes.
21 A The nurses did not think that?
22 Q Yes.
23 A I'm not sure that that can be
24 stated. The nurses don't do a

1 diagnosis, so there is no comment
2 that they thought one way or the
3 other.
4 Q There is no documentation in the
5 record that they thought the
6 patient had a clot, true?
7 A There is no documentation that
8 they thought there was a clot,
9 but they wouldn't document --
10 they documented the coolness, the
11 pain, so --
12 Q Okay. And there is no
13 documentation and no indication
14 that Mr. Flores or Mr. Loucraft
15 thought that he had a clot, true?
16 A Clearly.
17 Q Okay. And we know from Dr. Brew,
18 right, by the time the patient
19 showed up to Dr. Brew, Dr. Brew
20 questioned whether the patient's
21 complaints, even with a mottled
22 leg and a completely cool left
23 leg, he thought the patient's
24 presentation was consistent with

1 Q Yeah. And had an obligation to
2 be aware of it, and I think we
3 looked at Mr. Loucraft's note and
4 we see and I think you said,
5 well, the HPI follows the chief
6 complaint, right?
7 A That's correct. Yes.
8 Q Yeah. So, we do see that that
9 information was available to Mr.
10 Loucraft, correct?
11 A I would assume so, yes.
12 Q Yeah. And again, so far as any
13 decision-making, as we have
14 already established with the
15 jury, particular to an
16 ultrasound, that was something
17 for Mr. Loucraft to decide, not
18 Nurse Crocker, agree?
19 A That's correct. Nurses don't
20 order the tests.
21 Q Right. And as well, for March
22 13th, if we look at it, we would
23 see *again* in the note of Mr.
24 Flores, that Mr. Flores had the

1 obtained by Nurse Hanlon was all
2 available for both Mr. Loucraft
3 on March 7th and Mr. Flores in
4 March 13th. We can agree to
5 that, true?
6 A Correct.
7 Q And certainly, you know, we have
8 heard about care being provided
9 in an emergency department and
10 all expected to provide good care
11 to patients, right?
12 A Correct.
13 Q Yeah. There are, however,
14 distinct roles that are played by
15 providers in an emergency
16 department, can we agree?
17 A Yes.
18 Q Yeah. And, in fact, there are
19 what's called scope of practice
20 that attach to different
21 providers, right?
22 A Correct.
23 Q And a midlevel, as we're talking
24 about, a PA, an NP, their scope

1 of practice is, in fact,
2 different from nurses, right?
3 A That's correct.
4 Q Particularly in the essence of
5 caring for a patient, making
6 orders for a patient?
7 A Correct.
8 Q Determining whether a
9 consultation is required for a
10 patient?
11 A Correct.
12 Q The essence of that is the care
13 for a patient and that is outside
14 of the nursing scope of practice,
15 isn't it?
16 A That's correct.
17 Q So, there is nothing again
18 turning back to March 7th, there
19 is nothing that Nurse Crocker
20 knew, as far as what we see in
21 the record, about Mr. Luppold
22 that Mr. Loucraft didn't know or
23 should have known about him; is
24 that fair to say?

1 CERTIFICATION

2

3 I, MEREDITH POLLIER, A PER DIEM COURT
4 REPORTER, DO HEREBY CERTIFY THAT THE
5 FOREGOING IS A TRANSCRIPT FROM THE RECORD
6 OF THE COURT PROCEEDINGS IN THE ABOVE-ENTITLED
7 MATTER.
8 I, MEREDITH POLLIER, FURTHER CERTIFY
9 THAT I NEITHER AM COUNSEL FOR, RELATED TO
10 NOR EMPLOYED BY ANY OF THE PARTIES TO THE
11 ACTION IN WHICH THE HEARING WAS TAKEN AND
12 FURTHER THAT I AM NOT FINANCIALLY NOR
13 OTHERWISE INTERESTED IN THE OUTCOME OF THE
14 ACTION.
15
16 MEREDITH POLLIER, PER DIEM COURT REPORTER
17 PROCEEDINGS RECORDED BY STENOMASK.
18
19 TRANSCRIPTS PRODUCED FROM COMPUTER.
20
21 _____ _____
22 MEREDITH POLLIER DATE
23
24

Pages: 1-238
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD,
*
Plaintiff,
v.
*
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY
ASSOCIATES, INC.,
*
Defendants.
* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Friday, March 17, 2023
Courtroom: 15

Meredith Pollier
Court Reporter

1 Q Do you understand Nurse Smith,
2 that when Mr. Luppold came in,
3 the first thing he told
4 registration was that he had left
5 foot pain and it was turning
6 purple? Yes?
7 A Yes.
8 Q Okay. Those are in Nurse
9 Hanlon's discharge summary. So
10 with all the facts that I gave
11 you and assuming that she did not
12 tell Mr. Loucraft of the left
13 foot pain and turning purple, do
14 you have an opinion to a
15 reasonable degree of medical
16 certainty, as to whether Nurse
17 Hanlon fell below the standard of
18 care of the average, qualified
19 emergency room nurse in 2015?
20 Do you have an opinion?
21 A Yes.
22 Q And what is
23 A Yes.
24 Q -- what is that opinion?

1 A That opinion is that she
2 functioned far below the standard
3 of care as a discharge nurse.
4 Q Is a comment by a patient of left
5 foot pain, turning purple, is
6 that potentially very serious?
7 A Oh, yes.
8 Q Would you expect an emergency
9 room nurse to know that that was
10 very serious?
11 A Yes.
12 Q I'm going to move on to the next
13 visit. There's a visit of March
14 13th and this is Tab C, Nurse
15 Smith. You have that?
16 A Yes.
17 Q And I want you to turn to page
18 75, please.
19 A Okay.
20 Q Are you there?
21 A Yes.
22 Q And at the very top of page 75,
23 this is a triage note by Nurse
24 Busa, and the chief complaint

1 read them for you in a second
2 when I get to them:
3 radiculopathy or sciatica;
4 hypertension, high blood
5 pressure; peripheral edema,
6 swelling; and chronic low back
7 pain.
8 So let me ask you this.
9 If you understand those are the
10 diagnoses and you're giving a
11 patient a pamphlet of sciatica,
12 hypertension, and edema, does
13 that explain severe ankle or foot
14 pain? Any of those?
15 A No.
16 Q I'd like you to assume that at no
17 point in time in this record are
18 there any pulses documented by
19 Nurse Hanlon. There are no
20 there's no documentation of
21 pulses.
22 I'd like you to assume
23 that Nurse Hanlon never talked to
24 Mr. Flores about what's written

on her depart summary on page 76 of left ankle pain and foot pain, or that she discussed with Mr. Flores the fact that his complaints when she saw him related to ankle -- foot pain.

Do you have all those?

A Yes.

Q And I'd like you to assume that he was discharged with, in fact, the materials that we have in this book regarding edema, high blood pressure, radiculopathy or sciatica, and chronic low back pain.

Based on those facts and on your education, training, and experience, do you have an opinion to a reasonable degree of nursing certainty as to whether the care provided by Nurse Hanlon on March 13th when she discharged Mr. Luppold fell below the standard of care of the average,

qualified emergency room nurse practicing in 2015?

Do you have an opinion?

A Yes, I do.

Q And what is that opinion?

A It is that her performance in the care and discharge of Mr. Luppold was far below the acceptable standard of care.

Q And what's the basis of that, Nurse Smith? What do you say should have been done?

A A pulse evaluation and a further evaluation of the foot and the ankle and the left leg involving the 5 P's.

Q Does it also include a discussion with the provider?

A Yes, it does, and documentation in the medical record of same.

MR. HIGGINS: Thank you, Nurse Smith. That's all the questions that I have for you.

NURSE SMITH: Thank you.

1 MR. HIGGINS: I object.
2 THE COURT: Hang on.
3 Hang on.
4 BY THE WITNESS:
5 A Yes, I did and I find that -
6 THE COURT: Hang on.
7 Hang on.
8 BY THE WITNESS:
9 A and I find that --
10 MR. KELLEY: Hang on,
11 ma'am.
12 MR. HIGGINS: Ms. Smith.
13 BY THE WITNESS:
14 A -- standard of care.
15 MR. HIGGINS: Ms. Smith,
16 there's an objection.
17 THE COURT: What's your
18 objection? Is it
19 MR. HIGGINS: It's
20 characterizing the testimony from
21 a deposition that I don't think
22 is accurate, but --
23 THE COURT: Okay.
24 MR. KELLEY: Well, she

1 said, yes.
2 THE COURT: Well --
3 MR. HIGGINS: Whether she
4 answered or not.
5 THE COURT: I'm going to
6 overrule the objection, but I'll
7 give you some leeway
8 MR. HIGGINS: Okay.
9 THE COURT: -- on your
10 redirect.
11 MR. HIGGINS: Thank you.
12 BY MR. KELLEY:
13 Q Care decisions for Mr. Luppold on
14 both occasions, March 7th and
15 March 13th, were made by
16 providers other than the nurses,
17 can we agree to that?
18 A I'm sorry. Could you repeat
19 that, please?
20 Q Sure. Nurses do not order tests
21 in the emergency department,
22 correct, enter orders for --
23 A Correct.
24 Q Yup. Nurses do not determine if

a consult is required for a patient, correct?

A Correct.

Q Nurses do not determine if the provider is not a physician that that provider should speak with a physician, correct?

A Repeat that again, please.

Q Sure. The provider makes care decisions for a patient, right?

A Yeah.

Q Yup.

A Yes.

Q And can we agree with this description of triage, and I know you've given a description earlier this morning.

Triage is really sorting. When a patient comes to the ED you're greeted by a nurse who takes vital signs, asked your pain level, asks you what your complaint is, and then, they put you in a category that determines

how fast you're going to be seen by the emergency room provider, is that a fair statement?

A Yes.

Q All right. In fact, that's a statement you made about four or five years ago, right, in the Southwestern case?

A Okay.

Q And we can agree, as well, from that testimony, you stated that, "Triage level has nothing to do with a diagnosis. That's apples to oranges."

A Correct.

Q And what triage has as its purpose is to do with how fast a patient is seen in the emergency department, right?

A Yes and no.

Q Do you recall testifying to that in the Southwestern case?

A I don't recall the Southwestern case.

1 Q All right.
2 MR. KELLEY: Well, Your
3 Honor, I have a transcript.
4 THE COURT: You can see
5 if you can refresh her memory.
6 MR. KELLEY: All right.
7 THE COURT: You can just
8 read it.
9 MR. HIGGINS: Well, Your
10 Honor, I --
11 MR. KELLEY: And I can
12 then show it to Mr. Higgins to
13 see if it's correct?
14 MR. HIGGINS: That's
15 fine. I just -- I think he can
16 read it and ask her if she agrees
17 to it.
18 THE COURT: That's all
19 I'm allowing him to do right now
20 Well, he's going to
21 refresh her memory, that's all.
22 BY MR. KELLEY:
23 Q Do you recall from the
24 *Southwestern* testimony being

asked a question, "So, the triage category assigned by an emergency room nurse has nothing to do with the ultimate treatment rendered in the emergency department and the ultimate diagnosis made, true?"

Your answer: "What it has to do with is how fast that patient is brought in for evaluation and assessment."

Do you recall that?

A 1 don't recall that, but that is an accurate statement.

Q And you stand by that statement, right?

A Yes.

Q Now, just going back to some of your background, Nurse Smith, you've been reviewing cases since about 2002?

A Yes.

Q All right. And a fair percentage of your income comes from this

1 review of matters, depositions,
2 testifying, is that fair to say?
3 A No, it's not. You would have to
4 define what you mean by "fair" or
5 a bigger amount.
6 Q It's almost 15 to 20 percent of
7 your income?
8 A No, it's about 10 to 12 percent.
9 Q Fair enough. All right.
10 And do you recall
11 testifying in 2019 that you last
12 worked as a clinical nurse in
13 2016?
14 A Yes.
15 Q All right. So, you had stopped
16 nursing, clinical nursing,
17 practice in 2016?
18 A Yes, in February.
19 Q Your testimony earlier today to
20 this jury, and correct me if I'm
21 wrong in answer to Mr. Higgin's
22 question, was that you're still
23 bedside in a clinical role
24 providing patient care, or did

1 you stop in 2016?
2 A In 2016, I retired from the
3 facility I was working at. I was
4 doing some teaching at Penn
5 State. And in April of 2016, I
6 became clinically active again.
7 Q Well, in 2019, you said you had
8 last worked in 2016.
9 A It -- I cannot answer that
10 question. I don't know what you
11 are referring to, but I have
12 there was a two-month period that
13 I was not working, and I returned
14 to long-term care in 2016 in
15 April.
16 Q Well, you gave a deposition
17 February 19, 2019 in the matter
18 of ***Plaintiff v. Southwestern***
19 ***Medical.*** And on that occasion,
20 let me know if this refreshes
21 your memory, you were asked the
22 question: "When is the last time
23 you worked a full shift as an
24 emergency room nurse, not as a

1 clinical instructor, but as the
2 ER bedside nurse?"
3 And you answered:
4 "February 2016."
5 A At that time, that was accurate,
6 about in April of 2016, I
7 returned to clinical at long-term
8 for long-term care.
9 In March of 2020, I
10 returned to the emergency
11 department to help because of the
12 Covid situation.
13 Q Okay. You've never worked at
14 Lowell General Hospital, correct?
15 A No.
16 Q Never worked triage or in the
17 emergency department at Lowell
18 General Hospital, that would
19 certainly follow, correct?
20 A Correct.
21 Q And you would certainly defer to
22 the nurses involved in this
23 matter, Nurse Crocker, Nurse
24 Hanlon, Nurse Busa, to speak to

1 the set up operation expectation
2 for triage and primary nurses in
3 the Lowell General Hospital
4 setting, correct?
5 A Yes.
6 Q And nursing care provided to a
7 patient doesn't take away from
8 the provider duty to do patient
9 assessment, right?
10 A Correct.
11 Q Particularly, as nurses do not
12 make medical diagnosis for
13 patients, right?
14 A No, we make nursing diagnosis.
15 Q Yup. But the ultimate diagnosis
16 for a patient in an emergency
17 department is left with the
18 provider, right?
19 A Correct.
20 Q And as well, they determine the
21 discharge instructions for a
22 patient, right?
23 A Yes.
24 Q And you understand the practice

1 from review of depositions that
2 it would be the provider that
3 would print out discharge
4 instructions after their
5 assessment and evaluation of a
6 patient at Lowell General
7 Hospital in March of 2015?
8 A Yes.
9 Q And then, once the provider
10 accomplishes that, it may be
11 reported to the nurse that the
12 patient is ready for discharge.
13 The nurse collects the documents
14 and reviews the material with the
15 patient, right?
16 A Yes, but if she has concerns with
17 the discharge instructions, she
18 has a responsibility to present
19 her concerns to the provider.
20 Q Right. And if there is no
21 concern, based on the knowledge
22 that the provider has evaluated
23 and assessed the patient, then,
24 it's proper for the nurse

1 certainly to go ahead and carry
2 out the discharge of the patient,
3 we can agree to that certainly,
4 right?
5 A Not in this case, no.
6 Q Well, you weren't there, correct?
7 A Correct, but I know what the
8 standard of care is when a
9 patient is discharged.
10 Q Right, and what I just described
11 is the standard of care for the
12 discharge, carrying out the
13 instruction of the provider?
14 A Correct, but the standard also
15 includes, if there are questions
16 or concerns by the nurse, she
17 must present them to the provider
18 before discharging the patient.
19 Q And if there are no questions or
20 concerns for the nurse that was
21 present with the patient,
22 spending time with the patient
23 through discharge, then, it is
24 entirely proper for that nurse to

1 complete the discharge process,
2 true?
3 A Yes.
4 Q And now, Nurse Smith, back to
5 some of your background, you know
6 that we were provided with your
7 resume, CV, curriculum vitae?
8 A Yes.
9 Q When do you say you worked at
10 Temple?
11 A Yes.
12 Q No, when?
13 A Oh, when. That was when I was
14 employed by General Healthcare
15 Resources back in 2000 -- 2005.
16 Q And would there have been a
17 different entity listed on your
18 CV that would identify that time
19 at Temple?
20 A No, because I worked in multiple
21 hospitals in that area under
22 contract --
23 Q All right.
24 A -- through General Healthcare

1 THE COURT: Okay. Okay,
2 I apologize.
3 MR. HIGGINS: You should
4 have two special questions, one
5 from me --
6 THE COURT: I do.
7 MR. HIGGINS: -- and one
8 from --
9 THE COURT: I do. I've
10 got them both.
11 MR. HIGGINS: Okay.
12 THE COURT: All right.
13 Let's get going.
14 All right. So, my
15 instructions -- my first
16 instruction to everybody was to
17 get the instructions I used for
18 my -- from my last medical
19 malpractice trial, which are
20 essentially based on the model
21 instructions, and then agree upon
22 the instructions that we could
23 use for this case, understanding
24 it's five defendants as opposed

1 to one.
2 I don't know whether you
3 were able to agree on anything,
4 but I have the marked-up version
5 of what changes you want. So,
6 let's -- everybody have that copy
7 with the changes?
8 MR. HIGGINS: I don't
9 know what you mean "the changes."
10 MR. KELLEY: I --
11 MR. HIGGINS: I still
12 have the first copy
13 THE COURT: Yeah. I've
14 got a copy here that I just got
15 yesterday. It might have been
16 sent earlier, but I just got it
17 yesterday and it's got red line
18 changes in it.
19 MR. HIGGINS: That's Mr.
20 Kelley's, I believe.
21 THE COURT: Oh, it is?
22 MR. KELLEY: The first
23 requested change in my version,
24 or defendants version, majority

1 were my requests.
2 THE COURT: Okay.
3 MR. KELLEY: So, if
4 there's any --
5 THE COURT: But I know
6 Attorney Bello has some in here
7 because he puts "Bello" on some
8 of them.
9 MR. BELLO: Just a few.
10 THE COURT: Yeah.
11 MR. HIGGINS: Just two or
12 three.
13 MR. KELLEY: Just two, I
14 believe.
15 THE COURT: Yeah. Okay.
16 MR. HIGGINS: Do you have
17 the original one that I sent?
18 THE COURT: I do, but
19 that's --
20 MR. HIGGINS: Okay.
21 THE COURT: -- but that's
22 -- this is supposed to be the
23 original, right?
24 MR. HIGGINS: It is. It

1 and we'll go from there.
2 All right. So, the
3 introduction is fine.
4 Under standard of proof,
5 "Now, from time to time I'll
6 refer to proof or to proving
7 something, by this I mean Mr.
8 loopholed, as plaintiff in this
9 action, must prove --" that looks
10 fine to me.
11 MR. HIGGINS: That's
12 fine. I have no objection to
13 that.
14 THE COURT: Okay. Next
15 page.
16 "If you still have some
17 doubts, or even if those doubts
18 are reasonable, you can still
19 decide in favor of the plaintiff
20 as long as he proved each element
21 of his claim is more likely true
22 than not true."
23 I don't have a problem
24 with that either.

1 MR. HIGGINS: Nope.
2 THE COURT: "Nope,"
3 meaning you don't have a problem?
4 MR. HIGGINS: I don't. I
5 mean --
6 THE COURT: Yeah, that's
7 fine.
8 MR. HIGGINS: Yeah.
9 THE COURT: I just want
10 to -- we're on the record, so.
11 MR. HIGGINS: Okay.
12 THE COURT: All right.
13 The next change is, "but if the
14 scales remain exactly balanced,
15 it should be out." I agree with
16 you.
17 "I'm not tending toward
18 either side at all or if they tip
19 toward a defendant at all, then
20 the plaintiff has not proved his
21 claim against that defendant."
22 That's accurate. I'm okay with
23 that.
24 Next one. "It does not

matter who called a witness, asked a particular question, or introduced an exhibit. What you are weighing is the persuasive force of the evidence and whether the plaintiff's evidence is more likely true than not true and supports his burden of proof."

I just -- I agree with all that except "and supports his burden of proof." I don't think you need that. It's just whether the evidence is more likely true than not true.

Okay. Next down -- and by the way, the red changes that I'm -- I'm going to have this marked, but the red changes here are those changes by Attorney Kelley and there's two or three by Attorney Bello; am I correct?

MR. BELLO: Correct, Your Honor.

THE COURT: I just wanted

1 the record to be clear on that,
2 that's what we're doing.
3 MR. KELLEY: Yes.
4 THE COURT: Okay. So,
5 "There are five separate
6 defendants in this case and you
7 must --" cross out "decide"
8 reach a decision on each
9 defendant." That's perfectly
10 okay.
11 Next page. "In order to
12 prove medical malpractice --" we
13 go down to two. One is okay.
14 Two it says, "What the medical
15 standard of care for each
16 provider." And then it says
17 "what the individual --" that's
18 perfect.
19 Number three, "Then an
20 individual defendant's medical
21 treatment fell below that
22 standard of care that applied to
23 that defendant. In other words,
24 that the defendant was

1 negligent." I think that's
2 perfect.
3 "That the individual
4 defendant's negligence --" that's
5 good.
6 Keep going on down.
7 "First, Mr. Luppold must prove
8 more likely than not -- that's
9 good.
10 Standard of care, "must
11 prove the standard of care that
12 applies to --" good -- each
13 defendant." Good.
14 "Each defendant owed a
15 duty to treat Steven Luppold
16 according to the standard of care
17 that applied to him." That's
18 good.
19 And "in particular,"
20 that's good. All the other
21 changes on that page are good.
22 Up to the next page.
23 "Use the degree of skill and care
24 of the average qualified nurse

1 practitioner in 2015." That's
2 good.
3 Okay. "Plaintiff has the
4 burden to prove the standard of
5 care."
6 Can we just say "the
7 standard of care that should
8 have"?
9 MR. HIGGINS: Where are
10 we now? I think I lost you.
11 THE COURT: Sorry. These
12 mine is not numbered, but
13 under standard of care, okay,
14 one, two, three, four, the fifth
15 paragraph.
16 "Plaintiff has the burden
17 to prove --"
18 MR. HIGGINS: Yup.
19 THE COURT: "-- the
20 standard of care --" and you got
21 -- I think it should say "that
22 should have been."
23 MR. HIGGINS: Yup.
24 MR. BELLO: That's fine.

1 again.
2 But if you want to, I
3 think it has to stay in for all
4 or none.
5 THE COURT: I do. It's
6 going to stay in for all.
7 MR. HIGGINS: Okay.
8 THE COURT: Okay. "No
9 guarantee a bad result or
10 unfortunate outcome standing
11 alone."
12 MR. HIGGINS: I don't
13 know why that wasn't in there.
14 That is part of the model
15 instruction --
16 THE COURT: Yup.
17 MR. HIGGINS: That can
18 certainly be --
19 THE COURT: Okay.
20 All right. Causation.
21 "If you find that any/all of the
22 defendants were negligent, then
23 you must decide whether Mr.
24 Luppold proved more likely than

1 not the individual defendants
2 negligence caused --" that looks
3 good to me.
4 "The defendant caused
5 injuries --" blab, blab, blab "--
6 to decide this case would the
7 same harm have happened without a
8 defendant's negligence. In other
9 words, did the negligence make a
10 difference? If a defendant's
11 *negligence* had an impact on --"
12 or sorry.
13 "If a defendant's
14 negligence caused --" I think
15 that's what it *says.*
16 MR. HIGGINS: Your Honor,
17 I will tell you, this is where we
18 start getting into issues.
19 MR. BELLO: Yeah.
20 THE COURT: Yeah. Don't
21 worry about it, let me just --
22 MR. HIGGINS: I know, I
23 just want to let you know. The
24 model instruction says exactly --

1 I believe, exactly what the
2 original that I had proposed did,
3 and not these other changes.
4 THE COURT: "In other
5 words, did the negligence
6 make --"
7 MR. BELLO: That's the
8 issue.
9 THE COURT: Yeah.
10 MR. BELLO: The impact
11 of
12 THE COURT: I have it in
13 my notes. I looked at it last
14 night -- or this morning.
15 I'm going to leave in
16 "had an impact," okay. I'm not
17 going to say "caused."
18 MR. HIGGINS: That's
19 straight from the model
20 instruction.
21 THE COURT: That is.
22 MR. BELLO: It does, Your
23 Honor. I mean, again, we
24 believe, obviously, that impact

1 waters down the but for causation
2 standard --
3 THE COURT: I agree.
4 Yeah.
5 MR. BELLO: -- in the
6 dual case.
7 THE COURT: Yeah.
8 MR. BELLO: I mean,
9 its -- impact is what? I mean,
10 it makes no sense. You know,
11 according to that -
12 THE COURT: That's how
13 they're doing the but for.
14 MR. BELLO: No, I get it,
15 but that's not but for. I
16 mean --
17 THE COURT: Well, I'm
18 giving you the but for on the
19 next page.
20 MR. BELLO: You are?
21 THE COURT: Well, that's
22 what it's going to say, right?
23 MR. BELLO: Okay.
24 THE COURT: That's what

1 it *says.*
2 MR. KELLEY: And just for
3 the record, I joined Attorney
4 Bello in terms of the dual
5 language requiring something
6 different from a -- had no
7 impact.
8 MR. HIGGINS: It *says*
9 above, Your Honor, "A defendant
10 caused injuries if the injuries
11 would not have occurred without,
12 that *is* but for that defendant's
13 negligence."
14 That's in the model
15 instructions.
16 THE COURT: Right.
17 MR. HIGGINS: That
18 suggests it doesn't say "but
19 for," ignores that it does.
20 MR. BELLO: And then
21 impact just waters it down. I
22 mean, impact just makes it
23 completely confusing.
24 THE COURT: I get it. I

1 get it. And if you look at the
2 note, I mean, we don't even have
3 to use "but for" in the
4 instruction, but I think it's
5 actually -- it makes more sense
6 and it explains it better if you
7 do use "but for."
8 But on the model that you
9 guys have, look under note 20 --
10 sorry. Sorry, note 17.
11 "A judge who prefers to
12 use the technical legal phrase
13 "but for cause" may do so here,
14 for instance, saying the
15 defendant caused the plaintiff
16 harm if the harm would not have
17 occurred absent that is but for
18 the defendants negligence."
19 MR. BELLO: Right.
20 THE COURT: And I --
21 MR. HIGGINS: Your Honor,
22 I just -- I don't want to go
23 through every line here because
24 there's -- I would ask that the

1 model instructions you've given
2 us, that we used in the last
3 case, is as written in all the
4 others that have been added,
5 including the last sentence.
6 THE COURT: Right. I got
7 you.
8 MR. HIGGINS: I would
9 just ask that we use the model
10 instruction, Your Honor.
11 THE COURT: Yup. Okay.
12 "Often an injury has more than
13 one cause." Where did that go?
14 Okay, all right.
15 So, Attorney Bello wants,
16 "Even if you were to find that
17 the actions of the defendant did
18 not in some respects satisfy the
19 standard of care, in order to
20 find for the plaintiff you must
21 also find that this negligence
22 was the cause of Mr. Luppold's
23 injuries. In order to find for
24 the plaintiff, you must find that

1 but for the defendant's
2 *negligence,* that harm would not
3 have occurred."
4 MR. HIGGINS: That is
5 repeating what's already been
6 said.
7 THE COURT: I'm not going
8 to incorporate that.
9 MR. HIGGINS: And "the
10 cause" is not accurate.
11 THE COURT: Right. It's
12 enough what we have on the
13 existing instruction but,
14 Attorney Bello, do you want to
15 note your objection?
16 MR. BELLO: I do. So,
17 just so I'm clear, Your Honor,
18 you're still going to give what's
19 on the previous page --
20 THE COURT: Yes.
21 MR. BELLO: -- "the
22 defendant caused the injuries
23 would not have occurred, but for
24 the --" the but for is still

1 going to be in the previous
2 paragraph?
3 THE COURT: Yeah.
4 MR. BELLO: Okay.
5 THE COURT: Isn't it on
6 there?
7 MR. HIGGINS: Yes.
8 MR. BELLO: It is.
9 THE COURT: Yeah.
10 MR. BELLO: Well, it's in
11 the model.
12 THE COURT: It says, "A
13 defendant caused injuries if the
14 injuries would not have occurred
15 without, that is but for, that
16 defendant's negligence." That's
17 on the previous page.
18 MR. BELLO: Yeah. I
19 would ask that --
20 THE COURT: I'm going to
21 read that.
22 MR. BELLO: Yeah, no, I
23 understand.
24 THE COURT: Okay.

MR. BELLO: I would ask that the instruction that I proposed be given, but if the Court chooses not, just note my objection.

THE COURT: Yes. Okay.

And proximate cause --

MR. KELLEY: Just for the record, joining Attorney Bello

THE COURT: Yes.

MR. KELLEY: -- on that request for the proposed instruction.

THE COURT: Okay. "Proximate cause is that which is a continuous sequence unbroken by any new cause producing an event that would not have occurred otherwise."

Is that in here anywhere?

MR. HIGGINS: No. The word "proximate cause" does not appear in the model instructions for very good reason.

1 CERTIFICATION

2

3 I, MEREDITH POLLIER, A PER DIEM COURT
4 REPORTER, DO HEREBY CERTIFY THAT THE
5 FOREGOING IS A TRANSCRIPT FROM THE RECORD
6 OF THE COURT PROCEEDINGS IN THE ABOVE-ENTITLED
7 MATTER.
8 I, MEREDITH POLLIER, FURTHER CERTIFY
9 THAT I NEITHER AM COUNSEL FOR, RELATED TO
10 NOR EMPLOYED BY ANY OF THE PARTIES TO THE
11 ACTION IN WHICH THE HEARING WAS TAKEN AND
12 FURTHER THAT I AM NOT FINANCIALLY NOR
13 OTHERWISE INTERESTED IN THE OUTCOME OF THE
14 ACTION.

15

16 MEREDITH POLLIER, PER DIEM COURT REPORTER
17 PROCEEDINGS RECORDED BY STENOMASK.

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21 7/H.e.).92/ ,W, PSA:o.A. 8/30/2023 .
22 MEREDITH POLLIER DATE

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Pages: 1-201
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD, *
*
Plaintiff, *
v. *
*
CARLOS FLORES, N.P., *
CHARLES LOUCRAFT, P.A., *
STEFANIE BUSA, R.N., *
SUSAN HANLON, R.N., *
CARLA CROCKER, R.N., AND *
MERRIMACK VALLEY EMERGENCY *
ASSOCIATES, INC., *
*
Defendants. *

* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Monday, March 20, 2023
Courtroom: 15

Maria Santos
Court Reporter

here and tell Mr. Kelley is not accurately describing it or not. I just don't remember how it got to you.

What you gave, Your Honor, very importantly here Mr. Bello disagreed, as well, and Mr. Kelley -- is right from the model instructions, they use the word "impact."

THE COURT: Right.

MR. HIGGINS: Does it make a difference? I mean, if we're standing here literally arguing that you're going to overturn a 30-million-dollar judgment and you used the model instructions that were put together by Superior Court judges, what are we doing?

THE COURT: Yeah. Your rights are preserved on that. You can take that issue up. If my instruction was wrong, then it

was wrong.

There is not going to be any dispute that my instructions say what they say, so if you got a problem with that, then that -- you know, I used the instruction that I thought was appropriate. If I used the wrong law, I used the wrong law, and your rights -- your appellate rights are approved.

I'm not marking anything and having anything be a part of the official record here that I don't know what it is. And red-lined versions, I'm not even sure I saw those. You guys could have gone back and forth four different times.

If you want that to be part of some record and you want to show some misconduct on my part or somebody else's part, that's -- you can do that later

1 cross examine any further
2 witnesses, etc., but their case
3 is done.
4 Okay, so, now it's the
5 defendants, either or both, to
6 present their claims, should they
7 choose to do so.
8 Does the defendant want
9 to proceed?
10 MR. BELLO: Yes, may we
11 be heard at sidebar for one
12 moment, Your Honor?
13 THE COURT: Yes.
14 (SIDEBAR CONFERENCE)
15 MR. BELLO: Your Honor,
16 we rest on the papers.
17 THE COURT: Okay.
18 MR. KELLEY: On behalf of
19 the nurse defendants just in
20 support of the motion that the
21 evidence submitted by the
22 plaintiff is insufficient --
23 THE COURT: Okay.
24 MR. KELLEY: -- to

1 warrant a verdict in plaintiff's
2 favor, particularly where the
3 claim is that the nurses -- or
4 the evidence is the nurses
5 clearly reported their findings,
6 and it was the mid-levels that
7 had and acknowledged the
8 obligation to examine the patient
9 and to look at the triage note.
10 And so far as any
11 discharge notation, it was not an
12 observation made by Nurse Hanlon
13 different from information known
14 from the mid-levels in their
15 discharge of the patient.
16 THE COURT: Okay.
17 Well, the motion with
18 respect to the nurses is denied.
19 There's been more than sufficient
20 evidence to clearly establish the
21 standard of care.
22 There's been testimony
23 from expert witnesses that that
24 standard of care was violated,

1 and there's plenty of evidence to
2 support that, at least as far as
3 having the case go to the jury.
4 With regard to the Flores
5 and Loucraft's motion to -- for a
6 directed verdict, that's also
7 denied for the same reasons,
8 essentially, the standard of care
9 was established. The opinion was
10 there that they violated the
11 standard of care.
12 I think this jury's had a
13 lot of evidence to go by in order
14 to conclude that there may be a
15 violation of that standard of
16 care, and I'm going to deny that
17 motion, as well, okay.
18 MR. BELLO: Thank you,
19 Your Honor.
20 MR. HIGGINS: Thank you.
21 (SIDEBAR ENDS)
22 THE COURT: All right,
23 Attorney Kelley.
24 MR. KELLEY: Thank you,

1 emergency department?
2 A Yes.
3 Q Can you take a moment and explain
4 that set up to a jury.
5 A Sure. As I had said earlier,
6 I've worked in a number of
7 different places, but they are
8 similar in the way that they're
9 often set up.
10 And that is that there is
11 a triage area that most patients
12 will come in through, whether
13 you're coming either by an
14 ambulance or whether you're
15 walking in or a family member is
16 bringing you to the emergency.
17 And you'll go through a
18 triage process. And then,
19 depending on the type --
20 depending on how your emergency
21 department is set up, you may be
22 sent, depending on your acuity
23 level, to a fast track area which
24 is what I believe how it is set

1 up at the hospital.
2 And they also have a
3 central area that patients are
4 seen for all other complaints.
5 Q And is there often, you know, a
6 first individual non-clinical
7 person that may greet or
8 initially see an individual
9 coming for emergency care?
10 A Yes. So, in most settings,
11 generally for patients that walk
12 in or that come in with their
13 family member sometimes, you
14 don't always come in in an
15 orderly fashion. There might be
16 a lot of arriving at once.
17 So, often there will be
18 either a registration or it could
19 be security or it could be a
20 technician person that will
21 capture your name and really
22 verbatim what your words are for
23 what you're here for today.
24 And that will be either

1 captured in a notebook or in this
2 case it was captured in a
3 registration about why the
4 patient's here.
5 Q And so, taking the roles of
6 nursing there's a triage nurse,
7 there'd be what we would call a
8 primary nurse attending to a
9 patient, and it may be the same
10 or different, a nurse performing
11 a discharge function for the
12 patient?
13 A Yes.
14 Q And so, the triage nurse, what is
15 the role? What is the
16 responsibility? What do they do?
17 A Right, so, the triage nurse is
18 responsible for doing the triage.
19 And if that's a word that's not
20 familiar to you, that's really
21 sorting the patients.
22 Again, when multiple
23 patients come at once, or as
24 people come in, triage is really

1 set to help you to be able to
2 prioritize who should be seen
3 first.
4 So, the triage nurse's
5 role is really taking in the
6 patients and doing a rapid
7 focused assessment. Again, is
8 not the full assessment that a
9 patient would receive elsewhere
10 in the department, but a rapid
11 assessment of the patient to
12 determine the level of acuity
13 that they have and why they
14 presented to the department that
15 day.
16 Q And then with respect to a
17 primary nurse on occasion that a
18 patient will see in the emergency
19 department, what is the role of
20 that particular individual?
21 A So, *again,* that nurse is also
22 assessing the patient. They will
23 be doing a focused assessment
24 based on the patient's complaint.

1 And then, they will be
2 doing perhaps a medication
3 reconciliation. So, collecting
4 from the patient what medications
5 they're on.
6 They'll be doing any
7 treatments that are ordered by
8 the providers during that time.
9 And any reassessments that they
10 need to do related to the
11 treatments that they participated
12 in.
13 Q And then, is there another
14 potential role of a nurse in
15 regard to discharging a patient?
16 A Sure, yes.
17 Q What's that process?
18 A So, again, it's assessing the
19 patient as they're discharging
20 them. Going through the
21 discharge instructions that are
22 provided by either the nurse
23 practitioner, physician assistant
24 or physician.

The nurse will go through the instructions with the patient, really going through the pages, making sure that the patient understands what their departure diagnosis is, what types of treatments they may be getting when I'm leaving and that they really understand, you know, what sort of the next steps are for them in terms of their care and how to manage themselves once they leave the ED.

Q And where does that information come from that's made part of the discharge process by the nurse? What are they working on?

A Yeah, they're working off of forms, and I believe that's in your jury book.

But they're really working off of information that is provided and created by, like I said, the physician assistant,

1 nurse practitioner or a
2 physician.
3 The nurse does not create
4 the discharge instructions.
5 Q And when you told the jury a
6 moment ago about the sorting or
7 rapid assessment process of
8 triage, in your experience and
9 with respect to the triage area,
10 can you just give the jury a
11 sense of that set up?
12 A Yes. So, it's often -- I can
13 tell you where I work it's an
14 open booth. We have three or
15 four booths that are set up that
16 the patient will come into and
17 that you assess them in the
18 booth.
19 Again, it's meant to be a
20 very quick, sort of, stop on your
21 way, hopefully, into the
22 department. It's just to be able
23 to give you a triage level and
24 address any immediate issues.

1 cardiac arrest or that's not
2 breathing.
3 And then a level 5
4 patient, being your least acute
5 patient. So, somebody, perhaps,
6 for a prescription refill or
7 something like that.
8 But it's a standard
9 language and training that we use
10 for emergency nurses and
11 providers to be able to be all
12 working off of the same system.
13 Q And is it used for purposes of
14 diagnosing a patient?
15 A No, again strictly --
16 Q And why not?
17 A -- for triaging.
18 Well, one, is done by a
19 nurse, and nurses don't diagnose
20 patients.
21 But it is -- it's really
22 meant entirely for the rapid
23 sorting of patients.
24 Q And is there a phrase in

1 have a moment, Your Honor?
2 THE COURT: Yes.
3 BY MR. KELLEY:
4 Q And just the only other question,
5 Nurse Calder, is part of a
6 nursing function in the emergency
7 department back in March of 2015
8 to make any diagnosis for a
9 patient?
10 A No, and nurses don't diagnose in
11 any department.
12 Q And do nurses determine whether a
13 consultation from a medical
14 specialty is required for a
15 patient?
16 A They do not.
17 Q Do nurses determine whether the
18 provider should be speaking with
19 if they're not a physician but a
20 mid-level, whether they should be
21 speaking with a physician about
22 the patient?
23 A They do not.
24 MR. KELLEY: That's all I

1 A I believe in the provider's notes
2
3 Q No, no.
4 A -- I saw pulses checked.
5 Q I know you heard me say nurses.
6 MR. KELLEY: Well, object
7 to that, Your Honor.
8 BY MR. HIGGINS:
9 Q Well, I'd like you to answer my
10 question, Ms. Calder.
11 My question was very
12 specific. You understand that
13 Nurse Crocker wrote a triage
14 note, right?
15 A Yes.
16 Q Okay. And you know who Nurse
17 Crocker is? She's a nurse,
18 right?
19 A Yes.
20 Q Nurse Busa wrote a triage note,
21 right?
22 A Yes.
23 Q Nurse Hanlon wrote a -- signed a
24 depart summary on both visits,

A I believe I had read in the -- a few of the depositions that l's, 2's and 3's go into an area called the core or the main ED, and is it 4's and 5's that go to the fast track?
Q So, he was initially --
A But my understanding is they're all part of the emergency department though. Sorry.
Q Right, but they -- but they have two different sides to the emergency department. One's the ambulatory care and the other they call the core, right?
A Yes. And that's usual in many emergency
Q Sure.
A -- departments.
Q And the initial assessment was a 3, right?
A Well, it's again, -- I mean, you can see she struck it. That's not what she -- I mean she wrote

1 that --
2 Q Well, it's what she entered --
3 A -- and then changed her --
4 changed it to a 4.
5 Q Right, it's what she entered into
6 that chart, right, and then
7 changed it to a 4? That changed
8 the side of the ER that he goes
9 to, right?
10 A For the initial part, it may. Or
11 it does change where they go to,
12 but again that triage is only for
13 that moment getting the patient
14 into the department.
15 Once they're in there, if
16 a nurse or a physician or
17 somebody else sees the patient
18 and decides that's not
19 appropriate, they can move them
20 to another area.
21 Q So, you're saying that doctors on
22 the core side might see someone
23 and say what am I doing taking
24 care of this patient and send him

over to the ambulatory care side? You're not suggesting that that's what happens are you?

A That actually could happen. If it's a patient that has something that's lower acuity, and they're tight on beds and they will mis-triaged and landed in the wrong side, it would -- it does happen where they move patients --

Q Have you read --

A -- as they need to be moved where they're appropriately needing to be treated.

Q Have you read in the depositions about whether that happens that they actually get moved from the core to ambulatory care?

A I don't recall that part. I'm just speaking to what I know to be normal practice.

Q You agree that triage, the job is to get the patient to the right place in the right amount of time

1 Q Well, you testified to our jury
2 factually that Nurse Hanlon
3 picked up Mr. Luppold. Sort of,
4 she was there. She just picked
5 him up and discharged him.
6 You know she was assigned
7 to him when he went to the ED
8 because she was the only nurse
9 back there. You know that to be
10 true, right?
11 A I don't.
12 Q Okay.
13 A So, --
14 Q So, you believe -- you believe
15 she was just doing somebody a
16 favor to discharge him?
17 A No, what I'm saying is the way
18 that it works in a fast track
19 often is that the way the nurses
20 and physicians -- or nurses and
21 providers in general work
22 differently.
23 A physician or physician
24 assistant or a nurse practitioner

1 will go in, they *assess* the
2 patient. They write a bunch of
3 orders, and they move on.
4 The nurse is then
5 responsible for carrying out all
6 of those orders. So, you can
7 imagine there's a mismatch often
8 in how quickly -- a provider can
9 see patients often in a much more
10 rapid sequence than a nurse can.
11 So, this patient was seen
12 by a provider, deemed ready to be
13 discharged and the nurse at that
14 point in time came in and
15 completed the discharge.
16 She didn't see the
17 patient prior to the provider.
18 Q Whether she saw him or not, she
19 was assigned as his nurse. Are
20 you saying it's a good thing that
21 you didn't see him? That's okay.
22 Or should she have seen the
23 patient that was assigned to her?
24 A I don't believe -- being the

point of time when she was interacting with the patient was at the point when the patient was ready for discharge. She wouldn't start all over again seeing the patient, doing an initial assessment, getting him undressed and everything after a provider has already done all of that.

Q Do you know what --

A The provider has undressed them, assessed them, diagnosed them.

So, you would not undo everything that provider did and start over again doing a full nursing assessment or any of those things.

Q No, my question is a little different. Why did --

A Maybe I don't understand. Sorry.

Q Why did she not -- excuse me?

A I said maybe I don't understand. Sorry.

1 Q Why did she -- why did she not
2 see him for the couple hours he
3 was in back in the ED, do you
4 know?
5 A I don't know that it was a couple
6 of hours, but I'd have to look at
7 the time.
8 I'm assuming -- again, it
9 would all be assumptions. I'm
10 not sure exactly. I'm assuming
11 she was seeing other patients. I
12 don't know if she was gone on a
13 dinner break. There could be a
14 number of reasons why you
15 provider would have went ahead.
16 The idea, again, I
17 believe the provider is trying to
18 give the best care they can. So,
19 they're going to go in and see a
20 patient. They don't wait for the
21 nurse. There's no sequence.
22 Q What time was -- what time did
23 she go into the back of the ED --
24 did he go into the back of the

1 **CERTIFICATION**

2

3 **I, MARIA SANTOS, A PER DIEM COURT**
4 **REPORTER, DO HEREBY CERTIFY THAT THE**
5 **FOREGOING IS A TRANSCRIPT FROM THE RECORD**
6 **OF THE COURT PROCEEDINGS IN THE ABOVE-ENTITLED**
7 **MATTER.**
8 **I, MARIA SANTOS, FURTHER CERTIFY**
9 **THAT I NEITHER AM COUNSEL FOR, RELATED TO**
10 **NOR EMPLOYED BY ANY OF THE PARTIES TO THE**
11 **ACTION IN WHICH THE HEARING WAS TAKEN AND**
12 **FURTHER THAT I AM NOT FINANCIALLY NOR**
13 **OTHERWISE INTERESTED IN THE OUTCOME OF THE**
14 **ACTION.**
15
16 **MARIA SANTOS, PER DIEM COURT REPORTER**
17 **PROCEEDINGS RECORDED BY STENOMASK.**
18
19 **TRANSCRIPTS PRODUCED FROM COMPUTER.**
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22 **MARIA SANTOS** **DATE**
23
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Pages: 1-302
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD, *
*
Plaintiff, *
v. *
*
CARLOS FLORES, N.P., *
CHARLES LOUCRAFT, P.A., *
STEFANIE BUSA, R.N., *
SUSAN HANLON, R.N., *
CARLA CROCKER, R.N., AND *
MERRIMACK VALLEY EMERGENCY *
ASSOCIATES, INC., *
*
Defendants. *

* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Tuesday, March 21, 2023
Courtroom: 15

Maria Santos
Court Reporter

1 A Correct, and I believe back then
2 they also did IV's in the back in
3 those chairs for patients who
4 needed like repeat -- like daily
5 antibiotics and things of that
6 nature who couldn't come during
7 the day for the upstairs people
8 who would do the daily IV's.
9 Q And as a nurse in 2015 at Lowell
10 General Hospital, did you provide
11 the care independently?
12 A Well, nurses are not independent
13 providers. So, we rely on
14 doctors' orders to -- it's our
15 job to carry out the orders.
16 Q So, did you make treatment
17 decisions for patients?
18 A No.
19 Q And there were different staff
20 other than nursing staff that
21 were in the emergency department
22 providing care for patients, is
23 that fair to say?
24 A Yes.

1 a patient?
2 A No.
3 Q And can you just explain that?
4 A Well, no. So, again, there
5 wouldn't be enough time in triage
6 to sit and go through everything
7 that we would need to do to
8 actually figure out what was
9 going on with the patient and
10 that wouldn't be the role of the
11 nurse either to diagnose a
12 patient's condition.
13 You know, obviously,
14 we're aware of potential signs
15 and symptoms and things like
16 that, but it just -- that's not
17 what a nurse does.
18 So, no.
19 Q And we talked just a few moments
20 ago about the assessment that you
21 make as a patient comes in,
22 approaches triage, directed to
23 triage, and were there two sorts
24 of assessments you're making kind

1 your name for the record again
2 and spell your last name.
3 CHARLES LOUCRAFT: Hi.
4 Charles Loucraft,
5 L-O-U-C-R-A-F-T.
6 (DIRECT EXAMINATION OF CHARLES
7 LOUCRAFT, P.A.)
8 BY MR. BELLO:
9 Q Mr. Loucraft, where do you
10 reside?
11 A Pepperell, Massachusetts.
12 Q Okay. And who do you live there
13 with, sir?
14 A My wife, and I have three
15 children over 20, and they're
16 mostly out of the house.
17 Q Okay. Great. And what is your
18 occupation?
19 A I'm a Physician Assistant for
20 MVEA.
21 Q Okay. And what does it mean to
22 be a Physician Assistant?
23 A So, I am a physician extender in
24 an urgent care at Lowell General

1 Q Do you have any memory -- I see
2 you said you have no memory of
3 Mr. Luppold?
4 A I don't have any memory of him.
5 Q According to the records, how did
6 you come to see Mr. Luppold?
7 A He came in through triage. He
8 walked by me to get to a
9 treatment room.
10 I went in, examined him,
11 discussed his case. I did an
12 examination. I did a couple of
13 small tests. Wrote his
14 instructions. Wrote
15 prescriptions for him. Discussed
16 his -- what I thought was his
17 medical diagnosis.
18 He discussed in his
19 deposition that I showed him some
20 stretching exercises for his
21 spine discussing his sciatica
22 issue, and I went over his
23 medications and told him that he
24 needed to follow up with his, you

1 know, pain medication doctors,
2 primary care physician.
3 Q Okay. Mr. Loucraft, just so
4 we're clear, everything that you
5 just testified to, is that all
6 stuff that's documented in the
7 record or is any of that based
8 upon some new memory that you
9 have of the patient?
10 A It is documented in the record.
11 That's all I have.
12 Q One thing in particular that you
13 mentioned, just so we're clear on
14 this point, you say that he
15 walked in. Is that documented in
16 the record?
17 A Yes, it is.
18 Q Now, understanding you have no
19 recollection of this patient, did
20 you have a typical custom and
21 practice, Mr. Loucraft --
22 A Yes.
23 Q -- as to how you would typically
24 -- or what you would do to gather

1 information about a patient
2 before you saw a patient in the
3 emergency department for the
4 first time?
5 A Sure, I usually pull up a bench.
6 I usually have like a notebook,
7 and I usually put a sticker and
8 write a little blurb bedside
9 discussing with the patient
10 what's going on.
11 Even if *it's* a simple
12 thing like a laceration, I'll
13 still make a little notation on
14 everybody I take care of and I
15 will write what's going on.
16 We'll go over his vital
17 signs. Do an examination.
18 Discuss what I needed to do for
19 testing. Basically kind of get
20 the permission because sometimes
21 you're doing tests that people
22 aren't always comfortable, you
23 know.
24 In the case of Mr.

1 Luppold, I had to do a rectal
2 exam to rule out a catastrophic
3 problem with his spine, and I
4 did.
5 And like I said, I made
6 those notes. Went back to my
7 computer. Did his just shows
8 instructions. And then,
9 discussed with the discharge
10 nurse.
11 Q Okay. We're going to get to all
12 that.
13 I'd like if you could
14 please to turn to page 38.
15 MR. BELLO: And members
16 of the jury, if you could please
17 turn to page 38 of the book.
18 BY MR. BELLO:
19 Q Is that up there for you, Mr.
20 Loucraft?
21 A Yes.
22 Q We've looked at this -- are you
23 there?
24 A Yes, I have.

A Yes.
Q All right. Do you have an opinion --
MR. BELLO: Or strike that.
BY MR. BELLO:
Q Do you believe that you were expected to see this piece of paper? Is this something that you would typically see?
A I'm not expected to see this sheet.
Q All right. Does it become part of the record at some later point in time?
A It auto populates into the chart.
Q When you say, "it auto populates," because that term is used, I'm not talking about the specific terminology. I'm talking about the record itself. This sheet of paper, does that become part of the record at some later point in time?

1 A It becomes part of the, quote,
2 unquote, "medical record."
3 Q All right. But when you're
4 looking at the EMR System online
5 and you're evaluating a patient
6 in the emergency department, is
7 this a form that you would even
8 have access to?
9 A No.
10 Q Okay. Now, can we turn ahead a
11 few pages?
12 A Excuse me. I would have access
13 to it, but I would have to go
14 back into the computer and find
15 it, and I have no reason to find
16 this.
17 Q All right.
18 A Sorry.
19 Q That's okay. No, please, at any
20 time.
21 As part of your typical
22 practice, would you typically go
23 into the computer to look at the
24 registration --

A No, I don't.
Q -- the demographic form? All right.
Mr. Loucraft, can you now turn to page 41?
Okay. And this is where we begin your note?
A Correct.
Q All right. And as part of your note, there's certain information that's been auto populated from the triage note into your note, is that correct?
A Yes.
Q All right. In what portion of that?
A That's the chief complaint.
Q All right. And that's the information that was gathered by the triage nurse, in this case Nurse Crocker?
A Yes.
Q All right. And if we turn ahead to page 44, is that the triage

note of Nurse Crocker?
A At the bottom, yes.
Q All right. And that's timed at 17:51?
A Yes, it is.
Q All right. So, that's 5:51 p.m., correct?
A Yes.
Q All right. And the chief complaint, that chief complaint then auto populates, does it not, from the triage note into your note?
A That's correct.
Q All right. Now, had you wanted to, Mr. Loucraft, do you think you had access to the triage information in the medical record?
A Yes.
Q All right. That's something that had you wanted to you could have pulled up on the screen, so to speak?

A Yes.
Q All right. And at some point in time, when you go to create your note and begin to document in the record, that information then auto populates from the triage note into -- as part of your note, correct?
A Yes.
Q All right.
A That's true.
Q Now, do you know --
MR. BELLO: Or strike that.
BY MR. BELLO:
Q Do you have any recollection in this case whether you were aware of those complaints, the chief complaint as reflected in the triage note?
A I don't recall.
Q You don't recall one way or the other?
A No.

1 Q All right. So, does that help to
2 refresh your memory as to when
3 you saw Mr. Luppold?
4 A That is probably when I clicked
5 on to -- you know, like I said,
6 there's two providers, and you
7 had to click on a patient to take
8 the patient, and that is probably
9 when I clicked on to go see Mr.
10 Luppold.
11 Q Okay. But go back to page 41.
12 A Yes.
13 Q All right. This *says,* "Time
14 seen, date and time, March 7th,
15 2015 18:30:00. Is that likely
16 free text, something that you
17 wrote *in?*
18 A No.
19 Q Okay.
20 A That's probably a carryover from
21 -- oh, I'm not sure because
22 there's a 37 second difference
23 between that time and the other
24 one unless it was just brought to

zero.
Q All right. So, underneath that, it says, "History source, patient." What does that represent?
A The history I got was from Mr. Luppold by my record.
Q Okay. And then it says, "Arrival mode, walking." Is that what you referred to earlier is that he walked into the emergency department?
A Correct.
Q All right. As a provider who's been a PA now for almost 30 years, is that something that is significant to you in your overall assessment of a patient?
A Oh, most definitely.
Q Why?
A He's walked past me and walked into the room and had an evaluation and walked out, those are good *signs* with regards to

1 musculoskeletal issues,
2 circulatory issues at the time I
3 saw him.
4 Q Okay. And then we have the
5 triage note. We've already
6 talked about that.
7 And then, let's move on
8 to history of present illness.
9 What is -- Mr. Loucraft,
10 what is a history of present
11 illness? What does that
12 represent?
13 A A history of present illness is
14 basically the story of his visit.
15 So, a story of what I ask
16 for pertinent questions,
17 pertinent positives, pertinent
18 negatives to try to come to the
19 conclusion of what diagnosis it
20 will be.
21 Q Okay. So, back in 2015, you had
22 been working as a PA at that
23 point, sir, for more than 20
24 years?

1 that had Mr. Luppold taken off
2 his shoe and you examined his
3 foot that the designation of skin
4 being warm and drive would
5 include an evaluation of the skin
6 of his lower extremities?
7 A Yes.
8 Q Any question in your mind about
9 that?
10 A No question.
11 Q All right. And was that finding
12 consistent with what was in the
13 triage note? Inconsistent I
14 should say.
15 A Correct.
16 Q All right.
17 Now, let's move on to
18 cardiovascular. And it says
19 regular rate and rhythm. And
20 then it *says* normal peripheral
21 perfusion.
22 A Correct.
23 Q And you've been here and sat in
24 this courtroom throughout the

1 entire trial, correct?
2 A Yes.
3 Q And you've heard that the experts
4 questioned what that means,
5 right?
6 A Yes.
7 Q Dr. Stolbach and Dr. Harris said,
8 well, that's not my vernacular.
9 I've never seen that.
10 MR. HIGGINS: Well, I
11 object.
12 THE COURT: Yes, let's
13 not comment on what the other
14 individuals --
15 BY MR. BELLO:
16 Q You heard the testimony in this
17 case, correct?
18 A Yes.
19 Q All right. What does that mean
20 to you?
21 A So, --
22 Q What is normal peripheral
23 perfusion, based upon your custom
24 and practice, what does that

1 terminology mean to you?
2 A Peripheral perfusion to me means
3 that the blood flow to the hands
4 and the feet are normal. I
5 didn't find any issues with heart
6 beats, pulses, that kind of
7 thing.
8 Q Does that mean that you checked
9 his distal pedal pulses in his
10 foot?
11 A Yes, that's my practice with back
12 pain patients.
13 Q Why is that part of your
14 practice?
15 A It's just always been that way.
16 I always check posterior tibial
17 pulses.
18 Q The fact that you document normal
19 peripheral perfusion, does that
20 mean to you that you checked his
21 pulses and his pulses were
22 normal?
23 A Yes.
24 Q All right. And had you found

1 that his pulses were abnormal,
2 would you have documented as
3 such?
4 A Yes, I would have.
5 Q Mr. Loucraft, having now been a
6 physician assistant for nearly 30
7 years, is that the terminology
8 that you use as part of your
9 documentation to note the
10 presence of normal pulses?
11 A Yes, it is.
12 Q Have you always used that?
13 A Yes.
14 Q Do you, as part of your practice
15 at least through part of 2015, do
16 you ever write pulses or do you
17 write normal peripheral
18 perfusion?
19 A I wrote normal peripheral
20 perfusion.
21 Q There was some question --
22 MR. BELLO: Well, let me
23 strike as to what the testimony
24 was. Let me ask you this.

1 BY MR. BELLO:
2 Q Do you feel that as of 2015 that
3 you had adequate training,
4 education and experience to
5 assess the distal pedal pulse and
6 the pulses of a lower extremity
7 of a patient?
8 A Yes.
9 Q All right. Just give us an idea
10 in the emergency department and
11 in your work in the military, how
12 often that's something that you
13 did?
14 A Every shift.
15 Q How many times a day?
16 A I don't know, if you saw 20
17 patients, you did both hands and
18 both feet, you'd look at the
19 hands and feet.
20 Q And where there occasions in
21 which you would find abnormal
22 pulses on a patient?
23 A Yes.
24 Q And if you did that, would you

1 document as such?
2 A Yes.
3 Q Let's move on to page 44.
4 You make reference to an
5 examination of his back. Can you
6 tell us what your findings were?
7 A Sure. So, normal alignment means
8 that when you look at his back
9 from standing behind him or
10 standing to the side, it looks
11 normal.
12 No step offs. A step off
13 is some people have like an issue
14 with a piece of bone looking like
15 it's sticking out. That's what a
16 step off is.
17 Decreased range of
18 motion, meaning he has discomfort
19 with me trying to move him
20 around, forwards, backwards, to
21 the side.
22 It looks like on the left
23 vertebral -- vertebral point 10
24 and it's at L3, 4 and 5, which

1 means the lower part of his spine
2 is where I actually pushed and
3 found pain.
4 Q Okay. And then you go on, what's
5 musculoskeletal, normal range of
6 motion? What is musculoskeletal?
7 What does that refer to? What
8 portion of the body based upon
9 your custom and practice did that
10 refer to?
11 A So, musculoskeletal is arms and
12 legs. So, again, he had to
13 disrobe to do an examination, and
14 I was able to look at his legs.
15 I was able to check his pulses.
16 He walked by. All these
17 things are things that we watch
18 with regards to musculoskeletal
19 examinations.
20 Q So, based upon your examination,
21 did he have normal range of
22 motion in his legs?
23 A Yes.
24 Q Did that include his left leg?

A Yes.
Q Did you elicit any calf pain of any kind?
A No.
Q Is that something that you would have documented?
A Yes.
Q So, then you indicate on the next line, gastrointestinal. It *says,* "Soft, nontender, normal bowel sounds. No organomegaly."
But it goes on to say, "Stool is guaiac negative."
What does that refer to, sir?
A So, again, when I did a rectal exam, it was to check his rectal tone. And you check to make sure there's no bleeding.
There is an indicator that we use that would allow me to find out if he had bleeding in his gastrointestinal area, which can be sometimes an issue with

1 back pain. And his was negative.
2 Q Okay. And again, what was the
3 purpose in doing the guaiac
4 examination of the rectal
5 examination?
6 A To rule out cauda equina, which
7 is medical issue that leaves you
8 with a severing of a nerve, and
9 it can be a medical emergency.
10 Patients can have
11 lifelong incontinence, lifelong
12 loss of bowel and bladder health.
13 Q Okay. If we move on to the next
14 line, neurological. What did you
15 find in the case of Mr. Luppold?
16 A That he was alert and oriented to
17 time and place and his situation.
18 Q Okay. In his reference to
19 psychiatric, he was cooperative
20
21 A Yes.
22 Q -- had appropriate mood and
23 affect?
24 A Correct.

1 Q And is that important information
2 in terms of evaluating a
3 patient's complaints, both their
4 neurological and psychiatric
5 status?
6 A Yes, because some patients have
7 issues that need to be dealt with
8 more than just their medical
9 things. There's mental health
10 things, and we have to make sure
11 that you're watching for these
12 kinds of things also.
13 Q All right. Can we move on to
14 medical decision making.
15 A Yup.
16 Q And it says, "Differential
17 diagnosis." And what was your
18 differential diagnosis?
19 A Lumbar strain.
20 So, a differential
21 diagnosis is the -- most of the
22 things that you're going to think
23 that this diagnosis may be at the
24 time you're seeing the patient

1 and you're doing the chart.
2 So, I wrote lumbar
3 strain, disc herniation,
4 sciatica, chronic back pain, or a
5 compression fracture.
6 Q Okay. Let me ask you this. Is
7 that the disc herniation that can
8 lead to sciatica in certain
9 patients?
10 A Disc issues.
11 Q Disc issues.
12 A It doesn't have to be a
13 herniation.
14 Q So, these four or five things,
15 they're all related to the same
16 condition?
17 A Yes.
18 Q All right. They're all related
19 to some sort of chronic pain
20 syndrome or chronic back pain
21 problems?
22 A Yes.
23 Q All right.
24 A But I mean you can have a lumbar

A I prepare the discharge instructions with usually which -- you know, again, which diagnosis is going to be pertinent to helping the patient.

And then the discharge instructions go and the nurse takes the discharge instructions and brings them to the patient and the patient gets assessed and leaves.

Q Are these drop down boxes that you check or are these things that you type in?

A They are typed in. No, they can be both.

Q They can be both.

A Yeah.

Q All right.

A I can -- I can free text.

Q All right. And what information, just so we're clear on this point, you know as a provider who's preparing the discharge

1 instructions that then get
2 printed and given to the nurse
3 and ultimately reviewed with the
4 patient, what information do you
5 put in into the screen or into
6 the computer, what information do
7 you include?
8 A Like in his case, we put in
9 radiculopathy and back pain.
10 Q Okay. And what about his
11 medications?
12 A And I sent his -- I forget
13 exactly what we did at that
14 point. I think at that point, we
15 had paper prescriptions. He got
16 the paper prescriptions. We
17 discussed using those.
18 And again, exercises and
19 discharge.
20 Q All right. Can we turn to page
21 49 of the jury book?
22 All right. And now we're
23 looking at what's entitled depart
24 -- "Clinical Depart Summary"? Do

1 you see that?
2 A Yes.
3 Q All right. And up top, it says,
4 "Document name, depart summary.
5 Document status. Reference is
6 modified. Performed by Susan
7 Hanlon and authenticated by Susan
8 Hanlon. Her name appears twice,
9 and your name appears once. Do
10 you see that?
11 A Yes.
12 Q All right. The authentication,
13 does that reference what you just
14 talked about in terms of entering
15 the medications and the discharge
16 diagnosis?
17 A Yes.
18 Q All right. In terms of who
19 actually -- so you then enter
20 your information and the
21 information then gets --
22 discharge instructions get
23 printed out and given to the
24 nurse who then does what with it?

1 A Brings them into the patient.
2 *Asks* any other questions.
3 Discuss with the patient. Reads
4 over some of the discharge
5 instructions. Gives the
6 prescriptions.
7 And then the patient
8 leaves if he doesn't have any
9 questions or she doesn't.
10 Q All right. Do you typically go
11 back into see the patient at that
12 point in time?
13 A If there's an issue, I'll go back
14 in.
15 Q All right.
16 A If the patient brings it to the
17 nurse's attention, I go back in.
18 Q Halfway or a little less than
19 halfway down the page, we have
20 this visit reason, and it *says,*
21 "back pain." Do you see that?
22 A I do.
23 Q "Numbness to left lower extremity
24 and left foot pain and turning

1 purple."
2 And there's been
3 testimony in this case that that
4 information, Mr. Loucraft, in
5 capitals auto populates from the
6 registration form, correct?
7 A That is correct.
8 Q All right. Let me ask you this,
9 Did you enter that information
10 into the record?
11 A I did not.
12 Q All right. Do you have any
13 reason to think, Mr. Loucraft,
14 that you saw that when you
15 printed out the pieces of paper
16 and gave them to Nurse Hanlon to
17 review with the patient?
18 A I don't have reason to believe I
19 saw that.
20 Q Had you seen reference to the
21 patient reporting that his foot
22 was turning purple, what would
23 you have done?
24 A I would have reassessed him and

1 Q Okay, and What is the *basis* for
2 that opinion?
3 A I assessed the patient. I did a
4 physical examination. I
5 discussed things. I gave him his
6 instructions. I treated his pain
7 appropriately, and I discharged
8 him.
9 Q Was there any indication when you
10 discharged him that this patient
11 had a blood clot?
12 A No indication to me.
13 Q Did he have any *signs* or symptoms
14 on your examination that was
15 suggestive of a blood clot?
16 A No.
17 Q Do you have normal pulses?
18 A Yes.
19 Q Normal skin?
20 A Yes.
21 Q Any change in temperature or
22 color?
23 A Not that I found.
24 Q Okay. Do you feel that your

1 to you?
2 A Yes.
3 Q And the package that you had to
4 look at that was marked as an
5 exhibit did not have the
6 registration page, correct?
7 A Correct
8 Q And the foot turning purple
9 reference on page 49 we see is
10 drawn from the registration page,
11 right?
12 A Yes, we do.
13 Q And you were asked some questions
14 about the discharge process.
15 A Yes.
16 Q And again, the package that is
17 provided to the nurse is printed
18 by you and given and explain to
19 the nurses I think you said? You
20 explain to the nurse patient
21 whomever is ready --
22 A Yes.
23 Q -- for discharge?
24 A Could you discharge bed 3. Could

1 you discharge bed 5. Yes.
2 Q Yeah, here's my diagnosis. Can
3 you go in and discharge the
4 patient?
5 A Yes.
6 Q Yeah. And then, with respect to
7 -- and we can turn to it if we
8 need to -- but we've looked at
9 the signature page for discharge
10 signed by both Mr. Luppold and
11 Nurse Hanlon, correct?
12 A Yes.
13 Q And that is a form of sorts of
14 attesting to the process being
15 completed and information given
16 to the patient and the patient
17 understanding and accepting that
18 discharge plan, correct?
19 A Correct.
20 Q And that's what occurred in this
21 instance on March 7th with regard
22 to Mr. Luppold's discharge,
23 correct?
24 A From what I understand, yes.

1 to be --
2 A Yes.
3 Q -- that was supposed to be under
4 oath, right?
5 A Yes.
6 Q It was, wasn't it?
7 A Yes.
8 Q You were telling the truth at
9 that time, weren't you?
10 A Yes.
11 Q And that's because you understood
12 how important it was to answer
13 questions truthfully even if it
14 meant that you had to take some
15 responsibility yourself, right?
16 A Oh, yeah.
17 Q There's no doubt about that that
18 you last Friday took some
19 responsibility for this not being
20 evaluated by not reading the
21 triage note, right?
22 A Yes.
23 Q And there's no question that the
24 nurses had responsibility, as

1 well, right?
2 A Yes.
3 Q Now, you just told our jury a
4 little bit about your background,
5 and you talked about I think it
6 was being in the Navy, right?
7 A Correct.
8 Q And you talked about, and I'm not
9 100 percent sure, before you were
10 a PA you gave it a title what
11 your job was but you *said* you
12 brought the ambulances around and
13 you sometimes brought the
14 patients up and things like that,
15 right?
16 A Yes.
17 Q Okay. So, you understand, I
18 think your words were, "we sort
19 of acted at times like nurses,"
20 right?
21 A I don't know if I said that. Did
22 I say that?
23 Q I don't know. You don't remember
24 saying that?

1 Q Well, okay -- well, foot pulses
2 and leg or lower leg pulses are
3 different things, are they not?
4 A Correct.
5 Q Okay. The dorsalis pedis pulse,
6 which again if I wrote it down
7 wrong, I apologize, but that's
8 the one where on the foot?
9 A The top of your foot.
10 Q Right.
11 A Between the 1st and 2nd
12 metatarsals.
13 Q You told us that your practice is
14 to do everything the way you
15 described it. This is how I
16 typically do it. It's my custom
17 and practice. That's what you
18 told us, right?
19 A Yes.
20 Q Sir, your custom and practice is
21 to read triage notes too, right?
22 A Yes.
23 Q You didn't do that in this case,
24 did you?

A No.
Q So, we know that when you tell us what your custom and practice is you have, in this case we know right here, you deviated from what your custom and practice is in this case, right?
A With regards to some of it, yes.
Q Well, when you say with regards to some of it, you've told our jury for the past hour all the things that you do in your practice. It's your custom and practice. This is what I do. This is what I do. This is what I do.
And now you're telling us some of the things you do all the time, but in Mr. Luppold's case, you decided to skip a few of those steps, right?
A No, I didn't skip pulses.
Q No, I didn't say pulses. You skipped a very important step

1 that you've had to acknowledge
2 and that is reading the triage
3 note, right?
4 A Yes.
5 Q You had to acknowledge that
6 because there's no way you could
7 have read this triage note and
8 not evaluated his cool foot,
9 right?
10 A I did evaluate his cool foot.
11 Q Nope. Sir, the reason that you
12 indicated that you know you
13 didn't read the triage note, and
14 I'm happy to get the testimony,
15 you said you know you didn't
16 because if you had, a further
17 workup including imaging would
18 have been done, right?
19 A Yes, possibly.
20 Q Right. So, you stand behind,
21 sir, don't you that, despite what
22 you answered to Mr. Bello, you
23 stand behind the fact that for an
24 emergency medicine mid-level

1 provider on March 7th, you
2 violated the standard of care in
3 not reading the triage note, you
4 stand by that, don't you?
5 A Yes.
6 Q Okay. There is no question about
7 that, right?
8 A Yes.
9 Q And when I asked you that last
10 time and when I'm asking you that
11 this time, that *is* an
12 acknowledgement by you that for
13 Mr. Luppold there were at least
14 that was something that you
15 should have done differently,
16 better by reading the triage
17 note, right?
18 A Better, yes.
19 Q And along with that though, you
20 know, do you not, sir, that part
21 of the reason why Mr. Luppold
22 left the emergency department
23 without anybody evaluating with
24 imaging a purple, cool, painful

left foot, in part, is because you weren't told of that information by Nurse Crocker or Nurse Hanlon, is that right?

A Yes.

Q I want to ask you a little bit about -- I don't want to spend a lot of time, but I think I need to ask you some questions.

You were asked questions by Mr. Bello about risk factors. And there was lots of discussion last week with Dr. Harris and now today about risk factors for developing clots. You remember that right?

A Yes.

Q Let's be real clear, Mr. Loucraft, a DVT stands for something, doesn't know?

A Correct.

Q It stands for deep venous thrombosis, right?

A Yes.

be seen very briefly, Your Honor?
THE COURT: Yeah.
SIDEBAR CONFERENCE:
MR. KELLEY: The reason I asked to be seen, Your Honor, is that the original, more the prior testimony in getting him to bias of this witness and giving those opinions against the nurses because of his circumstance with his company and with a high-low agreement I'd like to be able to inquire of that.
THE COURT: He gave this testimony at a deposition three years before any high-low agreement?
MR. HIGGINS: I don't even know what the high-low agreement is about, but I don't think that's relevant in any way.
THE COURT: I'll let Mr. Bello --
MR. BELLO: Yeah, I don't

1 either, Your Honor. I don't know
2 what the relevance is. I mean,
3 his testimony's been consistent
4 with what he said in his
5 deposition. None of it's
6 different.
7 MR. KELLEY: It is
8 different from the deposition,
9 and it's changed because of the
10 insurer is bankrupt.
11 MR. BELLO: Wait a
12 minute. Well, then, I think you
13 have a right to cross examine him
14 if he *says* something different on
15 his examination the insurers just
16 so the record's clear. Isn't --
17 rehabilitation is not bankrupt.
18 MR. KELLEY: Right.
19 MR. BELLO: And yeah, I
20 mean, there is. There's a high-
21 low agreement. I don't -- I'm
22 certainly happy to share that
23 with the court, but --
24 THE COURT: We're not

1 going to get into any of that.
2 MR. BELLO: Yeah, and I
3 wouldn't ask that you should.
4 THE COURT: And I don't
5 think they're going to
6 4:01:51
7 MR. HIGGINS: Just for
8 the record, I'd like to make
9 those inquiries.
10 THE COURT: Okay. _.
11 SIDEBAR CONFERENCE CONCLUDED
12 (RECROSS-EXAMINATION OF CHARLES
13 LOUCRAFT, P.A.)
14 BY MR. HIGGINS:
15 Q Mr. Loucraft, I just want to make
16 sure we understand having given
17 testimony twice in this case,
18 last week with me and then here
19 today with Mr. Bello, if the jury
20 were to find that you changed
21 some testimony between last time
22 and this time, which would you
23 want them to think is the truth?
24 MR. BELLO: I object,

1 CERTIFICATION

2

3 I, MARIA SANTOS, A PER DIEM COURT
4 REPORTER, DO HEREBY CERTIFY THAT THE
5 FOREGOING IS A TRANSCRIPT FROM THE RECORD
6 OF THE COURT PROCEEDINGS IN THE ABOVE-ENTITLED
7 MATTER.
8 I, MARIA SANTOS, FURTHER CERTIFY
9 THAT I NEITHER AM COUNSEL FOR, RELATED TO
10 NOR EMPLOYED BY ANY OF THE PARTIES TO THE
11 ACTION IN WHICH THE HEARING WAS TAKEN AND
12 FURTHER THAT I AM NOT FINANCIALLY NOR
13 OTHERWISE INTERESTED IN THE OUTCOME OF THE
14 ACTION.

15

16 MARIA SANTOS, PER DIEM COURT REPORTER
17 PROCEEDINGS RECORDED BY STENOMASK.

18

19 TRANSCRIPTS PRODUCED FROM COMPUTER.

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22 MARIA SANTOS DATE

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24

Pages: 1-319
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD, *
*
Plaintiff, *
v. *
*
CARLOS FLORES, N.P., *
CHARLES LOUCRAFT, P.A., *
STEFANIE BUSA, R.N., *
SUSAN HANLON, R.N., *
CARLA CROCKER, R.N., AND *
MERRIMACK VALLEY EMERGENCY *
ASSOCIATES, INC., *
*
Defendants. *

* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Wednesday, March 22, 2023
Courtroom: 15

Maria Santos
Court Reporter

to add to what the jury understands of that setup?

A I don't think there's anything I need to add. I think, you know, she gave a good description of that process.

Q All right. And again, it's your memory in March of 2015 that they were -- in ambulatory, there were areas for six patients?

A There were six rooms for patients.

Q Yeah.

A And then like we talked about yesterday, there was also these, like, recliner chairs in sort of like an alcove of the hallway there and patients would come in for their antibiotic therapy and so you could have -- and then sometimes patients, they would also -- you know, if a patient was just waiting for, you know, a test result of some sort, they

1 your practice up until 2015?
2 A Yes.
3 Q Now, let's go under history of
4 present illness. And where did
5 this information come from?
6 A From the patient.
7 Q Okay. And tell us *again,* you
8 said that you're using a
9 template.
10 Tell us again, I'm a
11 patient, I walk into the
12 emergency department, I went
13 through registration, I've gone
14 through triage, you walk into the
15 room and you see me, tell me,
16 based upon your custom and
17 practice, how you would go about
18 eliciting a history of present
19 illness for a patient.
20 A Sure. So, I always go in and,
21 you know, present myself, you
22 know, "My name is Carlos, I'm one
23 of the nurse practitioners, what
24 brings you into the hospital here

1 today?" And that's pretty much
2 verbatim what I say to every
3 patient that comes in.
4 So I ask that open-ended
5 question. And then from there
6 would dictate what I typically
7 do, so in this case, because I
8 knew it was back pain, I would
9 ask specifically the location of
10 the back pain and then I would
11 ask him to kind of give me kind
12 of a quality of what the back
13 pain feels like, and he described
14 it as a sharp, burning pain.
15 And then I would ask him,
16 you know, what makes it better,
17 any alleviating factors, and he
18 had told me that the muscle
19 relaxants had really helped; had
20 also told me that the Lyrica was
21 helping.
22 And then I would ask him
23 specifically what makes the pain
24 worse, any aggravating factors,

1 and that's when he had told me
2 that it was worse when he moved.
3 And then the other things
4 associated with you, you know,
5 any other manifestations based on
6 the back pain, you know, UTI
7 symptoms.
8 So I would ask him, you
9 know, does it burn when you pee?
10 Because he is having back pain,
11 make sure there *is* no kidney
12 stone. I would ask him if there
13 is any blood in the urine. And
14 then also the cauda equina, you
15 know, symptoms.
16 Anyone with back pain, we
17 should really ask those, you
18 know, the urine and stool
19 incontinence, the weakness to the
20 legs, which he had answered yes,
21 so that led me to adjust my exam
22 a little bit.
23 Q All right. Let me stop you
24 there. The initial questions

1 that you ask of a patient when
2 you're eliciting a history of
3 present illness, okay, a patient
4 that you haven't seen before, do
5 you ask open-ended questions?
6 A Yes.
7 Q All right. Do you ask questions
8 specific to the back or do you
9 ask something along the lines of
10 why are you here?
11 A Correct. I always go and ask
12 specifically why are you here and
13 then, you know, it's called seven
14 dimensions of a symptom.
15 Q Can you explain that?
16 A Sure. So seven dimensions of a
17 symptom are basically based on
18 your symptom, we typically would
19 ask you, you know, those seven
20 dimensions.
21 And, you know, I just
22 remember them as SLQQSAAM, and
23 that's the symptom, the location,
24 you know, alleviating factors,

1 Q All right. And what is that
2 suggestive of?
3 A That there is good circulation to
4 that distal extremity.
5 Q Okay. Based upon this note, Mr.
6 Flores, is there any question in
7 your mind that you assessed Mr.
8 Luppold's pulses?
9 A There is no question.
10 Q Any question in your mind that
11 you found normal distal pedal
12 pulses?
13 A I found normal pulses.
14 Q Any question in your mind that
15 you found normal capillary
16 refill?
17 A I found normal capillary refill.
18 Q Let's move on to neurological,
19 you did a brief neurological
20 assessment?
21 A Yes.
22 Q And what were your findings?
23 A That he was alert and oriented
24 times three.

1 dimensions of a symptom that only
2 he could give to me.
3 Q And your note references the fact
4 that he was alert and oriented to
5 person, place, time and
6 situation. What does that mean?
7 Does that mean he was able to
8 answer your questions?
9 A He sure was, yes.
10 Q Also, there's a reference to
11 psychiatric and what do you write
12 there?
13 A Cooperative, appropriate mood and
14 affect. He had normal judgment.
15 Q Let's go on to medical decision-
16 making, differential diagnosis
17 back pain. So just below that,
18 we're going to get to impression
19 and plan and has several
20 diagnoses.
21 Can you just explain to
22 the jury why the differential
23 diagnosis or the diagnosis
24 appears in two different places

1 here on this record?
2 A Yeah. So the differential
3 diagnosis is typically the
4 working diagnosis based on, you
5 know, people who come in. So
6 back pain specifically, we'll
7 stick with that, you know, back
8 pain could be many different
9 causes.
10 And, you know, the
11 working diagnosis would be the
12 differential diagnosis, so, you
13 know, I could have written on
14 there, sciatica, I could have
15 written on there, herniated disc,
16 I could have written on there a
17 lumbar fracture.
18 Q Okay. So your working diagnosis
19 at the time was back pain?
20 A Correct.
21 Q All right. So then underneath
22 that, it says reexamination and
23 reevaluation and there's a time
24 of 22:55 or 10:55 p.m. And you

1 told the jury earlier that you
2 think you saw the patient at
3 22:30, you reordered -- I believe
4 the records said you ordered a
5 blood pressure check at 22:38 or
6 10:38, and now you're
7 reevaluating him at 10:55 p.m.?
8 A Correct.
9 Q Okay. So what happened then?
10 What happened at 10:55?
11 A So, at 10:55, I went in and spoke
12 to him about his elevated blood
13 pressure and that's when he told
14 me that he was on propranolol,
15 which is a blood pressure
16 medicine, albeit, you know, beta-
17 blockers usually aren't, you
18 know, great for hypertension, and
19 I did discuss with him about
20 maybe adding another medicine to
21 his regimen.
22 And we do what's called
23 shared decision-making, meaning
24 that, you know, before we go to

1 prescribe or make a, you know,
2 plan of care, we typically would
3 make sure that the patient is in
4 agreement with it.
5 So I told him that -- and
6 it's not verbatim obviously, but
7 I did order some clonidine to
8 help to bring his blood pressure
9 down temporarily and then that I
10 would order another medicine
11 called lisinopril for him to take
12 that would help his blood
13 pressure.
14 Q Okay. So then let's move on to
15 impression and plan and you have
16 several diagnoses listed there.
17 Your first one was radiculopathy?
18 A Correct.
19 Q And what was the basis for your
20 diagnosis of radiculopathy?
21 A So that would be the IA5
22 radiculopathy based on the
23 history of present illness and
24 the exam.

1 Q Okay. And next you list
2 hypertension?
3 A Yes. That was because his blood
4 pressure was over 140 over 90.
5 Q And again, that was a chronic
6 condition?
7 A Yes.
8 Q Peripheral edema, what was the
9 basis for your diagnosis of
10 peripheral edema?
11 A So that's based on the one-plus
12 bipedal edema that he had.
13 Q And then chronic low back pain,
14 that's consistent with the
15 diagnosis in his history?
16 A Yes.
17 Q All right. So then if we move
18 down, there's a plan and you note
19 that his condition was improved
20 and stable?
21 A Correct.
22 Q What does that mean?
23 A That means specifically that his
24 blood pressure improved and he

1 was stable to go.
2 Q All right. And then we have a
3 discharge time of 23:59, so that
4 would be just before midnight.
5 That's when he went home?
6 A Well, I'm not sure if that's the
7 time he went home, but that's the
8 time maybe where, you know, all
9 the information was available and
10
11 Q Yeah.
12 A -- you know, I'm not sure if at
13 that time is when we put all the
14 discharge stuff specifically on a
15 certain -- I think we had, like,
16 a little basket for the
17 discharges. So that was just at
18 the point in time when he was
19 ready to go, not that he left at
20 that time.
21 Q Okay. So, in any event, he was
22 there -- you reevaluated him at
23 22:55 or 10:55, he is ready to go
24 home at around 11:59 or midnight,

1 need to do. We'll see you
2 tomorrow morning at 9:00. I know
3 you won't talk about this with
4 anybody, I know you won't do any
5 independent research, and I will
6 look forward to seeing you
7 tomorrow at 9:00. Okay?
8 THE COURT OFFICER: All
9 rise for the jury.
10 (JURY EXITS)
11 THE COURT OFFICER:
12 Please be seated, folks. Court
13 is back in *session.*
14 MOTION FOR DIRECTED VERDICT
15 THE COURT: All right.
16 In front of me, I have Carlos
17 Flores and Charles Loucraft's
18 motion for a directed verdict at
19 the close of evidence. You want
20 to be heard on that?
21 MR. BELLO: I don't need
22 to be heard, Your Honor.
23 THE COURT: All right.
24 And, also, on -- I do have

1 Stefanie Busa, Susan Hanlon, and
2 Carla Crocker's motion for
3 directed verdict. Do you want to
4 be heard on that?
5 MR. KELLEY: At this
6 time, we'll rely on the papers,
7 Your Honor.
8 THE COURT: Okay. Well,
9 we've all been sitting through a
10 lot of evidence and I do think
11 the evidence *is* sufficient with
12 respect to Mr. Flores and Mr.
13 Loucraft, even to the extent that
14 some have even testified that
15 they did comply with the standard
16 of care.
17 I think the evidence
18 beyond that is sufficient to get
19 over the bar. I'm not making a
20 comment about whether who is
21 going to win or lose, but at
22 least as far as the requirement
23 of a directed verdict motion, I
24 think there has been more than

1 enough evidence to let this jury
2 -- let this case go to the jury,
3 same thing with Nurse Busa,
4 Hanlon, and Crocker.
5 There has been a lot of
6 evidence with respect to
7 reporting requirements, when they
8 should have informed midlevel
9 providers, that type of thing. I
10 think it's been -- there's enough
11 evidence that they deviated from
12 the standard of care in order to
13 get -- allow this case to get to
14 the jury and so that motion is
15 also denied.
16 Again, this is no comment
17 on strength or weaknesses for
18 people in the back; it's just
19 that with respect to the directed
20 verdict standard, there's more
21 than enough to satisfy that this
22 case go to the jury. Okay?
23 THE COURT OFFICER: The
24 jurors were curious, will

1 CERTIFICATION

2

3 I, MARIA SANTOS, A PER DIEM COURT
4 REPORTER, DO HEREBY CERTIFY THAT THE
5 FOREGOING IS A TRANSCRIPT FROM THE RECORD
6 OF THE COURT PROCEEDINGS IN THE ABOVE-ENTITLED
7 MATTER.
8 I, MARIA SANTOS, FURTHER CERTIFY
9 THAT I NEITHER AM COUNSEL FOR, RELATED TO
10 NOR EMPLOYED BY ANY OF THE PARTIES TO THE
11 ACTION IN WHICH THE HEARING WAS TAKEN AND
12 FURTHER THAT I AM NOT FINANCIALLY NOR
13 OTHERWISE INTERESTED IN THE OUTCOME OF THE
14 ACTION.
15
16 MARIA SANTOS, PER DIEM COURT REPORTER
17 PROCEEDINGS RECORDED BY STENOMASK.
18
19 TRANSCRIPTS PRODUCED FROM COMPUTER.
20
21 _____ _____
22 MARIA SANTOS DATE

Pages: 1-268
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD, *
*
Plaintiff, *
v. *
*
CARLOS FLORES, N.P., *
CHARLES LOUCRAFT, P.A., *
STEFANIE BUSA, R.N., *
SUSAN HANLON, R.N., *
CARLA CROCKER, R.N., AND *
MERRIMACK VALLEY EMERGENCY *
ASSOCIATES, INC., *
*
Defendants. *

* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

TRIAL TRANSCRIPT

Thursday, March 23, 2023

Maria Santos
Court Reporter

1 same question on negligence as to
2 Susan Hanlon, R.N. And question
3 nine asks the same question on
4 negligence as to Stephen (sic)
5 Busa, R.N.
6 All right, back to the
7 instructions. If you find that
8 any or all of the defendants were
9 negligent and let me repeat that,
10 if you find that any or all of
11 the defendants were negligent,
12 then you must decide whether Mr.
13 Luppold proved that, more likely
14 than not, the individual
15 defendant's negligence caused Mr.
16 Luppold's injuries.
17 The defendant caused
18 injuries if the injuries would
19 not have occurred without, that
20 is but for, that defendant's
21 negligence. To decide this, you
22 must ask would the same harm have
23 happened without that defendant's
24 *negligence.* In other words, did

1 **the negligence make a difference?**
2 **If a defendant's**
3 **negligence had an** impact on
4 Steven Luppold's injuries, then
5 it caused those injuries. But if
6 the negligence had no impact on
7 Steven Luppold's injuries and the
8 result would have happened
9 anyway, then that defendant did
10 not cause the injuries.
11 An injury may have more
12 than one cause. If a defendant's
13 negligence was one of those
14 causes, that is enough.
15 Plaintiff does not have to show
16 that a defendant's negligence was
17 the only cause of the injuries,
18 nor does he have to show that a
19 defendant's negligence was the
20 largest or main cause of the
21 injuries as long as the injuries
22 would not have occurred without
23 that defendant's negligence.
24 Here again, plaintiff

1 don't need to give a closing if
2 you've listened all this time to
3 all the things that I'm going to
4 say. They've told you what I'm
5 going to say. They do that for a
6 reason because they have
7 problems. So they try to head
8 off those problems, but we're
9 going to touch on a lot of
10 things.
11 But I want to deal with
12 one issue that was just raised
13 with you before I move on. And
14 I'm going to come back to this
15 issue because it's an important
16 part of this case that I'm going
17 to focus on and talk to you about
18 specifically.
19 Mr. Kelley just stood
20 before you and said sometimes
21 it's hard being a witness, and
22 Nurse Hanlon had a difficult time
23 being a witness. The reason she
24 didn't get back on the stand

1 isn't because it was difficult
2 for her to be a witness. The
3 difficulty she has is telling the
4 truth. That's the difficulty she
5 has.
6 She sat before you and
7 I'm going to go over it, and
8 repeatedly -- repeatedly lied to
9 you. I don't say that lightly,
10 calling somebody a liar. But
11 that was the difficulty she had
12 in this case was keeping the
13 truth straight. Code -- she has
14 a difficult time being a witness.
15 Anybody can tell the truth. That
16 was her difficulty. We're going
17 to talk about her again later on.
18 You are given
19 instructions by the Judge every
20 day. Don't talk about the case.
21 Don't talk to other people.
22 Don't let outside influences
23 affect you. Don't go do
24 research, all those things.

1 There are lots of reasons for
2 that. It's because you base your
3 verdict on what you hear in here.
4 But one of the things
5 that we don't take away from you
6 -- in fact, not only do we not
7 take it away, we implore you to
8 use. It's one of the reasons we
9 spent two days selecting not a
10 juror but a jury. This isn't
11 tried to one person. It's tried
12 to people from the community
13 because people from the community
14 bring their life experiences from
15 all walks of life and their
16 common sense.
17 And common sense and life
18 experience is maybe the most
19 important, the single most
20 important thing you can bring
21 back into that room when you walk
22 back there. One juror could
23 potentially miss something, get
24 confused, maybe even get fooled.

1 A jury, that doesn't happen
2 because there are eight of you.
3 So when you go back into
4 the jury room, on behalf of Mr.
5 Luppold, I beg you don't leave
6 your common sense and your life
7 experience here. Bring it with
8 you because it is critical for
9 you to decide what more probably
10 than not happened here? What's
11 more likely, that's the standard.
12 That's what you have to decide.
13 You have to decide where does the
14 truth lie? What's more probably
15 true than not true?
16 And a large part of that
17 is you have to assess credibility
18 of witnesses, who you believe,
19 what you believe, and what you
20 think happened here. The defense
21 is, hey, Steven Luppold came in
22 on two occasions six days apart,
23 didn't tell us anything about his
24 foot, and maybe he didn't even

1 problem he's had. There's no
2 lawsuit. There's no litigation.
3 He's not saying this, maybe it
4 will help my liti- -- there's no
5 lawsuit. He doesn't know he's
6 going to lose his leg. He's
7 telling them what's been wrong
8 with him.
9 So when you think about
10 this case, ladies, and gentlemen,
11 put aside anything that's been
12 said here today. Put aside maybe
13 self-serving statements and look
14 at what Mr. Luppold told people
15 if you want to know where the
16 truth lies. It lies in exactly
17 the records from Lowell General
18 and the records from Lahey. He
19 had a foot problem. That's the
20 first thing.
21 The second thing I would
22 suggest to you, there may not be
23 much more important than this
24 testimony and I am going to say

1 something that I very rarely say
2 when I stand in front of juries
3 in cases like this. I'm going to
4 ask you to give a lot of credit
5 to Charles Loucraft, one of the
6 defendants. He is a defendant.
7 He has been accused of medical
8 malpractice. He has been accused
9 of not doing what he was supposed
10 to do causing somebody to lose
11 his leg.
12 And Mr. Loucraft, to his
13 credit, told you he messed up.
14 He told you, he agreed, I was
15 negligent in not reading that
16 triage note. I should have. He
17 also told you; I want you to go
18 back and look at the testimony
19 from -- it was a week ago Friday.
20 He actually wasn't the first
21 witness; he was the second
22 witness. Dr. Stolbach was first.
23 But he told you, a cool
24 foot, a purple foot, a painful

1 foot, severe ankle pain,
2 swelling, he told you all of
3 those are concerning. There
4 aren't a lot of things that will
5 cause those, and they require an
6 ultrasound. You remember I
7 talked to him, sir, people can
8 change. They can have -- it can
9 be cool, but it doesn't have to
10 be cool all the time.
11 He said, I agree. If you
12 get those complaints, the role
13 and the responsibility of the
14 provider is to get an ultrasound.
15 Remember, I said to him, you all
16 failed him, didn't you, all of
17 you? And at first he said, I
18 don't know if we failed him. I
19 said, you failed him. You never
20 should have let him walk out of
21 that emergency department. You
22 remember this testimony. And he
23 said, you're right. We should --
24 he never should have been

1 discharged without an ultrasound
2 because that is true testimony.
3 Not easy testimony, I'm
4 sure, for him to give. We call
5 it in the law an admission when a
6 party tells you something, agrees
7 something, it's called admission.
8 Why? Because they're admitting
9 something. He had to admit to
10 all of you in a case, I was
11 negligent. He didn't throw
12 anybody under the bus as Mr.
13 Kelley would suggest he wants to
14 blame others. That's I didn't do
15 anything wrong but blame them.
16 That's what that is. He took
17 responsibility, but to be fair to
18 Mr. Luppold, he also said but it
19 wasn't just me. Nurse Crocker
20 fell below the standard of care.
21 She should come back and tell me.
22 That doesn't excuse my
23 negligence. He's not saying
24 that. But she had a

1 responsibility too. And Nurse
2 Hanlon had a responsibility to
3 tell him about a purple, cool
4 foot. And he told you, if I had
5 known about any of that, I would
6 have gotten an ultrasound.
7 And you remember I said
8 to him, and that would have led
9 to a vascular consult or -- he
10 said, yeah. I would have either
11 ordered it or I would have sent
12 him over to the corp. But he
13 would have gotten a consult.
14 You don't have to look,
15 ladies and gentlemen, in this
16 case. You can use the
17 defendant's own statement to base
18 your verdict. And I would submit
19 to you, he did that for one
20 reason and one reason only. It's
21 refreshing because it's the
22 truth. He didn't try to hide
23 from it. He could have. He
24 could have said, like Mr. Flores

1 did, oh I don't -- I don't have
2 to look at triage notes, but he
3 didn't say that because he knows
4 that mid-level providers like
5 him, like Mr. Flores, they work
6 in the same group. They're hired
7 for the exact same job.
8 Dr. Stolbach told you
9 there is an expectation, whether
10 it's a doctor, a nurse
11 practitioner, or a P.A., in an
12 emergency department, the
13 expectation is you will read the
14 information that's provided
15 because it's vital information.
16 He told you he agrees with that.
17 And Mr. Flores doesn't want to
18 agree to that. I don't
19 necessarily have to read it, no.
20 No. Why won't he tell you the
21 truth?
22 Give Mr. Loucraft credit.
23 He doesn't get a lot. It doesn't
24 mean he wasn't negligent; he was.

1 they change, there's a real good
2 reason for it. Remember she
3 said, I haven't really much
4 attention to this case. I have
5 other things going on in my life.
6 Exactly how she and the other
7 nurses in this case treated this
8 case. Eh, they were here when
9 they wanted to be here. Weren't
10 here to listen to Mr. Luppold.
11 Weren't here to listen to Mr.
12 Loucraft. Nurse Hanlon came and
13 went. I agree with Mr. Bello,
14 Mr. Loucraft and Mr. Flores sat
15 in the front row and listened to
16 everything. Can't say the same
17 for the three nurses.
18 Maybe it's telling, kind
19 of the way they acted about this
20 case is how they acted about Mr.
21 Luppold in the ED. Someone
22 else's problem. Write it down.
23 Move him to the waiting room.
24 Write it down, move him to the

waiting room. If that's how emergency rooms operate, ladies and gentlemen, I would suggest to you that's frightening. When somebody has a serious complaint, it's supposed to be taken seriously by everybody. As Mr. Loucraft told you, we were all responsible for the patient and that's true.

Steven Luppold, you heard from him. I would suggest to you he told you the truth. He was honest with you. He doesn't remember everything that happened. In fact, I said to him, it says purple foot. He said I don't remember what color it was. I remember my foot hurt. I remember it was cool and I remember it was turning colors.

And I remember she asked me if I stuck my foot in a snowbank. And her answer is

1 tell them when to come or not
2 come. But it is fair for them to
3 assess the overall how this
4 how behavior in a courtroom is
5 important.
6 MR. KELLEY: Absolutely
7 not, Your Honor.
8 THE COURT: Okay, all
9 right.
10 MR. KELLEY: There was
11 discussion that some of the
12 nurses would not be able to be
13 here.
14 MR. HIGGINS: Friday.
15 MR. KELLEY: That was a
16 sidebar --
17 MR. HIGGINS: Friday.
18 MR. KELLEY: and there
19 was discussion that no one was
20 going to direct attention to
21 that.
22 THE COURT: I don't
23 remember --
24 MR. HIGGINS: Friday.

1 THE COURT: -- that part
2 Do you have a memory of that?
3 MR. HIGGINS: Friday.
4 THE COURT: What?
5 MR. HIGGINS: It was -
6 THE COURT: Of that, was
7 there an agreement that no one
8 was going to draw attention to
9 people coming and going?
10 MR. KELLEY: There
11 absolutely was, Your Honor.
12 THE COURT: Okay.
13 MR. KELLEY: But now,
14 this --
15 THE COURT: I understood.
16 SO you want me to give an
17 instruction, right?
18 MR. KELLEY: I would,
19 Your Honor.
20 THE COURT: Okay.
21 MR. KELLEY: I think it's
22 necessary and important.
23 THE COURT: All right.
24 What else?

1 MR. KELLEY: That there
2 be that instruction.
3 THE COURT: Anything else
4 that you want to bring up with
5 the Court?
6 MR. KELLEY: From
7 closing, no.
8 THE COURT: Anything?
9 MR. BELLOW: Nothing.
10 THE COURT: Anything?
11 MR. HIGGINS: No.
12 THE COURT: Okay. So
13 what I may try to do, is just
14 there's something in what is
15 evidence. And it says other
16 things that are not evidence.
17 Questions that a lawyer
18 has asked. A lawyer asks a
19 question, that you know, if I
20 struck an answer. Anything that
21 you may have seen or heard when
22 the Court was not in session,
23 blah, blah, blah.
24 I can -- I can put in a

1 quick line. The parties'
2 presence here in the courtroom or
3 lack there of is not evidence,
4 period.
5 MR. KELLEY: And should
6 draw no negative inference.
7 THE COURT: No. I'm just
8 going to say it's not evidence.
9 MR. KELLEY: That I will
10 _-
11 THE COURT: Okay.
12 MR. HIGGINS: That's
13 fine.
14 MR. KELLEY: -- for the
15 record, Your Honor, at a minimum,
16 defendant requests that the
17 addition of "and the jury is to
18 take no negative inference"
19 THE COURT: Okay.
20 MR. KELLEY: -- "from the
21 presence or absence of a party."
22 THE COURT: I'm going to
23 put that in right before the part
24 of the opening statements and the

1 closing statements of the lawyers
2 is not evidence, so it helps
3 explain it's not evidence. And
4 it's your memory of the testimony
5 that differs, okay.
6 And then later on, I talk
7 about it's only evidence that you
8 can consider with respect to the
9 issues in this case. All right.
10 MR. KELLEY: And they'll
11 be specific reference to the
12 parties' presence or absence?
13 THE COURT: No. I'm not
14 going to -- I'm not going to, all
15 I'm going to say, "a party's
16 presence or lack thereof is not
17 evidence." period.
18 MR. KELLEY: Your Honor,
19 under these circumstances and the
20 manner in which Attorney Higgins
21 argued to the jury, at a minimum,
22 there ought to be instruction
23 that there can be no negative
24 inference from the presence or

1 absence of a party.
2 THE COURT: Well I'm
3 going to leave it at that. Okay,
4 anything -- nothing else, right?
5 All right. We'll see you in
6 seven minutes.
7 (END SIDEBAR CONFERENCE)
8 THE COURT OFFICER:
9 Court, all rise.
10 (Court is in recess at 12:01
11 P.m.)
12 (Court resumes at 12:13 p.m.)
13 THE COURT OFFICER:
14 Court, all rise.
15 THE COURT: Want to go
16 get them?
17 THE COURT OFFICER: Yes.
18 THE COURT: Thank you.
19 THE COURT OFFICER:
20 Court, all rise for the jury.
21 (JURY ENTERS)
22 THE COURT OFFICER: Court
23 is back in session, resuming case
24 on trial. You may be seated.

1 was raining. If a lawyer asks a
2 question and I sustained an
3 objection and therefore the
4 witness did not answer it, then
5 neither the question nor the fact
6 that the witness did not answer
7 the question is evidence.
8 If I struck or I told you
9 to disregard any part of or all
10 of an answer by a witness, then
11 that part of the testimony is not
12 evidence, and you may not
13 consider it. Anything that you
14 may have seen or heard when in
15 the courtroom that was not in --
16 excuse me.
17 Anything that you may
18 have seen or heard when the Court
19 was not in session is not
20 evidence. A party's presence in
21 the courtroom or lack thereof is
22 not evidence. The opening
23 statements and closing arguments
24 of the lawyers are not evidence.

1 the right one. In the end, you
2 should vote based on your own
3 assessment of the evidence
4 regardless of how other jurors
5 have voted. Ultimately, you each
6 much decide this case for
7 yourself.
8 Before I close, jurors,
9 any of the parties need to see me
10 at sidebar?
11 MR. BELLO: Yes, Your
12 Honor, briefly.
13 THE COURT: All right.
14 (SIDEBAR CONFERENCE)
15 MR. BELLO: Your Honor,
16 two *issues.* The first issue, I
17 renew my objection on the
18 instructions regarding use of the
19 impact language as being a
20 watered-down version of Doull and
21 what's required under "but-for."
22 So I just renew that
23 objection --
24 MR. KELLEY: Yes.

1 MR. BELLO: -- to the use
2 of the term impact. The other
3 issue, Your Honor, and I did
4 include this in my revised or my
5 proposed revisions was that I had
6 asked that the word "work" come
7 out of --
8 THE COURT: So where are
9 we?
10 MR. BELLO: So we're on
11 page -- on pain and suffering
12 damages.
13 THE COURT: Okay.
14 MR. BELLO: And it says,
15 also "If Steven Luppold's
16 injuries caused him to lose
17 enjoyment of activities such as
18 work, play, family, otherwise."
19 I just want to make it clear
20 there is no claim here --
21 THE COURT: Yeah, yeah.
22 MR. BELLO: -- for lost
23 wages, earning capacity. So I
24 think we should just give some

1 sort of an instruction
2 THE COURT: By the way,
3 this is the first I've been
4 flagged on that issue, and I
5 agree with you completely on it.
6 Okay. If I had been flagged on
7 it earlier, I would have taken it
8 out in two seconds.
9 MR. BELLO: I -- actually
10 I did. For whatever reason it
11 did not
12 THE COURT: I didn't see
13 it.
14 MR. BELLO: -- I think I
15 mentioned it when we did the
16 charge conference. My apologies
17 THE COURT: It's okay.
18 MR. BELLO: Okay.
19 THE COURT: But I don't
20 disagree with you.
21 MR. BELLO: Okay.
22 THE COURT: Anything from
23 you?
24 MR. HIGGINS: No. I just

1 wonder what you're going to say
2 or are you going to say it?
3 THE COURT: Do you want
4 me to bring it up?
5 MR. BELLO: I do.
6 THE COURT: Okay.
7 MR. BELLO: I want you to
8 say that there's no claim here,
9 you know, you could even
10 reference this language. But
11 that there's no claim here for
12 loss of earning capacity or lost
13 wages.
14 THE COURT: Okay.
15 MR. HIGGINS: Yeah, I
16 mean -- I --
17 MR. BELLO: As an element
18 of damages.
19 MR. HIGGINS: It's true.
20 I hate, at the end of everything
21 -_
22 THE COURT: I know, I
23 know.
24 MR. HIGGINS: -- pointing

1 it out, but it's not an incorrect
2 statement.
3 THE COURT: I just didn't
4 -- I just didn't, I don't
5 remember anybody saying anything
6 about it and I didn't catch it as
7 I was going through it. And now
8 that I see it, I don't think
9 you're -- you're incorrect.
10 Anything from you?
11 MR. KELLEY: Just to
12 renew, as we discussed, in regard
13 to the instructions, the
14 defendants' request under
15 causation. And it was numbers
16 36, 38, 42, and 44, 47, and 48,
17 under proposed defendants'
18 instructions relating to
19 causation, in particular "but
20 for."
21 THE COURT: All right.
22 So on the --
23 MR. KELLEY: And then
24 just the other one is renewing

1 the request under 50 and 51, 52,
2 53, 54, which dealt with
3 superseding, intervening cause.
4 THE COURT: Right, okay.
5 MR. BELLO: And just so
6 the record is clear, I'll join
7 Mr. Kelley with regard to those
8 instructions that have to deal
9 with "but for" causation. So I
10 join in that objection.
11 THE COURT: Okay. So on
12 the one, on the pain and
13 suffering, I'm going to say
14 ladies and gentlemen, I did read
15 you that if Steven Luppold's
16 injuries caused him to lose
17 enjoyment of activities such as
18 work, play, family life, or
19 otherwise, then you should award
20 damages for that reduction in the
21 enjoyment of life.
22 I just -- I had forgotten
23 to -- I'm going to tell them I
24 had forgotten to cross out the

1 word work because we really
2 haven't had --
3 MR. BELLO: Correct.
4 THE COURT: -- heard the
5 evidence with respect to work or
6 lack thereof.
7 MR. HIGGINS: Why don't
8 you just -- if you're going to
9 read the entire line --
10 THE COURT: I am going to
11 read the entire line.
12 MR. HIGGINS: -- then I
13 think you need to be very clear
14 that the only thing you're
15 crossing out is work.
16 THE COURT: Yes.
17 MR. HIGGINS: Because
18 okay.
19 THE COURT: Okay.
20 MR. BELLO: Thank you,
21 Your Honor.
22 (END SIDEBAR CONFERENCE)
23 THE COURT: All right.
24 So you probably noticed as we

1 went along, I did say something
2 different orally than what you
3 might have been reading.
4 And one of the ones I
5 didn't catch, and I just want to
6 read you the sentence. It's
7 under pain and suffering and I
8 didn't catch this and it's my
9 fault. It should not be in
10 there.
11 And it's the last
12 paragraph under pain and
13 suffering. It says, "Also, if
14 Steven Luppold's injuries caused
15 him to lose enjoyment of
16 activities such as work, play,
17 family life, or otherwise, then
18 you should award damages for that
19 reduction in the enjoyment of
20 life."
21 What I should have
22 crossed out and should not have
23 said was the work "work," such as
24 work. Because we've heard no

1 evidence of work or lack of work
2 as a result of these injuries and
3 that wouldn't be appropriate to
4 put in here.
5 So please disregard the
6 word "work" as I put in that last
7 sentence there, okay. All right.
8 Anything else I need to, that I
9 missed?
10 MR. HIGGINS: No, Your
11 Honor.
12 THE COURT: All right.
13 All right, ladies and gentlemen,
14 now we will have the Court
15 Officer sworn.
16 (COURT OFFICER SWORN)
17 THE COURT: All right,
18 ladies and gentlemen, I'm now
19 going to discharge you to your
20 deliberations. Seven out of
21 eight, I'm not sure I mentioned
22 that, seven out of eight on each
23 of the jury verdict -- on the
24 questionnaire, okay. And we'll

1 **CERTIFICATION**

2

3 **I, MARIA SANTOS, A PER DIEM COURT**
4 **REPORTER, DO HEREBY CERTIFY THAT THE**
5 **FOREGOING IS A TRANSCRIPT FROM THE RECORD**
6 **OF THE COURT PROCEEDINGS IN THE ABOVE-ENTITLED**
7 **MATTER.**
8 **I, MARIA SANTOS, FURTHER CERTIFY**
9 **THAT I NEITHER AM COUNSEL FOR, RELATED TO**
10 **NOR EMPLOYED BY ANY OF THE PARTIES TO THE**
11 **ACTION IN WHICH THE HEARING WAS TAKEN AND**
12 **FURTHER THAT I AM NOT FINANCIALLY NOR**
13 **OTHERWISE INTERESTED IN THE OUTCOME OF THE**
14 **ACTION.**
15
16 **MARIA SANTOS, PER DIEM COURT REPORTER**
17 **PROCEEDINGS RECORDED BY STENOMASK.**
18
19 **TRANSCRIPTS PRODUCED FROM COMPUTER.**
20
21 DocuSIgnedby: ChtAriek: S AlitieS 9DAE5465601245F.. 8/31/2023
22 **MARIA SANTOS** **DATE**
23
24

Pages: 1-101
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* *

STEVEN LUPPOLD, *
*
Plaintiff, *
v. *
*
CARLOS FLORES, N.P., *
CHARLES LOUCRAFT, P.A., *
STEFANIE BUSA, R.N., *
SUSAN HANLON, R.N., *
CARLA CROCKER, R.N., AND *
MERRIMACK VALLEY EMERGENCY *
ASSOCIATES, INC., *
*
Defendants. *

* *

BEFORE THE HONORABLE CHARLES W. BARRETT
DOCKET NUMBER 1681CV01287

Friday, October 27, 2023
Courtroom: 530

Allyson Pallier
Court Reporter

1 here and tell Mr. Kelley is not
2 accurately describing it or not.
3 I just don't remember how it got
4 to you.
5 What you gave, Your
6 Honor, very importantly here --
7 Mr. Bello disagreed, as well, and
8 Mr. Kelley -- is right from the
9 model instructions, they use the
10 word "impact."
11 THE COURT: Right.
12 MR. HIGGINS: Does it
13 make a difference? I mean, if
14 we're standing here literally
15 arguing that you're going to
16 overturn a 30-million-dollar
17 judgment and you used the model
18 instructions that were put
19 together by Superior Court
20 judges, what are we doing?
21 THE COURT: Yeah. Your
22 rights are preserved on that.
23 You can take that issue up. If
24 my instruction was wrong, then it

1 was wrong.
2 There is not going to be
3 any dispute that my instructions
4 say what they say, so if you got
5 a problem with that, then that --
6 you know, I used the instruction
7 that I thought was appropriate.
8 If I used the wrong law, I used
9 the wrong law, and your rights --
10 your appellate rights are
11 approved.
12 I'm not marking anything
13 and having anything be a part of
14 the official record here that I
15 don't know what it is. And red-
16 lined versions, I'm not even sure
17 I saw those. You guys could have
18 gone back and forth four
19 different times.
20 If you want that to be
21 part of some record and you want
22 to show some misconduct on my
23 part or somebody else's part,
24 that's -- you can do that later

1 fine. Then I'll give you a
2 chance. Go ahead.
3 MR. HIGGINS: Let me just
4 start by saying, Your Honor, as
5 the Court is well-aware, in every
6 malpractice case, virtually every
7 one, including Mr. Kelley, they
8 file motions beforehand saying do
9 not talk about insurance, right?
10 Doesn't say talk about it
11 for any reason other than
12 negligence. You can have it if
13 you can find bias. It says don't
14 talk about it. So, that's how
15 they start.
16 The fatal flaw that Mr.
17 Kelley knows but doesn't talk
18 about here is that Mr. Loucraft
19 had insurance. They weren't in
20 receivership when he gave his
21 deposition when he testified
22 under oath.
23 Mr. Kelley knows because
24 I filed a 93A letter after the

1 deposition saying settle this
2 case because Mr. Loucraft just
3 said your nurse was negligent and
4 I got back a response, "No, he
5 didn't."
6 He did. A plain reading
7 of that, when he had insurance,
8 was she was negligent. If she
9 had told me, I would have gone to
10 a doctor, he would have gone over
11 to the other side of the
12 emergency room to see a doctor,
13 and I said to him, "What would
14 have then happened?"
15 He said he would have had
16 a consult with a vascular surgeon
17 and he would have gone where they
18 could do vascular surgery. I
19 didn't ask one question at the
20 deposition. I did a whole line
21 of questioning.
22 Twenty-nineteen Mr.
23 Kelley was aware of that
24 testimony. When Mr. Loucraft

1 took the stand, there was no
2 high-low. There was no high-low.
3 But his circumstances had
4 changed. He only had so much
5 coverage.
6 So, I said to Mr.
7 Luppold, if Mr. Kelley's
8 insurance company can settle and
9 I can get a high-low from Mr.
10 Luppold, you should -- Loucraft,
11 you should take it at all,
12 because you can only get so much.
13 Mr. Kelley's insurance company
14 said to me, "Go pound sand,"
15 basically.
16 Mr. Luppold -- Mr.
17 Loucraft said we'd like to talk
18 to you. We only have so much,
19 but we'd like to talk to you. He
20 took the stand, testified
21 consistent with his deposition,
22 and there was no high-low in
23 place.
24 After he was done

1 testifying, Mr. Bello approached
2 me again and said, "What do you
3 think?" Mr. Luppold, my client,
4 as is his right, said, I'd like
5 to make sure that I get some
6 money out of this, let's talk.
7 Somehow now there's this
8 conspiracy that Mr. Kelley has
9 created in his own mind that Mr.
10 Bello, a fellow defense lawyer,
11 and I have concocted this
12 scenario whereby what *is* Mr.
13 Loucraft's incentive? He has a
14 high-low; he's protected.
15 Why would he want to
16 stick it to somebody else? To
17 give my client money? No. No.
18 That's ludicrous.
19 Mr. Kelley, when Mr.
20 Loucraft went back up with Mr.
21 Bello is when he -- he learned of
22 the high low. The flaw is I had
23 the testimony at deposition when
24 he had insurance. There was no

high low. I had the testimony on the stand when there was no high low.

The fact that my client engaged in discussions with Mr. Loucraft's insurance, and the nurses told me they weren't interested in it, there's no reason for you to now allow him to stand up and say to the jury, oh, he's getting money. Think about what that does to my client.

Maybe the jury *says,* well, we don't know how much, but we're not going to give him any money. That would be unfair to my client. So that's the high low issue.

Let's talk about closing arguments for a second, and I'm going to be very clear on this. Mr. Kelley just said, "Before closing arguments, I said I

1 CERTIFICATION

2

3 I, ALLYSON POLLIER, A PER DIEM COURT
4 REPORTER, DO HEREBY CERTIFY THAT THE
5 FOREGOING IS A TRANSCRIPT FROM THE RECORD
6 OF THE COURT PROCEEDINGS IN THE ABOVE-ENTITLED
7 MATTER.
8 I, ALLYSON POLLIER, FURTHER CERTIFY
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12 FURTHER THAT I AM NOT FINANCIALLY NOR
13 OTHERWISE INTERESTED IN THE OUTCOME OF THE
14 ACTION.
15
16 ALLYSON POLLIER, PER DIEM COURT REPORTER
17 PROCEEDINGS RECORDED BY STENOMASK.
18
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21 DocuSlired by: 61, 4,10., Polli.t. 9E15/08b29AL24EF.. 1/25/2024
22 ALLYSON POLLIER DATE
23
24

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 1681CV01287

STEVEN LUPPOLD,
Plaintiff

v.

CARLOS FLORES, N.P., CHARLES :
LOUCRAFT, PA., STEFANIE BUSA, R.N.,:
SUSAN HANLON, RN., AND CARLA :
CROCKER, RN. •
Defendants

JURY BOOK

k **Lahey Hospital and Medical Center**

B. **Lowell General Hospital/Saints Campus 3/7/15**

C. **Lowell General Hospital/Saints Campus 3113115**

D. **Massachusetts General Hospital**

EXHIBIT

J
1,;g 7

Lahey Health

41 Mall Road
Burlington, MA 01805
781-744-5100

OPERATIVE REPORT

Name:	LUPPOLD, STEVEN G
Date:	03/18/2015
LC#:	2788665
DOB:	08/01/1979
Admit Date:	03/17/2015
Visit ID:	F17903293
Floor:	BUR6CENT / 6C13 / 01

PREOPERATIVE DIAGNOSIS: Irreversibly ischemic left leg.

POSTOPERATIVE DIAGNOSIS: Irreversibly ischemic left leg.

PROCEDURE: Left above-knee-amputation.

SURGEON: Michael Minor, MD.

FIRST ASSISTANT: Victor Kim, MD.

ANESTHESIA: General.

ESTIMATED BLOOD LOSS: Minimal.

INDICATIONS: Mr. Luppold is a 35-year-old gentleman, who has a long history of exercise-induced discomfort in his hips and buttocks. He was told it was secondary to sciatica by outside physicians and this has been long-standing. He is a longtime smoker and continues to smoke. He also has a strong family history of abnormal clotting suggestive of a possible hereditary thrombophilia.

The patient presented with a nearly 2-week history of pain, numbness and coldness of his left foot. He was seen approximately 12 days ago in an outside emergency room for similar complaints. It is unclear what workup was done at that time. The patient continued to have pain and progressive paralysis of his left foot over the ensuing days. He re-presented to an outside emergency room several days ago and discharged. He presented to the Lahey Emergency Room last evening. On arrival, his foot was _____, painful, insensate and paralyzed. He had minimal movement of the ankle with no Doppler signals. His femoral pulse was absent. He had a well-perfused right foot with strongly dopplerable signals. The patient states that he had been unable to move his foot for over a week. On exam, his calf was firm and swollen with purplish nonblanching mottling to the mid calf, which was clearly demarcating at the mid calf. CT angiography confirmed a complete thrombotic occlusion of the left common and external iliac arteries. There was reconstitution of the left common femoral artery. The proximal superficial femoral artery was patent; however, there was complete thrombosis likely from an embolic occlusion of all calf vessels with no named vessels visible, with no opacification of contrast in the calf, lower leg and foot. He had significant swelling consistent with irreversibly ischemic muscle in the calf, essentially involving the entire posterior compartment as well as the anterior compartment. Given the length of his symptoms with essentially several days of a completely insensate, paralyzed foot and his exam which was clearly consistent with an irreversibly ischemic leg, an amputation was recommended. His CPK was noted to be 32,000. There is no evidence of rhabdomyolysis with a normal creatinine. However, given the significantly elevated CPK and the large amount of irreversibly ischemic muscle in the leg, I felt that an urgent amputation was necessary to prevent rhabdomyolysis and possibly other complications. I did

have a lengthy discussion with the patient, both in the emergency room on presentation as well as the following morning. I explained that his leg is not salvageable and he will require an above-knee amputation. Risks of surgery were discussed and he agreed to proceed.

DESCRIPTION OF PROCEDURE: After informed consent was obtained, he was taken to the operating room and laid supine on the operating table. General anesthesia was established. The left thigh, upper calf and groin were prepped and draped in standard fashion. A standard circumferential fish-mouth incision was made around the distal thigh. It was carried down sharply with cautery. The underlying fascia and muscle was divided with cautery. The muscle was viable in the thigh and appeared adequately perfused. The femur was isolated with a periosteal elevator and divided several centimeters above the skin incision with a wire saw. The remaining posterior musculature was divided. The superficial femoral artery and vein were both divided. The artery was completely thrombosed. The vein appeared to be thrombosed as well. The artery and vein were ligated and doubly suture ligated with heavy silk suture ligatures. The sciatic nerve was then identified. It was dissected free and clamped and divided and tied with a heavy Vicryl. The leg was then passed off the field as specimen. The femur was then filed smooth with a rasp. Any bleeding points were controlled with cautery. The wound was copiously irrigated. The fascia was reapproximated with interrupted 3-0 Vicryl. The skin was closed with 3-0 nylon vertical mattress sutures alternating with skin staples. Sterile dressings were applied. The patient tolerated the procedure well. He was extubated and brought to recovery room, stable. I was present and performed the entire procedure.

MEM:nts
D: 03/18/2015 20:58
T: 03/19/2015 01:17
J: E13157937 / 874381

CC: Elizabeth Lo, MD, PCP1

Michael E. Minor, MD
781-744-8770

104624
7/27/15

5

LOWELL GENERAL HOSPITAL
1 HOSPITAL DRIVE
LOWELL, MA 01852

LUPPOLD JR, STEVEN G
Visit#: 61490548 MRN: 063494
DOB: 8/1/1979 Sex: M Age: 35 yrs
MV EMERGENCY ASSOC

EMERGENCY RECORD

ADMIT BY	ADMIT DATE/TIME	MEDICAL SERVICE	FINANCIAL CLASS	PATIENT TYPE	ACCOUNT NO.	MEDICAL RECORD NO.
MAP	03/07/2015 17:28	EMERGENCY ROOM 65	21	5-EMERGENCY ROOM	61490548	063494

LANGUAGE	RACE	RELIGIOUS PREFERENCE/CHURCH
English	White	CA NO LOCAL

PATIENT

PATIENT NAME AND ADDRESS	BIRTH DATE	AGE	SEX	SOCIAL SECURITY NO.	MARITAL STATUS
LUPPOLD JR, STEVEN G 22 KINSMAN ST APT 1 LOWELL, MA 01852 (978)421-3115	08/01/1979	35Y	M	7049	Single

NEXT OF KIN NAME AND ADDRESS	NEXT OF KIN PHONE NUMBER	NEXT OF KIN RELATIONSHIP
LUPPOLD, STACEY 197 MIDDLESEX ST 1ST FL LOWELL, MA 01852	(978)569-0431	Sister Emergency Contact

GUAR

GUARANTOR NAME	GUARANTOR ADDRESS AND TELEPHONE	GUAR. SOC. SEC. NO.
LUPPOLD JR, STEVEN	22 KINSMAN ST APT 1 LOWELL, MA 01852	7049

EMPL

CODE	GUARANTOR EMPLOYER NAME	GUARANTOR EMPLOYER ADDRESS	GUARANTOR EMPLOYER PHONE #
1)			

INSURANCE

PLAN NO.	INS. CO. CODE	COMPANY NAME	POLICY HOLDER NAME	REL.	CERTIFICATE NO.
1) 0110		NEIGHBORHOOD HEALTH PLAN	LUPPOLD JR, STEVEN G	Patient is Insured	NHP1499254
2) 0070		MASS HEALTH	LUPPOLD JR, STEVEN G	Patient is Insured	100010476806
3)					

PCP/FAMILY PHYSICIAN	ADMITTING PHYSICIAN	ATTENDING PHYSICIAN
NOT ON STAFF, 00999	NONE, 00888	MV EMERGENCY ASSOC, EMERGENCY 00444

PATIENT STATED COMPLAINT	PPR AMOUNT
LEFT FOOT PAIN AND TURNING PURPLE	$

Codes

NURSE SIGNATURE X_____ PHYSICIAN SIGNATURE X_____

DISPOSITION OF PATIENT	ADMITTED / RM NO.	HOME	TRANSFERRED TO	OTHER	TIME AM PM	CONDITION ON DISCHARGE	VISIT CODE

FS010

Rev 06/27 MEDICAL RECORDS COPY FAC_ED_Facesheet.doct

Saints Campus
1 Hospital Drive
Lowell, MA 01852-
(978) 458-1411

Patient:	LUPPOLD JR, STEVEN G		**MR#:**	LGH00063494	
Acct #:	LGH061490548		**Location:**	ED LSC	
DOB:	8/1/1979	**Age:** 38 years	**Date:**	3/7/2015	-3/7/2015
Gender:	Male		**Admitting:**	None,MD	
			PT Type:	Emergency	

Allergy List

Substance: NKA Recorded Date/Time	
4/30/2007 10:43 EDT	Type: Allergy; Recorded On Behalf Of: Duchesne,Suzanne; Reaction Status: Active; Reviewed Date/Time: 3/13/2015 22:40 EDT; Reviewed By: Flores NP,Carlos; Category Drug

Emergency Documentation

Document Name:	ED Note-Physician
Document Status:	Auth (Verified)
Performed By:	Loucraft PA-C,Charles (3/7/2015 19:11 EST)
Authenticated By:	Lyons MD,Richard G (3/8/2015 07:52 EDT); Loucraft PA-C, Charles (3/7/2015 19:11 EST)

Back pain*

Patient: **LUPPOLD JR, STEVEN G** **MRN: 063494** **FIN: 061490548**
Age: **35 years** Sex: **Male** DOB: **08/01/1979**
Associated Diagnoses: **None**
Author: **Loucraft PA-C, Charles**

Basic Information
Time seen: Date & time 03/07/2015 18:30:00.
History source: Patient.
Arrival mode: Walking.
Additional information: Chief Complaint from Nursing Triage Note : Chief Complaint Description
03/07/2015 17:51 Chief Complaint Description low back pain with numbness to left lower extremity - left foot cool to touch
03/07/2015 17:45 Chief Complaint Description low back pain with numbness to left lower extremity - left foot cool to touch .

History of Present Illness
The patient presents with back pain and left leg occasionally numb. The onset was 4 days ago and pain got worse, there has been pain for many weeks, had an MRI 10 days ago. The course/duration of symptoms is worsening. Type of injury: none. Location: Left lumbar left

Emergency Documentation

Back: Normal alignment, no step-offs, decreased range of motion, Lumbar: Left, vertebral point tenderness at L 345.
Musculoskeletal: Normal ROM.
Gastrointestinal: Soft, Nontender, Normal bowel sounds, No organomegaly, stool is guaiac negative and quality control is OK.
Neurological: Alert and oriented to person, place, time, and situation.
Psychiatric: Cooperative, appropriate mood & affect.

Medical Decision Making
Differential Diagnosis: Lumbar strain, disc herniation, sciatica, chronic back pain, compression fracture.

Impression and Plan
Plan
Prescriptions: Prescription Writer
Pharmacy:
Valium 5 mg oral tablet (Prescribe): 5 mg, 1 tab(s), PO, TID, 15 tab(s)
acetaminophen-hydrocodone 325 mg-5 mg oral tablet (Prescribe): 1 tab(s), PO, q6hr, 8 tab(s).
Patient was given the following educational materials: BACK PAIN w/ SCIATICA, BACK PAIN w/ SCIATICA.
Follow up with: Staff Not On Within As needed; Call your pain doctor or PCP for recheck Within As needed.
Counseled: Patient, Regarding treatment plan, Regarding prescription.

Reviewed and electronically verified by: Loucraft PA-C, Charles
on: 03/07/2015 19:11

Reviewed and electronically authenticated by: Loucraft, Charles
on: 03/07/15 19:11

Reviewed and electronically co-authenticated by: Lyons, Richard G
on: 03/08/2015 07:52

Document Name: Triage Forms-Nursing
Document Status: Auth (Verified)
Performed By: Crocker RN,Carla (3/7/2015 17:51 EST)
Authenticated By: Crocker RN,Carla (3/7/2015 17:51 EST)

ED Triage (A) Entered On: 03/07/2015 17:51
Performed On: 03/07/2015 17:51 by Crocker RN, Carla

General
Chief Complaint Description : low back pain with numbness to left lower extremity - left foot cool to touch

Legend: @ = Corrected A = Abnormal C = Critical L = Low H = High * = Footnote # = Interp. Data R = Ref Lab

Emergency Documentation

Pain Symptoms : Yes
Lynx Mode of Arrival : Private vehicle
Accompanied By : None
Information Given By : Patient
Vital Signs Assessed : No
Persistent Cough : No
Domestic Concerns : None
ED Known/Suspected Infection : No
Pregnancy Status : N/A

Crocker RN, Carla - 03/07/2015 17:51

Family Notification
Family Notified : N/A

Crocker RN, Carla - 03/07/2015 17:51

Height/Weight
Height : 172 cm(Converted to: 5 foot 8 in, 67.72 in)
Weight in lb : 209 lb(Converted to: 94.801 Kg)
Weight : 94 Kg(Converted to: 207 lb 4 oz, 207.235 lb)
Body Surface Area : 2.07 m2
Body Mass Index : 31.77 Kg/m2
Type of Weight : Stated weight
Type of Height : Stated height

Crocker RN, Carla - 03/07/2015 17:51

Primary Pain
Primary Pain Location : Other: low back pain
Pain Scale Used : 0-10
Pain Score : 8
Primary Pain Interventions : No interventions at this time

Crocker RN, Carla - 03/07/2015 17:51

Image 1 - Images currently included in the form version of this document have not been included in the text rendition version of the form.

Social History
Cigarette Smoking Last 365 Days : No
Exposure to Tobacco Smoke : Unknown if ever smoked

Crocker RN, Carla - 03/07/2015 17:51

Social History

(As Of: 03/07/2015 17:51:58)

Alcohol:	Denies Alcohol Use (Last Updated: 06/28/2013 12:14:45 by McCarthy, Lisette)
Substance Abuse:	Denies Substance Abuse (Last Updated: 06/28/2013 12:48:17 by McCarthy, Lisette)
Tobacco:	High Risk

Legend: @ = Corrected A = Abnormal C = Critical L = Low H = High * = Footnote # = Interp. Data R = Ref Lab

Emergency Documentation

Current, Cigarettes Comments: 06/28/2013 12:48 - McCarthy, Lisette: 1 ppd (Last Updated: 06/28/2013 12:48:32 by McCarthy, Lisette)

TB Screen
TB Symptoms Grid
Bloody Sputum : No
Fatigue : No
Fever : No
Loss of Appetite : No
Night Sweats : No
Persistent Cough : No
Weight Loss : No

Crocker RN, Carla - 03/07/2015 17:51

Patient Ever Treated for TB : No

Crocker RN, Carla - 03/07/2015 17:51

Suicide Risk Screening
Initial suicide Risk Screening : No

Crocker RN, Carla - 03/07/2015 17:51

Document Name:	Triage Forms-Nursing
Document Status:	Modified
Performed By:	Crocker RN,Carla (3/7/2015 17:45 EST)
Authenticated By:	Crocker RN,Carla (3/7/2015 17:54 EST); Crocker RN,Carla (3/7/2015 17:45 EST)

ED ESI Saints Entered On: 03/07/2015 17:51
Performed On: 03/07/2015 17:45 by Crocker RN, Carla

ESI
Chief Complaint Description : low back pain with numbness to left lower extremity - left foot cool to touch
Child capillary refill>2;mottling/alt mental stat : N/A

Crocker RN, Carla - 03/07/2015 17:45
Crocker RN, Carla - 03/07/2015 17:45

DCP GENERIC CODE
Tracking Group : LSC ED Tracking Group

Crocker RN, Carla - 03/07/2015 17:45

Tracking Acuity : 4 -Semi-Urgent

Crocker RN, Carla - 03/07/2015 17:54
~~{[3 -Urgent] -- previously charted by Crocker RN, Carla at 03/07/2015 17:45 };~~

Do You Feel Safe at Home : Yes

Legend: @ = Corrected A = Abnormal C = Critical L = Low H = High * = Footnote # = Interp. Data R = Ref Lab

Emergency Documentation

Hx Cough MRSA VRE Other : No

Crocker RN, Carla - 03/07/2015 17:45

Vital Signs
Pain Scale Used : 0-10
Pain Score : 8
Temperature Oral : 98.0 DegF
Peripheral Pulse Rate : 74 bpm
Respiratory Rate : 20 br/min
Systolic Blood Pressure : 169 mmHg (HI)
Diastolic Blood Pressure : 97 mmHg (HI)
Blood Pressure Extremity : Right arm
Mean Arterial Pressure : 121 mmHg
SpO2 : 100 %
Oxygen Therapy 1 : Room air

Crocker RN, Carla - 03/07/2015 17:45

Allergies

(As Of: 03/07/2015 17:51:04)

Allergies (Active)
NKA — *Estimated Onset Date:* Unspecified ; *Created By:* Duchesne, Suzanne; *Reaction Status:* Active ; *Category:* Drug ; *Substance:* NKA ; *Type:* Allergy ; *Updated By:* Duchesne, Suzanne; *Reviewed Date:* 05/09/2014 18:43

Reason For Visit

(As Of: 03/07/2015 17:51:04)

Problems(Active)
No Chronic Problems (Cerner :NKP) — *Name of Problem:* No Chronic Problems ; *Recorder:* Crocker RN, Carla; *Code:* NKP ; *Last Updated:* 03/07/2015 17:50 ; *Life Cycle Date:* 03/07/2015 ; *Life Cycle Status:* Active ; *Vocabulary:* Cerner

Diagnoses(Active)
numbness to left lower extremity — *Date:* 03/07/2015 ; *Diagnosis Type:* Reason For Visit ; *Confirmation:* Complaint of ; *Clinical Dx:* numbness to left lower extremity ; *Classification:* Nursing ; *Clinical Service:* Emergency medicine ; *Probability:* 0

Problem List/Family History

(As Of: 03/07/2015 17:51:04)

Problems(Active)
No Chronic Problems (Cerner :NKP) — *Name of Problem:* No Chronic Problems ; *Recorder:* Crocker RN, Carla; *Code:* NKP ; *Last Updated:* 03/07/2015 17:50 ;

Emergency Documentation

Life Cycle Date: 03/07/2015 ; *Life Cycle Status:* Active ; *Vocabulary:* Cerner

Diagnoses(Active)

numbness to left lower extremity — *Date:* 03/07/2015 ; *Diagnosis Type:* Reason For Visit ; *Confirmation:* Complaint of ; *Clinical Dx:* numbness to left lower extremity ; *Classification:* Nursing ; *Clinical Service:* Emergency medicine ; *Probability:* 0

Family History

(As Of: 03/07/2015 17:51:04)

Mother:
Relation: Mother ; *Gender:* Female ;
Nomenclature: Stroke ; *Value:* Positive
Nomenclature: High blood pressure ; *Value:* Positive

Mat. Grandfather:
Relation: Mat. Grandfather ;
Nomenclature: Stroke ; *Value:* Positive
Nomenclature: High blood pressure ; *Value:* Positive

Mat. Grandmother:
Relation: Mat. Grandmother ;
Nomenclature: High blood pressure ; *Value:* Positive

Pat. Grandfather:
Relation: Pat. Grandfather ;
Nomenclature: Stroke ; *Value:* Positive
Nomenclature: High blood pressure ; *Value:* Positive

Pat. Grandmother:
Relation: Pat. Grandmother ;
Nomenclature: High blood pressure ; *Value:* Positive

Emergency Documentation

Document Name:	Depart Summary
Document Status:	Modified
Performed By:	Hanlon RN,Susan (3/7/2015 19:10 EST)
Authenticated By:	Hanlon RN,Susan (3/7/2015 19:10 EST); Hanlon RN,Susan (3/7/2015 19:10 EST); Loucraft PA-C,Charles (3/7/2015 18:54 EST)

Depart Summary

Lowell General Hospital
Emergency Department LSC
Clinical Depart Summary

PERSON INFORMATION

Name LUPPOLD JR, STEVEN G	**Age** 35 Years	**DOB** 08/01/1979
Sex Male	**Language** English	**PCP** Not On Staff
PCP Phone	**MRN** 063494	**Visit Reason** Back pain*; numbness to left lower extremity; LEFT FOOT PAIN AND TURNING PURPLE

Checkin 03/07/2015 17:26:00 **Checkout** 03/07/2015 19:10:20 **Dispo Type**

EMERGENCY PROVIDER INFORMATION

Provider	Role	Assigned	Unassigned
Loucraft PA-C, Charles	ED Physician	03/07/2015 18:30:37	

Medical Information

You had the following procedures performed during your inpatient visit:

No major procedures performed.

The following test results were not available before your discharge. Your Primary Care Provider should contact you of any abnormal test results regarding follow-up. However, if you would like the results, please contact your Primary Care Provider.

No results pending.

Legend: @ = Corrected A = Abnormal C = Critical L = Low H = High * = Footnote # = Interp. Data R = Ref Lab

Saints Campus
1 Hospital Drive
Lowell, MA 01852-
(978) 458-1411

Patient:	LUPPOLD JR, STEVEN G	**MR#:**	LGH00063494
Acct #:	LGH061494969	**Location:**	ED LSC
DOB:	8/1/1979 **Age:** 38 years	**Date:**	3/13/2015 -3/13/2015
Gender:	Male	**Admitting:**	None,MD
		PT Type:	Emergency

Allergy List

Substance: NKA Recorded Date/Time	
4/30/2007 10:43 EDT	**Type:** Allergy; **Recorded On Behalf Of:** Duchesne,Suzanne; **Reaction Status:** Active; **Reviewed Date/Time:** 3/13/2015 22:40 EDT; **Reviewed By:** Flores NP,Carlos; **Category** Drug

Emergency Documentation

Document Name:	ED Note-Physician
Document Status:	Auth (Verified)
Performed By:	Flores NP,Carlos (3/13/2015 23:41 EDT)
Authenticated By:	Dummit MD,Marc (3/14/2015 07:15 EDT); Flores NP,Carlos (3/13/2015 23:47 EDT)

UC - Back Pain*

Patient: **LUPPOLD JR, STEVEN G** **MRN: 063494** **FIN: 061494969**
Age: **35 years** Sex: **Male** DOB: **08/01/1979**
Associated Diagnoses: **Radiculopathy; Chronic low back pain; Hypertension; Peripheral edema**
Author: **Flores NP, Carlos**

Basic Information
Additional information: Chief Complaint from Nursing Triage Note : Chief Complaint Description
03/13/2015 21:49 Chief Complaint Description L ankle pain, atraumatic - pt AAOx3, NAD. Skin p/w/d. Reports seen here last week for sciatica. Reports pain in lower back and upper leg improved but continues to have severe L ankle pain. Ran out of pain killers/muscle relaxants that were Rx'd.
03/13/2015 21:45 Chief Complaint Description L ankle pain, atraumatic - pt AAOx3, NAD. Skin p/w/d. Reports seen here last week for sciatica. Reports pain in lower back and upper leg improved but continues to have severe L ankle pain. Ran out of pain killers/muscle relaxants that were Rx'd. .

History of Present Illness
The patient presents with back pain. The onset was Chronic for 2 years.. The course/duration of symptoms is worsening. Type of injury: none. The location where the

Legend: @ = Corrected A = Abnormal C = Critical L = Low H = High * = Footnote # = Interp. Data R = Ref Lab

Emergency Documentation

incident occurred was unknown. Location: Left Low back radiating down left leg.. Radiating pain: left lower extremity. The character of symptoms is sharp. The degree at onset was severe. The degree at present is severe. There are exacerbating factors including movement and bending over. The relieving factor is Muscle relaxant.. Risk factors consist of Chronic low back pain.. Prior episodes: chronic. Therapy today: prescription medications including Lyrica.. Associated symptoms: focal weakness left, denies bowel dysfunction, denies bladder dysfunction, denies altered sensation and denies saddle numbness. He c/o chronic left low back pain x 2 years. The pain is sharp and burning radiating down left buttocks and leg. He says he was seen here 6 days ago and "the muscle relaxant really helped." He has since run out of muscle relaxant. He is currently being seen by Pain clinic and prescribed Lyrica with relief. He says he has 6 steroid injections scheduled for end of the month with pain clinic. He says the Vicodin that was given also helped. He says he has chronic numbness to "outer part of leg." Denies straddle numbness, urinary/stool incontinence, new injury, or fall..

Review of Systems

Constitutional symptoms: Weakness, decreased activity.
Skin symptoms: No ecchymosis..
Cardiovascular symptoms: No chest pain,
Gastrointestinal symptoms: No abdominal pain,
Genitourinary symptoms: Denies urinary frequency, No straddle numbness, Denies urine incontinence., no dysuria, no hematuria.
Musculoskeletal symptoms: Denies neck pain, No back pain,
Neurologic symptoms: Weakness, no headache, no dizziness.
Additional review of systems information: not All systems reviewed as documented in chart.

Health Status

Allergies:

Allergic Reactions (Selected)

NKA.

Past Medical/ Family/ Social History

Surgical history:

Other Repair of the Cruciate Ligaments (81.45) in 2013 at 34 Years.
Excision of Semilunar Cartilage of Knee (80.6) in 2013 at 33 Years.
right ganglion wrist sx in 2007 at 27 Years.
right ACL reconstruction in 1996 at 16 Years..

Family history:

High blood pressure
Mother
Mat. Grandfather
Mat. Grandmother

Emergency Documentation

Pat. Grandfather
Pat. Grandmother
Stroke
Mother
Mat. Grandfather
Pat. Grandfather

Physical Examination

Vital Signs

Vital Signs

03/13/2015 21:45	Temperature Oral	98.4 DegF
	Peripheral Pulse Rate	**112 bpm HI**
	Respiratory Rate	18 br/min
	Blood Pressure Extremity	Left arm
	Systolic Blood Pressure	**169 mmHg HI**
	Diastolic Blood Pressure	**119 mmHg HI**
	Mean Arterial Pressure	136 mmHg
	SpO2	97 %
	Oxygen Therapy	Room air

Measurements

03/13/2015 21:49	Height	172.72 cm
	Type of Height	Stated height
	Weight	95 Kg
	Type of Weight	Stated weight
	BSA	2.08 m2
	Body Mass Index	31.84 Kg/m2

General: Alert, no acute distress, Able to get up of exam table, stand. He says he cannot walk onto left heel or toes due to numbness..
Skin: Warm, dry, pink, No visible ecchymosis.
Head: Normocephalic.
Neck: Supple, Full ROM.
Eye
Ears, nose, mouth and throat: Tympanic membranes clear, oral mucosa moist, no pharyngeal erythema or exudate.
Cardiovascular: Regular rate and rhythm, No murmur, 1 + pitting edema..
Respiratory: Lungs are clear to auscultation, respirations are non-labored, breath sounds are equal.
Back: Costovertebral angle tenderness: Able to walk on tips of toes and heels of right foot. Positive Axial Loading Pain. Able to extend legs when asked. Neg X-SLR, Normal dorsiflexion and right great toe. He says he cannot dorsiflex or

Emergency Documentation

plantar flex great toe when asked which is chronic. +C, CRT spontaneous and warm distally..

Musculoskeletal: Normal ROM.

Chest wall

Gastrointestinal: Soft, Nontender.

Neurological: Alert and oriented to person, place, time, and situation, No focal neurological deficit observed, Patella DTRs 2 + and equal bilaterally..

Psychiatric: Cooperative, appropriate mood & affect, normal judgment.

Medical Decision Making

Differential Diagnosis: Back pain.

Reexamination/ Reevaluation

Time: 03/13/2015 22:55:00 .

Notes: Aware BP is elevated which he says he has had for a long time and is related to his pain. He says he is compliant with Propranolol. Consents to adding a new BP medication..

Impression and Plan

Diagnosis

Radiculopathy (ICD9 729.2, Discharge, Medical)
Hypertension (ICD9 401.9, Discharge, Medical)
Peripheral edema (ICD9 782.3, Discharge, Medical)
Chronic low back pain (ICD9 724.2, Discharge, Medical)

Plan

Condition: Improved, Stable.

Disposition: Discharged: Time 03/13/2015 23:59:00, to home.

Patient was given the following educational materials: Lisinopril, Clonidine Hydrochloride Oral tablet, Cyclobenzaprine Hydrochloride Oral tablet, BACK PAIN w/ SCIATICA, Naproxen Oral tablet.

Limitations: Activities as tolerated.

Follow up with: Staff Not On Within As needed; Follow up with primary care provider Within As needed next week for blood pressure recheck..

Counseled: Patient, w/ s.o..

Notes: Counseling: I discussed with patient and s.o. regarding: exam findings supporting the discharge diagnosis, the importance for outpatient follow up, and to return to the Emergency Department if symptoms worsen or persist or if there are any questions or concerns that arise after discharge. I have given opportunity to ask questions. Reviewed plan of care. Verbalizes understanding. All questions answered. Concurs with plan of care. Will f/u with PCP /Pain Clinic ASAP.

Emergency Documentation

- Aware that by not getting treatment for high blood pressure you put yourself at risk for the following medical conditions: Eye problems (leading to vision loss), kidney problems (which may lead to you needing dialysis if your kidneys shut down), worsening heart condition leading to heart attack, stroke, and/or death.

Reviewed and electronically verified by: Flores NP, Carlos
on: 03/13/2015 23:47

Reviewed and electronically authenticated by: Flores, Carlos
on: 03/13/15 23:47

Reviewed and electronically co-authenticated by: Dummit, Marc
on: 03/14/2015 07:15

Document Name:	ED Assessment Forms-Nursing
Document Status:	Auth (Verified)
Performed By:	Hanlon RN,Susan (3/13/2015 22:21 EDT)
Authenticated By:	Hanlon RN,Susan (3/13/2015 22:21 EDT)

ED Assessment (A) Entered On: 03/13/2015 22:25
Performed On: 03/13/2015 22:21 by Hanlon RN, Susan

System Review
Pain : Detail assessed
Elderly Immobile or from Long Term Care : No
Pt Presents w/TIA Stroke Assoc Symptom : No
Problems List/Family History : Review and Document

Hanlon RN, Susan - 03/13/2015 22:21

Primary Pain
Primary Pain Location : Foot
Pain Scale Used : 0-10
Primary Pain Laterality : Left
Pain Score : 4
Primary Pain Interventions : No interventions at this time
Primary Pain Time Pattern : Chronic, Intermittent
Primary Pain Quality : Tightness, Other: numbness
Primary Pain Aggravating Factors : Movement, Walking
Primary Pain Alleviating Factors : None
Associated Symptoms : None

Hanlon RN, Susan - 03/13/2015 22:21

Emergency Documentation

Document Name: Triage Forms-Nursing
Document Status: Auth (Verified)
Performed By: Busa RN,Stefanie (3/13/2015 21:49 EDT)
Authenticated By: Busa RN,Stefanie (3/13/2015 21:49 EDT)

ED Triage (A) Entered On: 03/13/2015 21:50
Performed On: 03/13/2015 21:49 by Busa RN, Stefanie

General
Chief Complaint Description : L ankle pain, atraumatic - pt AAOx3, NAD. Skin p/w/d. Reports seen here last week for sciatica. Reports pain in lower back and upper leg improved but continues to have severe L ankle pain. Ran out of pain killers/muscle relaxants that were Rx'd.
Pain Symptoms : Yes
Lynx Mode of Arrival : Private vehicle
Accompanied By : Friend
Information Given By : Patient
Vital Signs Assessed : No
Persistent Cough : No
Domestic Concerns : None
ED Known/Suspected Infection : No
Pregnancy Status : N/A
Languages : English

Busa RN, Stefanie - 03/13/2015 21:49

Height/Weight
Height : 172.72 cm(Converted to: 5 foot 8 in, 68.00 in)
Weight in lb : 209 lb(Converted to: 94.801 Kg)
Weight : 95 Kg(Converted to: 209 lb 7 oz, 209.439 lb)
Body Surface Area : 2.08 m2
Body Mass Index : 31.84 Kg/m2
Type of Weight : Stated weight
Type of Height : Stated height

Busa RN, Stefanie - 03/13/2015 21:49

Primary Pain
Primary Pain Location : Ankle
Pain Scale Used : 0-10
Pain Score : 9
Primary Pain Interventions : Rest

Busa RN, Stefanie - 03/13/2015 21:49

Image 1 - Images currently included in the form version of this document have not been included in the text rendition version of the form.

Social History
Cigarette Smoking Last 365 Days : Yes
Exposure to Tobacco Smoke : Current every day smoker

Busa RN, Stefanie - 03/13/2015 21:49

Legend: @ = Corrected A = Abnormal C = Critical L = Low H = High * = Footnote # = Interp. Data R = Ref Lab

Emergency Documentation

Hypertension (SNOMED CT :1215744012)	*Name of Problem:* Hypertension ; *Recorder:* Busa RN, Stefanie; *Confirmation:* Confirmed ; *Classification:* Patient Stated ; *Code:* 1215744012 ; *Contributor System:* PowerChart ; *Last Updated:* 03/13/2015 21:46 ; *Life Cycle Date:* 03/13/2015 ; *Life Cycle Status:* Active ; *Vocabulary:* SNOMED CT
Sciatica (SNOMED CT :38727013)	*Name of Problem:* Sciatica ; *Recorder:* Busa RN, Stefanie; *Confirmation:* Confirmed ; *Classification:* Patient Stated ; *Code:* 38727013 ; *Contributor System:* PowerChart ; *Last Updated:* 03/13/2015 21:45 ; *Life Cycle Date:* 03/13/2015 ; *Life Cycle Status:* Active ; *Vocabulary:* SNOMED CT

Diagnoses(Active)

L ankle pain	*Date:* 03/13/2015 ; *Diagnosis Type:* Reason For Visit ; *Confirmation:* Complaint of ; *Clinical Dx:* L ankle pain ; *Classification:* Medical ; *Clinical Service:* Non-Specified ; *Probability:* 0

Document Name:	Depart Summary
Document Status:	Modified
Performed By:	Hanlon RN,Susan (3/13/2015 23:52 EDT)
Authenticated By:	Hanlon RN,Susan (3/13/2015 23:52 EDT); Hanlon RN,Susan (3/13/2015 23:52 EDT); Flores NP,Carlos (3/13/2015 23:46 EDT)

Depart Summary

Lowell General Hospital
Emergency Department LSC
Clinical Depart Summary

PERSON INFORMATION

Name LUPPOLD JR, STEVEN G	**Age** 35 Years	**DOB** 08/01/1979
Sex Male	**Language** English	**PCP** Not On Staff
PCP Phone	**MRN** 063494	**Visit Reason** UC - Back Pain*; L ankle pain; FOOT PAIN

Checkin 03/13/2015 21:10:00 **Checkout** 03/13/2015 23:52:46 **Dispo Type**

EMERGENCY PROVIDER INFORMATION

Legend: @ = Corrected A = Abnormal C = Critical L = Low H = High * = Footnote # = Interp. Data R = Ref Lab

Emergency Documentation

With:
Staff Not On
Comments:

Address:

When:
Within As needed

DIAGNOSIS

Chronic low back pain; Hypertension; Peripheral edema; Radiculopathy

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Document Name: ED Pat Edu
Document Status: Modified
Performed By: Hanlon RN,Susan (3/13/2015 23:52 EDT)
Authenticated By: Hanlon RN,Susan (3/13/2015 23:52 EDT); Hanlon RN,Susan (3/13/2015 23:52 EDT); Hanlon RN,Susan (3/13/2015 23:52 EDT); Hanlon RN,Susan (3/13/2015 23:52 EDT); Flores NP, Carlos (3/13/2015 23:46 EDT); Flores NP,Carlos (3/13/2015 23:46 EDT)

ED Pat Edu

116178en

Eat well balanced fresh meals. Avoid table salt, frozen/canned/fast foods.

Exercise at least 30 minutes 3 times per week.

Weight loss.

Follow up with your doctor within 2 weeks for a repeat blood pressure.

You have high blood pressure so it is important to treat to less than 140/90. If you do not get your blood pressure under control you put yourself at risk for the following medical conditions: Eye problems (leading to vision loss), kidney problems (which may lead to you needing dialysis if your kidneys shut down), worsening heart condition leading to heart attack, stroke, and/or death.

Return immediately to the Emergency Room if you develop increased or new symptoms, chest pain, trouble breathing, break out in a cold sweat, vomit, fever, questions or concerns.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 1681CV01287

STEVEN LUPPOLD,
Plaintiff,
V.
CHARLES LOUCRAFT, P.A.,
CARLOS FLORES, N.P.
CARLA CROCKER, R.N.,
SUSAN HANLON, R.N.,
STEFANIE BUSA, R.N., AND
MERRIMACK VALLEY EMERGENCY ASSOCIATES, INC.
Defendants.

FINAL Jury Instructions

INTRODUCTION

Jurors, thank you for serving on this jury. Jury service is a very important part of our democratic self-government. You are responsible for upholding the law and our principles of justice. That is what you promised to do at the start of this trial when you took your oath as a juror.

You must carefully consider all of the evidence, decide whom and what to believe, and then answer specific questions that I will discuss with you.

This final part of the trial will take place in three steps. I will give you instructions about the law you must apply when deciding the questions we need you to answer to resolve this case. Then, the attorneys will make their closing arguments, in which they will summarize the evidence and suggest conclusions you may reach. The defense attorneys, on behalf of their own clients, will argue first, and the plaintiff's attorney will argue last. After the closing arguments, I will give you general instructions that apply in every case. You will then work together to reach a verdict.

Please pay close attention to my instructions. All of my instructions are important, and you must follow all of them even if you do not agree with them.

To make sure that I give you the instructions accurately, I will read them to you. You also have a written copy so you can read along if you wish and refer to the instructions in the jury room during your deliberations.

I will do my best to make sure that the instructions I give when speaking with you match the written instructions. If there is any difference between what I say aloud and what the written instructions say, please follow what I say aloud.

STANDARD OF PROOF

The person who files a civil case, the plaintiff, has the burden of proof. That means that he must present enough evidence to prove his claims. What is enough evidence?

I will tell you in a minute each of the specific things that Steven Luppold must prove. Mr. Luppold must show that each of these things is **more likely true than not true.** The lawyers or I may use the phrases "more probable than not" or "by a preponderance of the evidence," and each of those terms means the same thing as "more likely true than not true."

Now, from time to time, I will refer to proof or to proving something. By this, I mean ~~showing that~~ Mr. Luppold~~'s~~ as Plaintiff in this action must prove his claim ~~version~~ of the facts is more likely true than not true, based upon evidence and any reasonable conclusions that you draw from the evidence.

True

If you find that the evidence supporting Mr. Luppold's version of the facts is more persuasive than any or all of the defendants' version, then you must decide in favor of Mr. Luppold. But if you find that the evidence supporting a Defendant's version of the facts is more persuasive, or that the evidence on the two sides is equally persuasive—50/50—then you must decide in favor of that Defendant.

Because this is a civil case, we do not use the rule that applies in a criminal case. In other words, Plaintiff does not have to prove his claims beyond a reasonable doubt the way the government must in a criminal case. In civil cases like this one, even

if you still have some doubts, and even if those doubts are reasonable, you can still decide in favor of Plaintiff as long as he has ~~presented the more persuasive evidence~~proved each element of his claim is more likely true than not true.

OK

You are probably familiar with balance scales, like the scales of justice. Plaintiff must provide proof that is convincing enough to tip the scales, however slightly, toward his claim being true or correct, in your view as the jury. If the scales tip toward Plaintiff, even a little bit, then Plaintiff has proved his claim. But if the scales remain ~~exactly~~ balanced, not tending toward either side at all, or if they tip toward a Defendant at all, then Plaintiff has not proved his claim against that Defendant.

OK

The number of witnesses or exhibits on each side is not necessarily important. The side with fewer witnesses or exhibits may be more convincing. It does not matter who called a witness, asked a particular question, or introduced an exhibit. What you are weighing is the persuasive force of the evidence and whether the Plaintiff's evidence is more likely true than not true ~~and supports his burden of proof.~~

OK

REACHING A VERDICT

All eight of you will deliberate on this case. When you go to the jury room, you will need to answer a series of questions. Because this is a civil case, you may reach a verdict so long as seven of the eight of you agree on the answer to a particular question. As all eight jurors are deliberating, seven of you must agree on the answer to a particular question in order to reach a verdict. However, it does not have to be the same seven jurors that agree on each answer.

There are 5 separate defendants in this case and you must ~~decide~~ reach a decision on each defendant individually and not as a collective group.

OK

QUESTIONS FOR THE JURY TO ANSWER

As I explained before the trial began, the term "medical malpractice" is the same thing as "medical negligence." "Medical malpractice" refers to medical negligence by a physician, physician assistant, nurse, nurse practitioner or other health care professional in providing medical care to a patient.

In order to prove medical negligence, Mr. Luppold must show that the following five things are more likely true than not true:

1. that a **health care provider - patient relationship** existed between Steven Luppold and the defendant;
2. what the medical **standard of care** for each provider was in the circumstances of this case - in other words, what the individual defendant should have done; OK
3. that an individual defendant's medical treatment **fell below that standard of care that applied to that defendant** - in other words, that defendant was negligent; OK
4. that the individual defendant's negligence was a **cause** of Steven Luppold's injuries and OK
5. that the alleged **injuries/harm,** which we call "damages" exist.

I will now explain each of these things in more detail.

Heath Care Provider-Patient Relationship

First, Mr. Luppold must prove ~~that~~, more likely than not, that Steven Luppold and each of the defendants had a health care provider-patient relationship at the time of the alleged negligence. There is no dispute in this case that such a relationship existed. OK

Standard of Care

Next, Plaintiff must prove the standard of care that applies to ~~a~~each defendant's care of Steven Luppold – in other words, the care that each~~the~~ defendant should have provided to Steven Luppold in this case. OK

Each defendant owed a duty to treat Steven Luppold according to the "standard of care~~.~~"that applied to him or her in March 2015. "Standard of care" means the degree of skill and care of the average practitioner practicing in ~~the~~ the particular defendant's area of specialty, taking into account the advances in the profession and the medical resources available to the ~~doctor~~provider. This standard of care required Mr. Loucraft to use the degree and skill and care of the average qualified physician assistant ~~in 2013~~ in 2015~~-~~. This standard of care required Mr. Flores to OK OK

use the degree and skill and care of the average qualified nurse practitioner ~~in 2013~~ in 2015. The standard of care required Nurse Hanlon, Nurse Busa and Nurse Crocker to each use the degree of skill and care of the average qualified registered nurse in 2015.

OK

The standard does not require a medical provider to provide the best care possible. But a medical provider must have and exercise the skill and expertise ordinarily possessed by other providers in the same specialty.

OK

Plaintiff has the burden to prove ~~what~~ the standard of care ~~would to~~ what would have been provided by the average qualified physician assistant, nurse practitioner and registered nurse in 2015 under similar circumstances to the Plaintiff. You may not hold a Defendant to some other standard of care ~~(Bello)~~ For example, what a different ~~individual physician assistant, nurse practioner or registered nurse~~ medical provider did or would have done is not enough to show what care the average qualified ~~PA, NP or RN~~ medical provider would provide.

You must determine this standard of care from the testimony presented by medical witnesses during the trial of this case. This may come from the testimony of medical expert witnesses along with testimony of the defendants themselves ~~if you find them to be an expert in their area of practice.~~ The standard of care does not need to be in writing. If there is disagreement about the standard of care, you will have to resolve the conflict to determine the degree of care and skill of the average qualified practitioner that was owed by each defendant in their specialty.

out

An expert must be familiar with ~~and have sufficient knowledge of~~ the standard of care through education, training, experience and familiarity with the subject matter but does not have to be a specialist in each defendant's area of practice. Similarly, an expert does not have to practice in the same state or geographic area.

out

You may not guess or speculate as to the applicable standard of care, or substitute your belief of what the standard of care should be. You may not do your own medical research, on the Internet or anywhere else, to try to understand the

standard of care. Instead, you must base your decision solely on the evidence presented here in the courtroom.

The standard of care to be applied in this case is the standard of care applicable in 2015. If the standard of care has changed between that time and now, then you need to consider the standard of care that applied at the time each of the defendants cared for Steven Luppold.

Falling Below the Standard of Care

Next, Plaintiff must prove that, more likely than not, that ~~any/all of the~~ this claim of negligence against a defendant~~s were~~ was ~~negligent~~, which means that Plaintiff must prove that a defendant provided medical care that fell below the standard of care that the average qualified provider practicing in that defendant's specialty would have provided at the time and under the circumstances. Negligence might consist of doing something inconsistent with the standard of care or failing to do something required by the standard of care.

You must decide whether or not ~~a~~ the individual defendant met the standard of care in light of the facts that the defendant knew or reasonably should have known under the circumstances, at the time of the alleged negligence.

Even if a defendant did not know some information, you must consider what he /she should have known at the time, if he/she had complied with the standard of care. Medical providers cannot predict everything accurately, but they do need to comply with the standard of care.

Judgment

Medical care providers are allowed to use their judgment as long as that judgment does not fall below the standard of care.

Sometimes more than one course of action or conclusion may be consistent with the required standard of care. If so, then a health care provider may exercise his or her best judgment as to the appropriate steps to take, and doing so is not negligence. However, a doctor is negligent and may be held liable for an error of judgment if that judgment represents a departure from the standard of care.

Evidence that another ~~doctor~~ medical provider might have treated the patient differently ~~or taken different action~~ is not, by itself, evidence that the Defendant was negligent, because ~~doctors~~ medical providers are entitled to act within a range of ~~medical~~ medical judgment - as long as the judgment falls within the standard of care.

OK

No Guarantee

Medical providers do not guarantee a cure or a particular outcome. They do not guarantee that treatment will improve the patient's condition, or that the patient's condition will not get worse, either by natural causes or even as a result of the treatment itself. A bad result or unfortunate outcome, standing alone, is not evidence of negligence. They do not have to be perfect, but they must meet the standard of care.

OK

Verdict Slip—Negligence

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On the verdict slip, the first question is "Was the defendant Charles Loucraft, P.A. negligent in his care and treatment of Steven Luppold?" If you find that Mr. Loucraft was negligent then you should answer 'YES' and go to the next question. If you find that a Defendant was not negligent, answer 'NO'. Question #3 asks the same question on negligence as to Carlos Flores, N.P., Question #5 asks the same question on negligence as to Carla Crocker, R.N., Question #7 asks the same question on negligence as to Susan Hanlon, R.N and Question #9 asks the same question on negligence as to Stephanie Busa, R.N.

Causation

If you find that any/all of the defendants were negligent, then you must decide whether Mr. Luppold proved that, more likely than not, ~~a~~ the individual defendant's negligence ~~a~~ caused ~~of~~ Mr. Luppold's injuries. A Defendant caused injuries if the injuries would not have occurred without – that is, but for – that defendant's negligence. To decide this, you must ask: "Would the same harm have happened without that defendant's negligence?" In ~~other words, did the~~ negligence make a difference? If a defendant's negligence ~~had an impact on~~ caused Steven

OK

NO

correct

NO

Luppold's injuries then it is considered the legal cause of ~~caused~~ those injuries. But if the negligence had no impact on Steven Luppold's injuries and the result would have happened anyway, then that defendant did not cause the injuries. (Bello) Even if you were to find that the actions of a defendant did not, in some respects, satisfy the standard of care, in order to find for the plaintiff you must also find that this negligence was the cause of Mr. Luppold's injuries. In order to find for the plaintiff, you must find that "but-for" that defendant's negligence, that harm would not have occurred.

NO

Proximate cause is that which in a continuous sequence, unbroken by any new cause, produces an event that would not have occurred otherwise.

NO

An injury may have more than one cause. If a defendant's negligence was ~~one of those causes~~ the legal cause of injury, that is enough. ~~Plaintiff does not have to show that a defendant's negligence was the only cause of the injuries. Nor does he have to show that a defendant's negligence was the largest or main cause of the injuries, as long as the injuries would not have occurred without that defendant's negligence.~~

NO

leave this!

Here, again Plaintiff must prove causation by expert medical evidence. This evidence may be in the form of testimony or in the form of medical records.

OK

In addition, Plaintiff must prove that the injuries were, more likely than not, a predictable result of a defendant's negligence. To decide this, you must ask: "Did that defendant's negligence create a foreseeable risk of the type of injury that Steven Luppold suffered?" The risk was foreseeable if a reasonable provider in that defendant's position should have known that the negligence created a risk of this type of harm. Plaintiff does not have to prove that a defendant could or should have predicted the precise way in which the injury occurred, but he must show that his injuries were a natural result of that defendant's negligence.

If you find a Defendant negligent, a subsequent act or event, may intervene between the defendant's act and the injury- this is known as an intervening force. When an intervening force occurring subsequently to the defendant's act prevents the defendant from being held liable, it is called a superseding cause. A defendant may not be held liable for the intervening negligence of a third person if it breaks

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NO

the chain of causation. The causal connection is broken between the defendant's act and the ultimate harm when something so distinct from the original cause has thereafter happened so as to constitute an intervening efficient, independent and dominant cause.

Verdict Slip - Causation

On the verdict slip, the second question asks: "Was the negligence of Charles Loucraft, P.A. a ~~proximate~~ cause of Steven Luppold's injuries?" If you find that Charles Loucraft, P.A.'s negligence was a ~~proximate~~ cause of Steven Luppold's injuries and that the injuries were a predictable result of that negligence, then you should answer "Yes". Otherwise, if you find that Mr. Loucraft's negligence was not a ~~proximate~~ cause of Mr. Luppold's injuries and ~~that~~ the injuries ~~and death~~ were not a predictable result of that negligence, then answer "No," to that question. Question #4 asks the same causation question as to Carlos Flores, N.P., Question #6 ask the same causation question as to Carla Crocker, R.N, Question #8 asks the same causation question as to Susan Hanlon, N.P. and Question #10 asks the same causation question as to Stephanie Busa, R.N.

If you have answered "Yes" to both negligence and causation questions for any~~/all~~ defendant~~(s)~~, please go on to answer the remaining question. If you did not answer "Yes" to both negligence and causation questions for any of the defendants, go no further as you have reached a verdict.

(a) Compensation for Damages

Finally, Steven Luppold must prove, more likely than not, the amount of damages caused by the defendant(s) negligence. In this case, Steven Luppold is seeking damages that relate to physical and mental pain and suffering, loss of enjoyment of life and other items of general damages

If you reach the issue of damages Steven Luppold is entitled to receive full and fair compensation for the pain and suffering, loss of enjoyment of life and other items of general damages.

General Principles

If you award damages, you must award an amount sufficient to compensate Steven Luppold for the injuries or harm he suffered because of the negligence of any/all defendant. You must not use your damages award to reward the plaintiff nor may you use it to punish any of the defendants. As well, you must put aside your personal feelings during your deliberations and decide this case solely on the facts as you find them and the law I am telling you about.

OK

The law gives you no special formula to assess Steven Luppold's damages. So, working together as the jury, you must use your wisdom, judgment, and sense of basic justice to translate into dollars and cents an amount that will fairly and reasonably compensate Steven Luppold for any harm you find. Steven Luppold must show, more likely than not, what his damages are. However, the law does not require any witness to express an opinion about the amount of such damages. Often amounts of damages are left to a meager amount of evidence. It is the jury's function, using common sense and judgment, to assign a value for such dames that are found to have been proven Mr. Luppold suffered. Steven Luppold may prove damages by direct evidence, indirect evidence, or both. Now, let me turn to the specific types of damages that you should consider.

i. Pain and Suffering Damages

You should consider his claim for damages for pain and suffering. There are two kinds of pain and suffering: physical pain and suffering, and mental pain and suffering.

For physical pain and suffering, you must consider any physical injuries to Steven Luppold's body resulting from a defendant's negligence. You must consider the pain and suffering that Steven Luppold endured in each part of his body since the date of the incident.

You should also consider any past mental pain and suffering that Steven Luppold endured. Mental pain and suffering includes nervous shock, anxiety, embarrassment, or mental anguish resulting from the injury. Also, if Steven Luppold's injuries caused him to lose enjoyment of activities such as work, play,

family life or otherwise, then you should award damages for that reduction in the enjoyment of life.

PLAINTIFF'S DAMAGES - ~~VERDICT QUESTION NOS. 3 & 4~~

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Compensation for Damages

On the verdict slip Question No. 3 asks "What amount of money would fully and fairly compensate Steven Luppold for pain and suffering and loss of enjoyment of life he has suffered up the present. You will be asked to write out that award in both words and figures.

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Question No. 4 asks "What amount of money would fully and fairly compensate Steven Luppold for pain and suffering and loss of enjoyment of life into the future. You will again be asked to write of that award in both words and figures. If you make an award of future damages please state the time for which that award is intended to cover. There is a line that asks for time period in weeks, month, years, etc.

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CLOSING ARGUMENTS

ROLE OF THE JURY

Jurors, you have the most important role in this trial, because you are the ones who must decide who and what to believe, and answer each of the questions ~~that I have discussed with you~~ necessary to reach a verdict in this case.

OK

You must be completely fair and unbiased in your work as jurors. Do not let your emotions, any kind of prejudice, or your personal likes or dislikes influence you in any way. Consider the evidence calmly and carefully. Do not be influenced by the nature of the claim or the possible consequences of your verdict. And do not let your personal feelings influence your decision. In reaching your verdict you must not be swayed by sympathy, prejudice, anger, or other emotion. If you like or dislike a lawyer or witness, ignore those feelings.

? OK ?

EVALUATING THE EVIDENCE

You must decide this case based **only** on the evidence presented at the trial. You may not decide this case based on anything else. Do not consider anything you have read, heard, or seen outside of this courtroom. Those things are **not** evidence. And you may not base your verdict on suspicion, guesswork, or speculation.

What is Evidence

As I told you earlier, you must decide this case based only on the evidence presented at trial. The evidence consists of the testimony of witnesses, as you recall it, and the things that were marked as exhibits. You will have the exhibits with you in the jury room. Things that were marked only for identification are not exhibits, and you will not be able to consider them.

As you review the exhibits, you may find that some information has been removed because it is not relevant. Please ignore that and don't try to guess what may have been removed or why.

Other things are not evidence and you may **not** consider them when deciding this case.

- Questions that a lawyer asked a witness are not evidence. Only the answers are evidence. For example, if a lawyer asked "wasn't it raining outside" and the witness answered "no"—or said "well, it was cloudy"—the question is not evidence that it was raining.
- If a lawyer asked a question, and I sustained an objection and therefore the witness did not answer it, then neither the question nor the fact that the witness did not answer is evidence.
- If I struck, or told you to disregard, any part or all of an answer by a witness, then that part of the testimony is not evidence and you may not consider it.
- Anything that you may have seen or heard when the court was not in session is not evidence.
- The opening statements and the closing arguments of the lawyers are not evidence. And if your memory of the testimony differs from the attorneys', you should rely on your memory.

- Any notes that you have taken are not evidence. But you may use your notes to refresh or as an aid to your memory of the evidence.

Direct and Indirect Evidence

As you know, evidence can come in many forms. It can be testimony about what someone saw, heard, smelled, or felt. It can be someone's opinion. And it can be an exhibit.

Some evidence proves a fact directly. For example, if a witness testifies that she saw and felt it raining outside before she came into the courthouse, then that is direct evidence that it was raining.

Some evidence proves a fact indirectly. For example, let's say a witness testifies that he saw someone come into the courthouse wearing a wet raincoat and shaking water off an umbrella. That is indirect evidence that, if you believe it, might lead you to conclude that it was raining outside even though the witness did not see, hear, or feel the rain.

This kind of indirect evidence does not directly prove that something is true, but it is evidence from which you could logically conclude that it is. We call this "drawing an inference." We all draw inferences every day; we take some information that we know, we apply our intelligence and common sense, and then we reach a conclusion. But inferences must be based on facts; they can't just be guesses that you make when you're not sure about something.

Sometimes you can draw more than one inference. You have to decide which inferences are reasonable, and decide which seems more reasonable to you.

It makes no difference whether evidence is direct or indirect. A party in a lawsuit may be able to prove that something happened with direct evidence, indirect evidence, or a combination of both.

Credibility

A very important part of your job as jurors is to decide whom and what to believe. You may believe everything a witness says, part of it, or none of it.

Sometimes people do not tell the truth. You must decide whether a witness was being truthful, or was deliberately lying. If you conclude that a witness lied to you about something, then of course you should not believe that part of the testimony.

Sometimes people make an honest mistake. You must also decide whether a witness testified accurately, or whether the witness may have gotten something wrong without meaning to do so. A witness may recall seeing or hearing something, but actually be mistaken.

For example, the witness might not have paid close attention or might have misunderstood what was happening. Or a witness's memory of what happened could be incorrect.

If you conclude that a witness tried to be truthful but that some part of the person's testimony was not accurate, then you should not consider the inaccurate testimony.

When you evaluate how reliable or believable a witness's testimony is, you may take into account whether that witness made an earlier statement that differs in any significant way from his or her present testimony at trial. It is for you to say how significant any difference is. The earlier statement is not itself evidence of any fact that is mentioned in it, but may be considered by you only for the purpose of determining how much belief or importance you will place on the testimony given here at trial.

Figure this out

put in Depositions

Just.

How do you ~~decide whether you~~ believe particular statements by a witness? Ask yourself:

- Did the testimony seem reasonable or probable?
- Did the witness have a good chance to observe what happened? How much attention did the witness pay?
- Does the witness's memory seem accurate?
- Was the witness's testimony consistent with other evidence, or instead contradicted by other evidence?
- How did the witness behave and answer questions?

- Did the witness have any motive for testifying in a certain way or have any other bias that may have influenced the witness's testimony?

Importance or Significance of Evidence

It is also up to you to decide how important each part of the evidence is, whether it is testimony by a witness or an exhibit. Whether evidence is direct or indirect, you should give every piece of evidence whatever significance you think it deserves.

You are not required to believe something simply because it appears in an exhibit. It is up to you to decide how important any exhibit is.

As you review the exhibits, you may find that some information has been removed or redacted or blackened because it is not relevant. Please ignore that and don't try to guess what may have been removed or why.

You do not have to treat testimony by the witnesses as more or less significant than the exhibits. You may find that a witness's testimony is very important, or that an exhibit is more important. That is up to you.

Opinion Testimony

Much of the testimony came from witnesses who saw or heard something. Some witness also told you about opinions or conclusions they reached based on some special training or experience. But even if a witness has some special training or experience, that does not necessarily make the witness's testimony any more believable or important than other testimony or exhibits.

You must decide whether you believe the witness, and how much importance to give to the witness's testimony. You should consider all the factors I have previously mentioned, including whether the witness had a motive to testify in a certain way or some other bias that could have influenced the witness's testimony.

In addition, as you evaluate a witness's opinions or conclusions, you should also ask:

- Was the witness's testimony supported by the facts of this case?

- Did the witness use guesswork or assumptions that you do not find to be convincing or are not consistent with the facts?
- Did the witness have sufficient education or experience?

You may decide to accept all, some, or none of the opinions or conclusions offered by a witness. But please remember that witnesses, even those with special training or experience, do not decide cases; juries do. It is up to you to decide this case, and to decide whether you accept or reject any opinion or conclusion that a witness offered during the trial.

Juror Notes

Many of you have taken notes during the trial. Your notes may help you remember the evidence, especially the testimony, but of course they are not an actual transcript or official record of what was said. So use your notes only to help you remember what you heard and saw during the trial. Whether you took notes or not, you must rely on your own memory of what the witnesses told you.

After the trial is over, and you have returned your verdict, a court officer will collect your notes and destroy them.

Objections During Trial

During this trial, the lawyers may have objected to questions posed to a witness. They may have moved to "strike," or in essence erase, certain testimony. Whenever a lawyer believes that something would violate the rules of evidence, the lawyer is supposed to object or move to strike. That is part of the lawyer's job.

BE FAIR

Let's turn to another important issue. Each of you has taken an oath and promised to be fair. I am sure that you want to be fair, but that is not always easy. Part of being fair is being willing to examine your decision-making process to be sure you base your decision as jurors only on the evidence and the law.

One difficulty comes from our own built-in expectations and assumptions. They exist even if we are not aware of them. You may have heard this called implicit

biases. We all have them, simply because we are human. They affect our actions and decisions without us even realizing it.

We judges have the same problem as everyone else, so let me share a few strategies that we have found useful. These strategies will help you make sure you decide this case based only on a careful examination of the evidence and on the legal rules I have explained to you.

First, slow down; do not rush to a decision. Take time to consider all the evidence. Quick decisions are more likely to reflect stereotypes, or assumptions about people that we may not even be aware of.

Second, as you start to draw conclusions, consider not only the evidence that supports your conclusions, but also think carefully about any evidence that undermines or weakens those conclusions.

Third, as you think about the people involved in this case, ask yourself: Would my decision be different if the people were different? For example, what if the people involved were in different social or economic groups -- or had different ages, genders, gender identities, or sexual orientations --or came from different racial or ethnic backgrounds?

Fourth, listen to one another. Other jurors may have different points of view. If so, they may help you make sure you are focusing on the facts. Of course, other jurors could be influenced by their own unstated assumptions, so do not hesitate to share your views. You should participate actively, particularly if you think the other jurors are overlooking or undervaluing evidence you think is important. When you explain your thoughts to other jurors, you help everyone focus on the evidence.

If you do these things, then you will do your part to reach a decision that is as fair as humanly possible. That is your responsibility as jurors.

JURY DELIBERATIONS

I am now going to give you some instructions about how to conduct your deliberations.

Private Discussions

First of all, you must keep your deliberations secret. You should not tell anyone outside the jury room, not even me, anything about them. For example, please do not tell me or anyone else the results of any votes you may have taken before you all agree on a verdict. You must not tell anyone how your discussions are going or what any jurors said.

If you need to communicate with me before you reach a verdict, you should send me a written note, in a form you all agree on. It must be signed by your foreperson. I will discuss your note with the lawyers. Then I will either send you a response in writing or bring you into the courtroom and respond to you in person. If you do send me a note, it should not mention any votes you may have taken or anything else about your deliberations.

Do not talk about the case unless all of you are present and no one else is in the room. If one of you needs to leave for a moment, the rest of you should stop deliberating until that juror returns. If we break for the day before you reach a verdict, you must not communicate with other jurors about the case until the next day and only after we gather in the courtroom and I ask you to resume your deliberations.

As you work to decide this case, and until I accept your verdict, you must not communicate with anyone about the case, except each other. And you must not do any kind of research about this case. You may not do so in any way, including with an electronic device such as a cell phone or tablet.

Role of the Foreperson

I choose JUROR ____ to be the foreperson. The foreperson will make sure that each of you has the chance to speak and that the other jurors listen to you respectfully. But the foreperson's opinion about the case is no more important than the opinions of all other jurors. Once you agree on a verdict, the foreperson will fill out the verdict slips and will report your verdict in court.

Making Decisions as a Group

When you work together as a jury, you will be making a decision as a group. This kind of decision-making is very valuable. Why do I say that? When a jury hears and sees evidence, each juror acts as a safeguard for the others. For example, someone else may recall evidence that you missed. And each of you will have insights that will help the other jurors make sense of the evidence and reach a verdict.

No member of the jury is more or less qualified than any other juror to decide who and what to believe. You have all heard the same evidence, listened to the same witnesses, and looked at the same exhibits. And you have all taken the same oath, promising that you will "well and truly try the issue between the plaintiff and the defendant according to the evidence." So you are all equally qualified to reach a verdict.

I have a few suggestions that might help you as you work together.

First, you should discuss and analyze the evidence before you take any vote about a verdict. Voting first could keep you from discussing the issues, and hearing other peoples' perspectives, before making up your own mind.

Second, I encourage you to discuss not only the evidence you think supports your view of the case, but also what evidence you think might lead you to make a different decision.

Third, as the other jurors talk about the evidence that they found important, please listen. In order for this process to work fairly, each of you should hear every other juror's insights and ideas. Please be open to them, since they might influence your thinking.

Fourth, don't be shy. As in any group, some of you will be more comfortable than others in sharing your thoughts. But you must have the benefit of everyone's input to help you reach a just verdict. For example, you may be the only one who remembers a particular piece of evidence or has a particular point of view. The more points of view that you all hear, the more effective your deliberations will be.

Fifth, don't be afraid to change your mind if the discussion persuades you that you should. But you should not accept a decision just because other jurors think it is the right one. In the end, you should vote based on your own assessment of the evidence, regardless of how other jurors have voted. Ultimately, you each must decide this case for yourself.

Jurors, before I conclude I need to pause and speak with the attorneys.

[Clerk swears in court officers]

CONCLUSION

You will now go and start your private discussions. Please have confidence in what you are about to do. By serving on this jury, you carry on a long and proud tradition of citizens serving in jury trials in Massachusetts. If you are honest, thoughtful, and fair, you will be able to reach a fair and just verdict.

_____ _____

Date Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 1681CV01287

STEVEN LUPPOLD,
Plaintiff,
V.
CARLOS FLORES, N.P.,
CHARLES LOUCRAFT, P.A.,
STEFANIE BUSA, R.N.,
SUSAN HANLON, R.N.,
CARLA CROCKER, R.N., AND
MERRIMACK VALLEY EMERGENCY ASSOCIATES INC.
Defendants.

DEFENDANT STEFANIE BUSA RN, SUSAN HANLON RN AND CARLA CROCKER RN'S PRELIMINARY PROPOSED JURY INSTRUCTIONS

NOW COME the Defendants Stefanie Busa R.N., Susan Hanlon, R.N.,and Carla Crocker R.N. by their counsel ("Defendants"), and respectfully request that the attached jury instructions be provided to the jury prior to the beginning of deliberations, in addition to the standard instructions given by the Court.

The Defendants reserves the right to submit further proposed jury instructions, depending upon the nature of the evidence and the claims identified.

Respectfully submitted,
Defendants Stefanie Busa R.N., Susan Hanlon, R.N., and
Carla Crocker R.N.
by counsel,

J. Peter Kelley, Esq. B.B.O. #559588
Susan Johnson Bowen, Esq. B.B.O. #561543
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Date:

EVIDENCE

1. I have explained to you the various kinds of evidence which you may consider, including testimony, documentary evidence and expert opinions. The weight and credibility of each type of evidence is the province of the jury; this means that you, as the jury, must weigh the evidence and determine the truth of the matter.
   Commonwealth v. Dubois, 451 Mass. 20, 28 (2008).

2. Not everything which you have heard in this courtroom is evidence, however; answers which have been stricken must not be taken into account in your deliberations, for instance. Answers which have not been stricken are evidence and should be considered; however, the questions asked are not evidence. The attorneys' statements and their questions are not evidence and should not be considered during deliberations. The attorneys' arguments are also not evidence and should not be considered.
   Kelly v. Foxboro Realty Assoc., LLC, 454 Mass. 306, 314 (2009); see also, Gath v. M/A-Com, Inc., 440 Mass. 482, 493 (2003) (Attorney Halstrom "crossed the line in his summation with references to airline crashes and baseball players' salaries."); Harlow v. Chin, 405 Mass. 697, 703-706 (1989) (noting that plaintiffs' counsel made egregious and improper arguments).

OPINION TESTIMONY

3. You have heard testimony by opinion witnesses in this case. If in the opinion of the Court certain knowledge is beyond the common knowledge of lay people, the Court will permit someone practicing in the field in question to testify to certain conclusions and opinions. Even though the plaintiff is required to present such evidence, you are in no way bound by the opinions and conclusions of such a witness. You should view such conclusions as any other testimony in the case, and you may consider it to the extent, and only to the extent, that you find it to be of assistance to you in arriving at your conclusions.

   Commonwealth v. Spiropoulos, 208 Mass. 71 (1911); Dodge v. Sawyer, 288 Mass. 402 (1934); Commonwealth v. Dockham, 405 Mass. 618, 629 (1989).

4. You should consider each such opinion and should weigh the qualifications of the witness and the reasons given for his/her opinion. Give each opinion the weight to which you deem it entitled.

5. You must resolve any conflict in the testimony of the opinion witnesses by weighing each of the opinions expressed against the others, and against the other credible evidence in the case, taking into consideration the reasons given for the opinion, the facts relied upon by the witness, his/her relative credibility, and his/her special knowledge, skill, experience, training and education.

6. In this trial, expert witnesses have advanced opinions based on the testimony in the case, or based on assumed facts which the evidence tends to establish. It is for you as jurors to determine whether the facts on which any such opinions are based have been established. The value of any expert's testimony is no stronger than the facts on which it is based. You may give weight to the expert's opinion only if you find all of the assumed facts to be true.

   Dickinson v. Inhabitants of Fitchburg, 79 Mass. (13 Gray) 546, 566-7 (1859); Commonwealth v. Taylor, 327 Mass. 641 (1951)

7. Expert testimony must have sound factual basis. An expert's opinion amounting to speculation unsupported by subordinate facts must be disregarded.

   Stark v. Patalano Ford Sales, Inc., 30 Mass. App. Ct. 194, 200 rev.den. 409 Mass. 1105 (1991); Toubiana v. Priestly, 402 Mass. 84, 91 (1988); Swartz v. General Motors Corp., 375 Mass. 628 (1978); Sevigny's Case, 337 Mass. 747 (1958); Nass v. Duxbury, 327 Mass. 396 (1951).

8. In considering expert testimony, a verdict cannot be founded on speculation or possibilities. In order for a plaintiff to recover damages arising from another's negligence, it must be shown within a reasonable degree of medical certainty that the damages were the result of the defendant's negligence. Speculation and possibilities are to be disregarded.

9. A mere guess or conjecture by an expert witness in the form of a conclusion from basic facts that do not tend toward that conclusion any more than toward a contrary one, has no evidential value.

   Ruschetti's Case, 299 Mass. 426, 431 (1938); Oberlander's Case, 348 Mass. 1, 7 (1964).

10. Even where expert opinion is given, such conclusions are not binding on the jury which may decline to adopt any one or all opinions.

    Banaghan v. Dewey, 340 Mass. 73, 79 (1959); Dodge v. Sawyer, 288 Mass 402 (1934).

11. Indeed, if the opinion is a guess or a mere assertion of a possibility of a causal connection, it is insufficient alone to sustain a finding.

    Nass v. Town of Duxbury, 327 Mass. 396 (1951); Look's Case, 345 Mass. 112 (1962); Oberlander's Case, 348 Mass. 1, 5-6 (1964).

NEGLIGENCE

12. There are four elements that the Plaintiff must prove by a preponderance of the evidence. These are:

    1. The Plaintiff must prove the standard of care owed by the Defendant medical provider in the circumstances of this case;

    2. The Plaintiff must prove that the Defendant breached that standard of care, or, in other words, was negligent;

    3. The Plaintiff must prove that the Plaintiff suffered injuries;

    4. The Plaintiff must prove that the negligence of the Defendant was the proximate cause of the injuries.

Each of these elements will be addressed separately in these instructions.

Cf., Massachusetts Superior Court Civil Practice Jury Instructions, §4.3 and cases cited therein.

STANDARD OF CARE

13. In this case, in which the Plaintiff alleges that a medical provider was negligent, expert testimony is required on the issue of the standard of care that is applicable to the medical care provider.

Haggerty v. McCarthy, 344 Mass. 136 (1962) and cases cited therein.

You, the jurors, cannot decide the issue based on your own knowledge or opinions.

14. As with all witnesses, you may give the testimony of any expert such weight as you believe it deserves. The jury's function with respect to an expert witness is to assess the soundness and credibility of the expert's opinions. You the jury may discount or disbelieve some or all of an expert's testimony.

> "... You are entitled to consider the expert's appearance, the manner in which [he/she] testifies, the character of [his/her] testimony and the evidence, if any in conflict with [his/her] conclusions. You may also consider the witness's education, training and experience in the area of professed expertise."

MA Superior Court Civil Jury Instructions, §13.4, Expert Witnesses.

15. Moreover, in determining whether or not a Defendant medical provider exercised the requisite care and skill of the average qualified provider, you must remember that "in the usual case where matters of professional judgment are involved, a tribunal of fact, whether the court or jury, unassisted by expert testimony or evidence from the profession concerned, should not retrospectively substitute its judgment for that of the person whose judgment had been sought and given."

Riggs v. Christie, 342 Mass. 402, 407 (1961).

16. The duty owed by a medical provider to a patient and the full extent of his responsibility to a patient, is that the provider has and will exercise the reasonable degree of learning, skill and experience ordinarily possessed by the average qualified provider in his field of practice, having regard to the resources available and to the then current state of advance of the profession and in case of doubt, to use his or her best judgment as to the proper course of action to produce a good result.

Brune v. Belinkoff, 354 Mass. 102 (1968);
Grassis v. Retik, 25 Mass. App. Ct. 595 (1988);
Borysewicz v. Dineen, 302 Mass. 461 (1939);
Bouffard v. Canby, 292 Mass. 305 (1935);
Chesley v. Durant, 243 Mass. 180 (1922).

17. The medical provider's conduct is to be tested by the standards of care and skill and advancements in the profession that prevailed at the time of these alleged events, among the average or ordinary provider practicing within that area of practice, having regard to the resources available.

Civitarese v. Gorney, 358 Mass. 652 (1971);
Brune v. Belinkoff, 354 Mass. 102 (1968).

18. To determine the standard of care applicable to the Defendant, you must consider the circumstances which each Defendant faced and you must decide, based upon expert testimony, what the average, qualified professional would have done under those circumstances: "what the average qualified physician [nurse] would do in a particular situation is the standard of care."

Palandjian v. Foster, 446 Mass. 100, 105 (2006);
Brune v. Belinkoff, 354 Mass. 102, 109 (1968).

BREACH OF STANDARD OF CARE

19. Medical providers deal in a somewhat inexact science and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors that are incapable of precise measurement. The indeterminable nature of these factors makes it impossible for providers to gauge them with complete accuracy in every instance. Because of the inescapable possibility of error which inheres in these services, the law has traditionally required not perfect results but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated medical providers.

Klein v. Catalano 386 Mass. 701 (1982).

20. A medical provider must be allowed a wide range in the reasonable exercise of professional judgment. He or she is not guilty of negligence so long as such judgment is employed and so long as that judgment does not represent a departure from accepted standard of practice and does not result in failure to do something that accepted practice obligates the doctor to do.

Vartanian v. Canby, 311 Mass. 249 (1942).
Borysewicz v. Dineen, 302 Mass. 461, 463 (1939);

21. A healthcare provider does not guarantee good results. The law does not require perfection. The difficulties and the uncertainties in the practice of healthcare are such that, absent a specific promise, no one can guarantee results.

22. An unfortunate result, standing alone, it is not evidence of negligence. The degree of care and skill exercised by the Defendant must be judged in the light of facts which were known to them or reasonably should have been known to them. Any hindsight is not a proper basis for your evaluation of this matter.

23. The mere fact that a patient suffers medical problems during or after treatment by the Defendant does not necessarily mean that the Defendant was negligent, nor that the Defendant is legally responsible, nor that the Defendant must pay damages. The Plaintiff cannot recover unless the Plaintiff proves that the Defendant failed to use proper care and skill and that this failure was a direct and proximate cause of the complications that followed.

Semerjian v. Stetson, 284 Mass. 510 (1933);
Riggs v. Christie, 342 Mass. 402 (1961).

24. A negligence case is not made out because an expert witness disagrees with a Defendant as to what is the best or better approach in handing a medical or administrative issue, or because an expert witness states that he would have cared for the patient differently from the Defendant. Such differences as to preference do not amount to malpractice. To make a case that the Defendant was negligent, the expert witness must testify clearly that the Defendant has departed from accepted medical standards.

See, Grassis v. Retik, 25 Mass. App. Ct. 595, 602 (1988).
See, Bouffard v. Canby, 292 Mass. 305 (1935).

25. Medical evidence to the effect that another medical provider might undertake a different course of action from that undertaken by the Defendant is not evidence that the Defendant was negligent unless you find that the Defendant's actions were not in accordance with good medical practice.

26. The personal opinion of a doctor or other professional medical personnel that a certain course of action is good medical practice is not a basis from which a jury may draw a conclusion that practice not conforming to such an opinion is bad practice.

Bouffard v. Canby, 292 Mass. 305 (1935).

27. The burden of proof is on the patient/Plaintiff to show negligence or acts from which negligence could properly be inferred.

Goode v. Lothrop, 266 Mass. 518 (1929).

28. The mere fact that the Plaintiff brought this action against the Defendant is not to be considered by you as evidence that anyone was negligent.

29. The mere possibility of an explanation predicated in negligence is not enough for you to hold the Defendant responsible.

Artz v. Hurley, 334 Mass. 606, (1956).

30. If you consider this evidence and determine that, on the whole of the evidence, the question of the Defendant's negligence is left to conjecture, surmise or speculation, then the Plaintiff has failed to meet the burden of proof and you must find for the Defendant.

Morris v. Weene, 258 Mass. 178, 180 (1922);
Bigwood v. Boston and Northern Street Railway, 209 Mass. 345 (1911).

31. If the Defendant exercised the diligence, care and skill exercised by the ordinary medical provider of that specialty under like circumstances even though she may have been mistaken in the exercise of her judgment, then the Plaintiff cannot recover.

Vartanian v. Berman, 311 Mass. 249 (1942);
Borysewicz v. Dineen, 302 Mass. 461 (1939);
Boufford v. Canby, 292 Mass. 305 (1935).

CAUSATION

32. A Defendant is only liable for those injuries that are a reasonably foreseeable consequence of his or her negligence. When we say that something is foreseeable, we mean that it is a probable and predictable consequence of the Defendant's negligent acts or omissions. Thus, if the Defendant should have realized his or her conduct might cause harm to a person in the patient's position in substantially the manner in which it was brought about, the injury is regarded as the legal consequence of the Defendant's negligence.

Jorgensen v. Massachusetts Port Auth., 905 F.2d 515 (1st Cir. 1990);
Wiska v. St. Stanislaus Social Club, Inc., 7 Mass.App.Ct. 813 (1979).

33. Even if you find that the care rendered to the Plaintiff did not in some respects satisfy the accepted standards of medical practice, you must still find for the Defendant unless you also find that these deficiencies caused or contributed to cause the injuries alleged by the Plaintiff.

McCarthy v. Boston City Hospital, 358 Mass. 639, (1971);
Marangian v. Apelian, 286 Mass. 429 (1934).

34. The question is whether or not the Plaintiff has proven that the Defendant medical provider's alleged breach of duty caused actual harm to the patient. Even if you find that the Defendant was negligent, then unless you also find, by a preponderance of the evidence, that the harm would not have occurred absent the negligence, you must find for the Defendant.

Prosser and Keeton on Torts, § 41 at 266 (5th ed. 1984);
Restatement (Third) Torts, § 26 (Tentative Draft March 2008);
Matsuyama v. Birnbaum, 452 Mass. 1, 30 n. 47 (2008).

35. It is the Plaintiff's burden to show causal relationship between any failure of the Defendant and any ensuing injury to the Plaintiff. In this case, expert medical testimony is required to establish a causal relationship. You the jury are not to decide causal relationship of your own knowledge or by conjecture, surmise or speculation.

Murphy, Admr. v. Conway, 360 Mass. 746 (1972);
Semerjian v. Stetson, 284 Mass. 510, (1933).

36. The Defendant's conduct is a cause of the event only if the event would not have occurred "but for" that conduct.

Prosser and Keeton on Torts, § 41 at 266 (5th ed. 1984);
Restatement (Third) Torts, § 26 (Tentative Draft March 2008);
Matsuyama v. Birnbaum, 452 Mass. 1, 30 n. 47 (2008).
Doull v. Foster; SJC 12921 (Feb 26, 2021) (but-for causation standard is appropriate in most case and SJC discontinues use of substantial factor test).

37. Where causal connection, if any, between an alleged act and an alleged injury is not a matter of common knowledge, the causal relationship cannot be demonstrated solely by complaints of the Plaintiff but must be substantiated by expert medical testimony.

Foley v. Kibrick, 12 Mass. App. Ct. 382, 385 (1981).
In re Hale's Case, 4 Mass. App. Ct. 769 (1976);
Anderson v. W.R.Grace and Co., 628 F. Supp. 1219 (1986).

38. The Plaintiff has the burden of proving by a preponderance of the evidence that the Defendant was negligent and that but for the defendant's conduct, the plaintiff would not have been injured. Unless you find both of these elements, you must find for the Defendant.

Prosser and Keeton on Torts, § 41 at 266 (5th ed. 1984);
Restatement (Third) Torts, § 26 (Tentative Draft March 2008);
Matsuyama v. Birnbaum, 452 Mass. 1, 30 n. 47 (2008).
Doull v. Foster, SJC-12921 (February 26, 2021)

39. Testimony by an expert that such a causal connection or relation is possible, conceivable or reasonable, without more, is insufficient to meet this burden.

Berardi v. Menicks, 340 Mass. 396, 402 (1960);
DeFilippo's Case, 284 Mass. 531, 534-535 (1933);
Glicklich v. Spievack, 16 Mass. App. Ct. 488 (1983).

40. If you consider the evidence and determine that, on the whole of the credible evidence, the question of causal connection is left to conjecture or speculative inferences, then the Plaintiff has not met his burden of proof.

Vartanian v. Berman, 311 Mass. 249, 254 (1942).

41. If causes other than the negligence of said Defendant have produced those injuries alleged in the Plaintiff's Complaint, the Plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence.

Wardsworth v. Boston Elevated Railway, 182 Mass. 572 (1903);
Morris v. Weene, 258 Mass. 178 (1927).

42. If on all the evidence it is just as reasonable to suppose that the cause of the Plaintiff's injury is one for which no liability would attach to the Defendant as one for which the Defendant is liable, then the Plaintiff has not met her burden of proof and you must find for the Defendant.

Morris v. Weene, 258 Mass. 178, (1927);
Bigwood v. Boston & Northern Street Railway Co., 209 Mass. 345 (1911);
Wadsworth v. Boston Elevated Railway Co., 182 Mass. 572, (1903).

43. If you find that it is just as likely that some other factor rather than the Defendant's negligence caused the alleged injury, then you must find for the Defendant.

Guell v. Tenney, 262 Mass. 54 (1928).

44. As to any condition that you find the Plaintiff had, the Defendant is not responsible for the natural course that condition would have taken regardless of the action of the Defendant. A Defendant is only responsible to a Plaintiff for so much of the injuries and damages, if any, which you find the patient to

have suffered because of some act or omission of the defendant.

In other words, for you to find in favor of the plaintiff, even were you to find that the defendant was negligent as I have defined that term, you must also find that the alleged injuries would not have occurred but for the negligence, if any, of the defendant.

LaClair v. Silberline Mft. Co., Inc., 379 Mass. 21, 31 (1979);
Prosser and Keeton on Torts, § 41 at 266 (5th ed. 1984);
Restatement (Third) Torts, § 26 (Tentative Draft March 2008);
Matsuyama v. Birnbaum, 452 Mass. 1, 30 n. 47 (2008).

45. The Plaintiff must establish by a preponderance of the evidence that any alleged harm would not have occurred absent the defendant's conduct.

Prosser and Keeton on Torts, § 41 at 266 (5th ed. 1984);
Restatement (Third) Torts, § 26 (Tentative Draft March 2008);
Matsuyama v. Birnbaum, 452 Mass. 1, 30 n. 47 (2008).

46. The Plaintiff must establish by a preponderance of the evidence that any alleged harm would not have occurred "but for" the defendant's conduct.

Prosser and Keeton on Torts, § 41 at 266 (5th ed. 1984);
Restatement (Third) Torts, § 26 (Tentative Draft March 2008);
Matsuyama v. Birnbaum, 452 Mass. 1, 30 n. 47 (2008).

47. If you find it just as likely that the plaintiff's underlying physical condition or illness caused the damage alleged by the Plaintiff, then you must find for the Defendant.

Guell v. Tenney, 262 Mass. 54 (1928).

48. If you find that there were injuries to the Plaintiff, you must distinguish between injuries caused by the negligence, if any, of the Defendant and injuries which were not caused by the Defendant. A Plaintiff may be compensated only for injuries that would not have happened "but for" the negligence of the Defendant. If the injury would have happened despite the conduct of the defendant, then the defendant was not the cause of the alleged injuries, and the Plaintiff cannot be compensated for those injuries.

Prosser and Keeton on Torts, § 41 at 266 (5th ed. 1984);
Restatement (Third) Torts, § 26 (Tentative Draft March 2008);
Matsuyama v. Birnbaum, 452 Mass. 1, 30 n. 47 (2008).

INTERVENING AND SUPERCEDING CAUSE

50. Proximate cause is that which in a continuous sequence, unbroken by any new cause, produces an event that would not have occurred.

Wallace v Ludwig, 292 Mass 251 (1935).

51. An intervening force as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed."

Restatement (Second) of Torts, § 441(1)

52. A superseding cause is "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

Restatement (Second) of Torts § 440

53. The causal connection is broken between the defendant's act and the ultimate harm when something so distinct from the original cause has thereafter happened so as to constitute an intervening efficient, independent and dominant cause.

Wallace v Ludwig, 292 Mass 251 (1935).

54. If you find Defendant negligent, a subsequent act or event, may intervene between the defendant's act and the injury- this is known as an intervening force. When an intervening force occurring subsequently to the defendant's act prevents the defendant from being held liable, it is called a superseding cause. A defendant may not be held liable for the intervening negligence of a third person if it breaks the chain of causation.

Restatement, 2d, Torts, § 440 and 441(1).
Buda v. Foley, 302 Mass. 411, 413 (1939).

DAMAGES - GENERALLY

55. You will reach the issue of damages only if you find that the Defendant was negligent and only if you find that the negligence of the Defendant was the proximate cause of the injuries to Stephen Luppold.

56. If you reach the issue of damages, then the Plaintiff bears the burden of proving damages by a fair preponderance of the evidence.

57. The fact that the Court is giving you instructions on the law of damages, standing by itself, is not relevant and should create no inference whatsoever as to whether or not you the jury should actually award damages in the individual circumstances of this case. You are being instructed on the subject of damages in this action because it is my duty to instruct you on all of the legal principles that may perhaps become pertinent in your deliberations. You should not consider the fact that you are being instructed about damages as intimating any view of the Court on the issue of liability or as to which party is entitled to your verdict.

> Sullivan v. Old Colony St. Ry. Co., 200 Mass. 303, 307-08 (1908);
> 2 Devitt and Blackmar, Federal Jury Practice Instructions, §71.16 at 596057 (3rd ed., 1977).

58. If you find that there were injuries to the Plaintiff, you must distinguish between injuries caused by the negligence, if any, of a Defendant and injuries which were not caused by the Defendant. A Plaintiff may be compensated only for injuries that were caused by the negligence of the Defendant. If the Defendant was not the cause of the alleged injuries, then the Plaintiff cannot be compensated for those injuries.

59. Any damages for which the Plaintiff seeks recovery in this action must be proven and not left to guess work or speculation. You are not permitted to award speculative damages, that is, compensation for loss or harm which, although possible, is conjectural or not reasonably certain.

> See e.g., Santana v. Registrars of Voters of Worcester, 398 Mass. 862, 867 (1986);
> Lufkin's Real Estate, Inc. v. Aseph, 349 Mass. 343, 346 (1965).

60. If you reach the question of damages in this case, any damages that you award must be reasonable. You may award only that amount of damages as will reasonably compensate the Plaintiff for any injuries. In this regard, the Plaintiff has the burden of proving, by the preponderance of the evidence in the case, that the damages he alleges or claims were sustained as a direct result of the accident.

> Nolan and Sartorio, Tort Law, Section 239 at 404-405 (2d ed. 1989).

61. If you reach the question of damages in this case, you are not to compensate the Plaintiff for the harm, if any, resulting from a medical condition that was not caused by the Defendant.

62. If you reach the question of damages in this case, you are not to compensate the Plaintiff for the harm, if any, resulting from the natural progression or outcome of a pre-existing medical illness.

63. If you reach the question of damages in this case, you are not to compensate the plaintiff from the harm, if any, resulting from a subsequent medical condition that was not caused by the Defendant. If you

find that the Plaintiff's pre-existing physical and/or medical condition caused the damages alleged by Plaintiff, you must find for the Defendant.

Guell v. Tenney, 262 Mass. 54 (1928)

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 1681CV01287

STEVEN LUPPOLD,
Plaintiff,
V.
CHARLES LOUCRAFT, P.A.,
CARLOS FLORES, N.P.
CARLA CROCKER, R.N.,
SUSAN HANLON, R.N.,
STEFANIE BUSA, R.N., AND
MERRIMACK VALLEY EMERGENCY ASSOCIATES, INC.
Defendants.

FINAL Jury Instructions

INTRODUCTION

Jurors, thank you for serving on this jury. Jury service is a very important part of our democratic self-government. You are responsible for upholding the law and our principles of justice. That is what you promised to do at the start of this trial when you took your oath as a juror.

You must carefully consider all of the evidence, decide whom and what to believe, and then answer specific questions that I will discuss with you.

This final part of the trial will take place in three steps. I will give you instructions about the law you must apply when deciding the questions we need you to answer to resolve this case. Then, the attorneys will make their closing arguments, in which they will summarize the evidence and suggest conclusions you may reach. The defense attorneys, on behalf of their own clients, will argue first, and the plaintiff's attorney will argue last. After the closing arguments, I will give you general instructions that apply in every case. You will then work together to reach a verdict.

Please pay close attention to my instructions. All of my instructions are important, and you must follow all of them even if you do not agree with them.

To make sure that I give you the instructions accurately, I will read them to you. You also have a written copy so you can read along if you wish and refer to the instructions in the jury room during your deliberations.

I will do my best to make sure that the instructions I give when speaking with you match the written instructions. If there is any difference between what I say aloud and what the written instructions say, please follow what I say aloud.

STANDARD OF PROOF

The person who files a civil case, the plaintiff, has the burden of proof. That means that he must present enough evidence to prove his claims. What is enough evidence?

I will tell you in a minute each of the specific things that Steven Luppold must prove. Mr. Luppold must show that each of these things is **more likely true than not true.** The lawyers or I may use the phrases "more probable than not" or "by a preponderance of the evidence," and each of those terms means the same thing as "more likely true than not true."

Now, from time to time, I will refer to proof or to proving something. By this, I mean Mr. Luppold as Plaintiff in this action must prove his claim of the facts is more likely true than not true, based upon evidence and any reasonable conclusions that you draw from the evidence.

If you find that the evidence supporting Mr. Luppold's version of the facts is more persuasive than any or all of the defendants' version, then you must decide in favor of Mr. Luppold. But if you find that the evidence supporting a Defendant's version of the facts is more persuasive, or that the evidence on the two sides is equally persuasive—50/50—then you must decide in favor of that Defendant.

Because this is a civil case, we do not use the rule that applies in a criminal case. In other words, Plaintiff does not have to prove his claims beyond a reasonable doubt the way the government must in a criminal case. In civil cases like this one, even

if you still have some doubts, and even if those doubts are reasonable, you can still decide in favor of Plaintiff as long as he has proved each element of his claim is more likely true than not true.

You are probably familiar with balance scales, like the scales of justice. Plaintiff must provide proof that is convincing enough to tip the scales, however slightly, toward his claim being true or correct, in your view as the jury. If the scales tip toward Plaintiff, even a little bit, then Plaintiff has proved his claim. But if the scales remain balanced, not tending toward either side at all, or if they tip toward a Defendant at all, then Plaintiff has not proved his claim against that Defendant.

The number of witnesses or exhibits on each side is not necessarily important. The side with fewer witnesses or exhibits may be more convincing. It does not matter who called a witness, asked a particular question, or introduced an exhibit. What you are weighing is the persuasive force of the evidence and whether the Plaintiff's evidence is more likely true than not true.

Reaching a Verdict

All eight of you will deliberate on this case. When you go to the jury room, you will need to answer a series of questions. Because this is a civil case, you may reach a verdict so long as seven of the eight of you agree on the answer to a particular question. As all eight jurors are deliberating, seven of you must agree on the answer to a particular question in order to reach a verdict. However, it does not have to be the same seven jurors that agree on each answer.

There are 5 separate defendants in this case and you must reach a decision on each defendant individually and not as a collective group.

Questions for the Jury to Answer

As I explained before the trial began, the term "medical malpractice" is the same thing as "medical negligence." "Medical malpractice" refers to medical negligence by a physician, physician assistant, nurse, nurse practitioner or other health care professional in providing medical care to a patient.

In order to prove medical negligence, Mr. Luppold must show that the following five things are more likely true than not true:

1. that a **health care provider - patient relationship** existed between Steven Luppold and the defendant;
2. what the medical **standard of care** for each provider was in the circumstances of this case - in other words, what the individual defendant should have done;
3. that an individual defendant's medical treatment **fell below that standard of care that applied to that defendant** - in other words, that defendant was negligent;
4. that the individual defendant's negligence was a **cause** of Steven Luppold's injuries and
5. that the alleged **injuries/harm**, which we call "damages" exist.

I will now explain each of these things in more detail.

Heath Care Provider-Patient Relationship

First, Mr. Luppold must prove, more likely than not, that Steven Luppold and each of the defendants had a health care provider-patient relationship at the time of the alleged negligence. There is no dispute in this case that such a relationship existed.

Standard of Care

Next, Plaintiff must prove the standard of care that applies to each defendant's care of Steven Luppold – in other words, the care that each defendant should have provided to Steven Luppold in this case.

Each defendant owed a duty to treat Steven Luppold according to the "standard of care" that applied to him or her in March 2015. "Standard of care" means the degree of skill and care of the average practitioner practicing in the particular defendant's area of specialty, taking into account the advances in the profession and the medical resources available to the provider. This standard of care required Mr. Loucraft to use the degree and skill and care of the average qualified physician assistant -in 2015. This standard of care required Mr. Flores to use the degree and skill and care of the average qualified nurse practitioner in 2015. The standard of

care required Nurse Hanlon, Nurse Busa and Nurse Crocker to each use the degree of skill and care of the average qualified registered nurse in 2015.

The standard does not require a medical provider to provide the best care possible. But a medical provider must have and exercise the skill and expertise ordinarily possessed by other providers in the same specialty.

Plaintiff has the burden to prove the standard of care that have been provided by the average qualified physician assistant, nurse practitioner and registered nurse in 2015 under similar circumstances to the Plaintiff. You may not hold a Defendant to some other standard of care. (Bello) For example, what a different medical provider did or would have done is not enough to show what care the average qualified PA, NP or RN would provide.

You must determine this standard of care from the testimony presented by medical witnesses during the trial of this case. This may come from the testimony of medical expert witnesses along with testimony of the defendants themselves. The standard of care does not need to be in writing. If there is disagreement about the standard of care, you will have to resolve the conflict to determine the degree of care and skill of the average qualified practitioner that was owed by each defendant in their specialty.

An expert must be familiar with the standard of care through education, training, experience and familiarity with the subject matter but does not have to be a specialist in each defendant's area of practice. Similarly, an expert does not have to practice in the same state or geographic area.

You may not guess or speculate as to the applicable standard of care, or substitute your belief of what the standard of care should be. You may not do your own medical research, on the Internet or anywhere else, to try to understand the standard of care. Instead, you must base your decision solely on the evidence presented here in the courtroom.

The standard of care to be applied in this case is the standard of care applicable in 2015. If the standard of care has changed between that time and now, then you need to consider the standard of care that applied at the time each of the defendants cared for Steven Luppold.

Falling Below the Standard of Care

Next, Plaintiff must prove that, more likely than not, his claim of negligence against defendan, which means that Plaintiff must prove that a defendant provided medical care that fell below the standard of care that the average qualified provider practicing in that defendant's specialty would have provided at the time and under the circumstances. Negligence might consist of doing something inconsistent with the standard of care or failing to do something required by the standard of care.

You must decide whether or not the individual defendant met the standard of care in light of the facts that the defendant knew or reasonably should have known under the circumstances, at the time of the alleged negligence.

Even if a defendant did not know some information, you must consider what he /she should have known at the time, if he/she had complied with the standard of care. Medical providers cannot predict everything accurately, but they do need to comply with the standard of care.

Judgment

Medical care providers are allowed to use their judgment as long as that judgment does not fall below the standard of care.

Sometimes more than one course of action or conclusion may be consistent with the required standard of care. If so, then a health care provider may exercise his or her best judgment as to the appropriate steps to take, and doing so is not negligence. However, a doctor is negligent and may be held liable for an error of judgment if that judgment represents a departure from the standard of care.

Evidence that another medical provider might have treated the patient differently is not, by itself, evidence that the Defendant was negligent, because medical

providers are entitled to act within a range of medical judgment - as long as the judgment falls within the standard of care.

No Guarantee

Medical providers do not guarantee a cure or a particular outcome. They do not guarantee that treatment will improve the patient's condition, or that the patient's condition will not get worse, either by natural causes or even as a result of the treatment itself. A bad result or unfortunate outcome, standing alone, is not evidence of negligence. They do not have to be perfect, but they must meet the standard of care.

Verdict Slip—Negligence

On the verdict slip, the first question is "Was the defendant Charles Loucraft, P.A. negligent in his care and treatment of Steven Luppold?" If you find that Mr. Loucraft was negligent then you should answer 'YES' and go to the next question. If you find that a Defendant was not negligent, answer 'NO'. Question #3 asks the same question on negligence as to Carlos Flores, N.P., Question #5 asks the same question on negligence as to Carla Crocker, R.N., Question #7 asks the same question on negligence as to Susan Hanlon, R.N and Question #9 asks the same question on negligence as to Stephanie Busa, R.N.

Causation

If you find that any/all of the defendants were negligent, then you must decide whether Mr. Luppold proved that, more likely than not, the individual defendant's negligence caused Mr. Luppold's injuries. A Defendant caused injuries if the injuries would not have occurred without – that is, but for – that defendant's negligence. To decide this, you must ask: "Would the same harm have happened without that defendant's negligence?" In other words, did the negligence make a difference? If a defendant's negligence had an impact on Steven Luppold's injuries then it caused those injuries. But if the negligence had no impact on Steven Luppold's injuries and the result would have happened anyway, then that defendant did not cause the injuries.

An injury may have more than one cause. If a defendant's negligence was one of those causes, that is enough. Plaintiff does not have to show that a defendant's negligence was the only cause of the injuries. Nor does he have to show that a defendant's negligence was the largest or main cause of the injuries, as long as the injuries would not have occurred without that defendant's negligence.

Here, again Plaintiff must prove causation by expert medical evidence. This evidence may be in the form of testimony or in the form of medical records.

In addition, Plaintiff must prove that the injuries were, more likely than not, a predictable result of a defendant's negligence. To decide this, you must ask: "Did that defendant's negligence create a foreseeable risk of the type of injury that Steven Luppold suffered?" The risk was foreseeable if a reasonable provider in that defendant's position should have known that the negligence created a risk of this type of harm. Plaintiff does not have to prove that a defendant could or should have predicted the precise way in which the injury occurred, but he must show that his injuries were a natural result of that defendant's negligence.

Verdict Slip - Causation

On the verdict slip, the second question asks: "Was the negligence of Charles Loucraft, P.A. a cause of Steven Luppold's injuries?" If you find that Charles Loucraft, P.A.'s negligence was a cause of Steven Luppold's injuries and that the injuries were a predictable result of that negligence, then you should answer "Yes". Otherwise, if you find that Mr. Loucraft's negligence was not a cause of Mr. Luppold's injuries and the injuries were not a predictable result of that negligence, then answer "No," to that question. Question #4 asks the same causation question as to Carlos Flores, N.P., Question #6 ask the same causation question as to Carla Crocker, R.N, Question #8 asks the same causation question as to Susan Hanlon, N.P. and Question #10 asks the same causation question as to Stephanie Busa, R.N.

If you have answered "Yes" to both negligence and causation questions for any defendant, please go on to answer question 11 and 12. If you did not answer "Yes" to both negligence and causation questions for any of the defendants, go no further as you have reached a verdict.

(a) Compensation for Damages

Finally, Steven Luppold must prove, more likely than not, the amount of damages caused by the defendant(s) negligence. In this case, Steven Luppold is seeking damages that relate to physical and mental pain and suffering, loss of enjoyment of life and other items of general damages

If you reach the issue of damages Steven Luppold is entitled to receive full and fair compensation for the pain and suffering, loss of enjoyment of life and other items of general damages.

General Principles

If you award damages, you must award an amount sufficient to compensate Steven Luppold for the injuries or harm he suffered because of the negligence of any/all defendant. You must not use your damages award to reward the plaintiff nor may you use it to punish any of the defendants. As well, you must put aside your personal feelings during your deliberations and decide this case solely on the facts as you find them and the law I am telling you about.

The law gives you no special formula to assess Steven Luppold's damages. So, working together as the jury, you must use your wisdom, judgment, and sense of basic justice to translate into dollars and cents an amount that will fairly and reasonably compensate Steven Luppold for any harm you find. Steven Luppold must show, more likely than not, what his damages are. However, the law does not require any witness to express an opinion about the amount of such damages. Often amounts of damages are left to a meager amount of evidence. It is the jury's function, using common sense and judgment, to assign a value for such dames that are found to have been proven Mr. Luppold suffered. Steven Luppold may prove damages by direct evidence, indirect evidence, or both. Now, let me turn to the specific types of damages that you should consider.

i. Pain and Suffering Damages

You should consider his claim for damages for pain and suffering. There are two kinds of pain and suffering: physical pain and suffering, and mental pain and suffering.

For physical pain and suffering, you must consider any physical injuries to Steven Luppold's body resulting from a defendant's negligence. You must consider the pain and suffering that Steven Luppold endured in each part of his body since the date of the incident.

You should also consider any past mental pain and suffering that Steven Luppold endured. Mental pain and suffering includes nervous shock, anxiety, embarrassment, or mental anguish resulting from the injury. Also, if Steven Luppold's injuries caused him to lose enjoyment of activities such as ~~work~~, play, family life or otherwise, then you should award damages for that reduction in the enjoyment of life.

PLAINTIFF'S DAMAGES

Compensation for Damages

On the verdict slip Question No. 11 asks "What amount of money would fully and fairly compensate Steven Luppold for pain and suffering and loss of enjoyment of life he has suffered up to the present. You will be asked to write out that award in both words and figures.

Question No. 12 asks "What amount of money would fully and fairly compensate Steven Luppold for pain and suffering and loss of enjoyment of life into the future. You will again be asked to write of that award in both words and figures. If you make an award of future damages please state the time for which that award is intended to cover. There is a line that asks for time period in weeks, month, years, etc.

CLOSING ARGUMENTS

ROLE OF THE JURY

Jurors, you have the most important role in this trial, because you are the ones who must decide who and what to believe, and answer each of the questions necessary to reach a verdict in this case.

You must be completely fair and unbiased in your work as jurors. Do not let your emotions, any kind of prejudice, or your personal likes or dislikes influence you in any way. Consider the evidence calmly and carefully. Do not be influenced by the nature of the claim or the possible consequences of your verdict. And do not let your personal feelings influence your decision. In reaching your verdict you must not be swayed by sympathy, prejudice, anger, or other emotion. If you like or dislike a lawyer or witness, ignore those feelings.

EVALUATING THE EVIDENCE

You must decide this case based **only** on the evidence presented at the trial. You may not decide this case based on anything else. Do not consider anything you have read, heard, or seen outside of this courtroom. Those things are **not** evidence. And you may not base your verdict on suspicion, guesswork, or speculation.

What is Evidence

As I told you earlier, you must decide this case based only on the evidence presented at trial. The evidence consists of the testimony of witnesses, as you recall it, and the things that were marked as exhibits. You will have the exhibits with you in the jury room. Things that were marked only for identification are not exhibits, and you will not be able to consider them.

As you review the exhibits, you may find that some information has been removed because it is not relevant. Please ignore that and don't try to guess what may have been removed or why.

Other things are not evidence and you may **not** consider them when deciding this case.

- Questions that a lawyer asked a witness are not evidence. Only the answers are evidence. For example, if a lawyer asked "wasn't it raining outside" and the witness answered "no"—or said "well, it was cloudy"—the question is not evidence that it was raining.
- If a lawyer asked a question, and I sustained an objection and therefore the witness did not answer it, then neither the question nor the fact that the witness did not answer is evidence.
- If I struck, or told you to disregard, any part or all of an answer by a witness, then that part of the testimony is not evidence and you may not consider it.
- Anything that you may have seen or heard when the court was not in session is not evidence. the courtroom
- A parties presence or lack thereof is not evidence.
- The opening statements and the closing arguments of the lawyers are not evidence. And if your memory of the testimony differs from the attorneys', you should rely on your memory.
- Any notes that you have taken are not evidence. But you may use your notes to refresh your memory of the evidence.

Direct and Indirect Evidence

As you know, evidence can come in many forms. It can be testimony about what someone saw, heard, smelled, or felt. It can be someone's opinion. And it can be an exhibit.

Some evidence proves a fact directly. For example, if a witness testifies that she saw and felt it raining outside before she came into the courthouse, then that is direct evidence that it was raining.

Some evidence proves a fact indirectly. For example, let's say a witness testifies that he saw someone come into the courthouse wearing a wet raincoat and shaking water off an umbrella. That is indirect evidence that, if you believe it, might lead you to conclude that it was raining outside even though the witness did not see, hear, or feel the rain.

This kind of indirect evidence does not directly prove that something is true, but it is evidence from which you could logically conclude that it is. We call

this "drawing an inference." We all draw inferences every day; we take some information that we know, we apply our intelligence and common sense, and then we reach a conclusion. But inferences must be based on facts; they can't just be guesses that you make when you're not sure about something.

Sometimes you can draw more than one inference. You have to decide which inferences are reasonable, and decide which seems more reasonable to you.

It makes no difference whether evidence is direct or indirect. A party in a lawsuit may be able to prove that something happened with direct evidence, indirect evidence, or a combination of both.

Credibility

A very important part of your job as jurors is to decide whom and what to believe. You may believe everything a witness says, part of it, or none of it.

Sometimes people do not tell the truth. You must decide whether a witness was being truthful, or was deliberately lying. If you conclude that a witness lied to you about something, then of course you should not believe that part of the testimony.

Sometimes people make an honest mistake. You must also decide whether a witness testified accurately, or whether the witness may have gotten something wrong without meaning to do so. A witness may recall seeing or hearing something, but actually be mistaken.

For example, the witness might not have paid close attention or might have misunderstood what was happening. Or a witness's memory of what happened could be incorrect.

If you conclude that a witness tried to be truthful but that some part of the person's testimony was not accurate, then you should not consider the inaccurate testimony.

Depositions

In this case you have heard references to depositions taken of the parties. As I explained to you during the trial, a deposition is testimony that was given out

of court by a party under oath, in response to questions asked by an attorney. You are to treat a deposition of a party in this case the same way as if the testimony had been given here in court. As with all witnesses, it is for you to determine how believable and how significant that testimony is.

When you evaluate how reliable or believable a witness's testimony is, you may also take into account whether that witness made an earlier statement that differs in any significant way from his or her present testimony at trial. It is for you to say how significant any difference is. If the earlier statement is not deposition testimony of a party in this case, the statement of any fact that is mentioned in it, may be considered by you only for the purpose of determining how much belief or importance you will place on the testimony given here at trial.

How do you decide whether you believe particular statements by a witness? Ask yourself:

- Did the testimony seem reasonable or probable?
- Did the witness have a good chance to observe what happened? How much attention did the witness pay?
- Does the witness's memory seem accurate?
- Was the witness's testimony consistent with other evidence, or instead contradicted by other evidence?
- How did the witness behave and answer questions?
- Did the witness have any motive for testifying in a certain way or have any other bias that may have influenced the witness's testimony?

Importance or Significance of Evidence

It is also up to you to decide how important each part of the evidence is, whether it is testimony by a witness or an exhibit. Whether evidence is direct or indirect, you should give every piece of evidence whatever significance you think it deserves.

You are not required to believe something simply because it appears in an exhibit. It is up to you to decide how important any exhibit is.

As you review the exhibits, you may find that some information has been removed or redacted or blackened because it is not relevant. Please ignore that and don't try to guess what may have been removed or why.

You do not have to treat testimony by the witnesses as more or less significant than the exhibits. You may find that a witness's testimony is very important, or that an exhibit is more important. That is up to you.

Opinion Testimony

Much of the testimony came from witnesses who saw or heard something. Some witness also told you about opinions or conclusions they reached based on some special training or experience. But even if a witness has some special training or experience, that does not necessarily make the witness's testimony any more believable or important than other testimony or exhibits.

You must decide whether you believe the witness, and how much importance to give to the witness's testimony. You should consider all the factors I have previously mentioned, including whether the witness had a motive to testify in a certain way or some other bias that could have influenced the witness's testimony.

In addition, as you evaluate a witness's opinions or conclusions, you should also ask:

- Was the witness's testimony supported by the facts of this case?
- Did the witness use guesswork or assumptions that you do not find to be convincing or are not consistent with the facts?
- Did the witness have sufficient education or experience?

You may decide to accept all, some, or none of the opinions or conclusions offered by a witness. But please remember that witnesses, even those with special training or experience, do not decide cases; juries do. It is up to you to decide this case, and to decide whether you accept or reject any opinion or conclusion that a witness offered during the trial.

Juror Notes

Many of you have taken notes during the trial. Your notes may help you remember the evidence, especially the testimony, but of course they are not an actual transcript or official record of what was said. So use your notes only to help you remember what you heard and saw during the trial. Whether you took notes or not, you must rely on your own memory of what the witnesses told you.

After the trial is over, and you have returned your verdict, a court officer will collect your notes and destroy them.

Objections During Trial

During this trial, the lawyers may have objected to questions posed to a witness. They may have moved to "strike," or in essence erase, certain testimony. Whenever a lawyer believes that something would violate the rules of evidence, the lawyer is supposed to object or move to strike. That is part of the lawyer's job.

BE FAIR

Let's turn to another important issue. Each of you has taken an oath and promised to be fair. I am sure that you want to be fair, but that is not always easy. Part of being fair is being willing to examine your decision-making process to be sure you base your decision as jurors only on the evidence and the law.

One difficulty comes from our own built-in expectations and assumptions. They exist even if we are not aware of them. You may have heard this called implicit biases. We all have them, simply because we are human. They affect our actions and decisions without us even realizing it.

We judges have the same problem as everyone else, so let me share a few strategies that we have found useful. These strategies will help you make sure you decide this case based only on a careful examination of the evidence and on the legal rules I have explained to you.

First, slow down; do not rush to a decision. Take time to consider all the evidence. Quick decisions are more likely to reflect stereotypes, or assumptions about people that we may not even be aware of.

Second, as you start to draw conclusions, consider not only the evidence that supports your conclusions, but also think carefully about any evidence that undermines or weakens those conclusions.

Third, as you think about the people involved in this case, ask yourself: Would my decision be different if the people were different? For example, what if the people involved were in different social or economic groups -- or had different ages, genders, gender identities, or sexual orientations --or came from different racial or ethnic backgrounds?

Fourth, listen to one another. Other jurors may have different points of view. If so, they may help you make sure you are focusing on the facts. Of course, other jurors could be influenced by their own unstated assumptions, so do not hesitate to share your views. You should participate actively, particularly if you think the other jurors are overlooking or undervaluing evidence you think is important. When you explain your thoughts to other jurors, you help everyone focus on the evidence.

If you do these things, then you will do your part to reach a decision that is as fair as humanly possible. That is your responsibility as jurors.

JURY DELIBERATIONS

I am now going to give you some instructions about how to conduct your deliberations.

Private Discussions

First of all, you must keep your deliberations secret. You should not tell anyone outside the jury room, not even me, anything about them. For example, please do not tell me or anyone else the results of any votes you may have taken before you all agree on a verdict. You must not tell anyone how your discussions are going or what any jurors said.

If you need to communicate with me before you reach a verdict, you should send me a written note, in a form you all agree on. It must be signed by your foreperson. I will discuss your note with the lawyers. Then I will either send you a response in writing or bring you into the courtroom and respond to you in person. If you do

send me a note, it should not mention any votes you may have taken or anything else about your deliberations.

Do not talk about the case unless all of you are present and no one else is in the room. If one of you needs to leave for a moment, the rest of you should stop deliberating until that juror returns. If we break for the day before you reach a verdict, you must not communicate with other jurors about the case until the next day and only after we gather in the courtroom and I ask you to resume your deliberations.

As you work to decide this case, and until I accept your verdict, you must not communicate with anyone about the case, except each other. And you must not do any kind of research about this case. You may not do so in any way, including with an electronic device such as a cell phone or tablet.

Role of the Foreperson

I choose JUROR ____ to be the foreperson. The foreperson will make sure that each of you has the chance to speak and that the other jurors listen to you respectfully. But the foreperson's opinion about the case is no more important than the opinions of all other jurors. Once you agree on a verdict, the foreperson will fill out the verdict slips and will report your verdict in court.

Making Decisions as a Group

When you work together as a jury, you will be making a decision as a group. This kind of decision-making is very valuable. Why do I say that? When a jury hears and sees evidence, each juror acts as a safeguard for the others. For example, someone else may recall evidence that you missed. And each of you will have insights that will help the other jurors make sense of the evidence and reach a verdict.

No member of the jury is more or less qualified than any other juror to decide who and what to believe. You have all heard the same evidence, listened to the same witnesses, and looked at the same exhibits. And you have all taken the same oath,

promising that you will "well and truly try the issue between the plaintiff and the defendant according to the evidence." So you are all equally qualified to reach a verdict.

I have a few suggestions that might help you as you work together.

First, you should discuss and analyze the evidence before you take any vote about a verdict. Voting first could keep you from discussing the issues, and hearing other peoples' perspectives, before making up your own mind.

Second, I encourage you to discuss not only the evidence you think supports your view of the case, but also what evidence you think might lead you to make a different decision.

Third, as the other jurors talk about the evidence that they found important, please listen. In order for this process to work fairly, each of you should hear every other juror's insights and ideas. Please be open to them, since they might influence your thinking.

Fourth, don't be shy. As in any group, some of you will be more comfortable than others in sharing your thoughts. But you must have the benefit of everyone's input to help you reach a just verdict. For example, you may be the only one who remembers a particular piece of evidence or has a particular point of view. The more points of view that you all hear, the more effective your deliberations will be.

Fifth, don't be afraid to change your mind if the discussion persuades you that you should. But you should not accept a decision just because other jurors think it is the right one. In the end, you should vote based on your own assessment of the evidence, regardless of how other jurors have voted. Ultimately, you each must decide this case for yourself.

Jurors, before I conclude I need to pause and speak with the attorneys.

[Clerk swears in court officers]

CONCLUSION

You will now go and start your private discussions. Please have confidence in what you are about to do. By serving on this jury, you carry on a long and proud tradition of citizens serving in jury trials in Massachusetts. If you are honest, thoughtful, and fair, you will be able to reach a fair and just verdict.

_____ _____

Date Justice of the Superior Court