RYAN SMITH	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
	:	
v.	:	
	:	
	:	
ANDREW N. TIMAR, D.C., ANDREW N. TIMAR, DC, LLC, AND PHOENIXVILLE CHIROPRACTIC	:	No. 1942 EDA 2024

Appeal from the Judgment Entered July 9, 2024
In the Court of Common Pleas of Chester County
Civil Division at No: 2020-07790-PL

RYAN SMITH	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
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v.	:	
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ANDREW N. TIMAR, D.C., ANDREW N. TIMAR, DC, LLC, AND PHOENIXVILLE CHIROPRACTIC	:	No. 1973 EDA 2024
	:	
Appellants	:	

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BEFORE: STABILE, J., DUBOW, J., and SULLIVAN, J.

OPINION BY STABILE, J.: **FILED SEPTEMBER 9, 2026**

These cross appeals arise from a medical malpractice action in which a jury found that Appellees/Cross-Appellants Andrew Timar, D.C., Andrew N. Timar, DC, LLC, and Phoenixville Chiropractic[1] were negligent, but that their

[1] We refer to these parties collectively as Timar.

negligence was not a factual cause of the injury of Appellant/Cross-Appellee Ryan Smith. Smith argues on appeal that the trial court erred in failing to give an increased risk of harm instruction to the jury. He therefore seeks a new trial on causation and damages. Timar argues on cross appeal that he was improperly barred from presenting evidence of Smith's drug and alcohol use at trial. After careful review, we vacate the judgment and remand for a new trial on causation and damages.

Smith alleges that Timar, a chiropractor, performed cervical spinal manipulations (in the neck region) on Smith which in turn caused a vertebral artery dissection—a tear in an artery within the spinal column that supplies blood to the brain. According to Smith, the cervical spinal manipulations were unnecessary, given that he presented with mild pain in his lower back and no complaints of neck pain. The vertebral artery dissection caused a stroke from which Smith suffers permanent impairment. Timar does not dispute that the vertebral artery dissection happened and that it was the cause of the stroke. Timar's theory of the case is that the dissection happened spontaneously due to an underlying condition, and that it is impossible for a chiropractor's cervical spine manipulations to cause an artery dissection in the V4 region of the spine, which is where Smith's dissection occurred. The V4 region is contained within the base of the skull and cannot be directly manipulated.

Smith's stroke led to two weeks of inpatient treatment at Bryn Mawr Hospital followed by several weeks of in-patient rehabilitation. Following the

stroke, Smith suffers from various symptoms, including a dragging sensation in his left leg resulting in occasional toe drag, droop on the left side of his face, impaired vision in his left eye, and reduced sensation in his right arm and leg.

Smith commenced this action with a writ of summons on October 21, 2020, followed by a complaint alleging Timar's professional negligence on February 16, 2021. On September 25, 2023, Timar filed a motion *in limine* to preclude Smith from offering expert testimony of increased risk of harm and to preclude the trial court from giving an increased risk of harm jury instruction. On October 5, 2023, the trial court entered an order permitting Smith to offer evidence on his increased risk of harm theory. The court reserved ruling on the jury instruction. Trial began on October 9, 2023, and concluded on October 13, 2023, with the jury finding that Timar was negligent but that his negligence was not a cause of Smith's injury.

During the jury charge colloquy, Smith's counsel moved for an increased risk of harm instruction and explained that it is impossible to show direct evidence of causation in this case. N.T. Trial, 10/12/23, at 108. The trial court declined to give the instruction, believing that it would confuse the jury. ***Id.*** at 110. Counsel preserved his objection. ***Id.*** at 111.

On October 19, 2023, Smith filed a timely post-trial motion. In it, he asserted that he is entitled to a new trial on causation and damages because the trial court erred in refusing to issue an increased risk of harm jury

instruction. The trial court denied the motion on June 26, 2024. The verdict was reduced to judgment on July 9, 2024. This timely appeal followed.

We begin with Smith's appeal, in which he presents the following questions:

> 1. Did the trial court commit a fundamental error by omitting the increased risk of harm causation standard from the jury charge?
>
> 2. Was the trial court's fundamental error and omission harmful where the jury was not provided 'a sufficient and correct legal basis to guide [the] jury in its deliberations' and the jury returned a verdict in favor of [Smith] on negligence, but not causation and damages?
>
> 3. Did the trial court commit a fundamental effort [sic] by denying [Smith's] motion for post-trial relief, requesting a new trial on causation and damages in light of the error in omitting the increased risk of harm standard from the jury charge?

Smith's Brief in Support of Appeal, at 4. We will consider these questions together.

We conduct our review according to the following standards:

> Our standard of review when faced with an appeal from the trial court's denial of a motion for a new trial is whether the trial court clearly and palpably committed an error of law that controlled the outcome of the case or constituted an abuse of discretion. In examining the evidence in the light most favorable to the verdict winner, to reverse the trial court, we must conclude that the verdict would change if another trial were granted. Further, if the basis of the request for a new trial is the trial court's rulings on evidence, then such rulings must be shown to have been not only erroneous but also harmful to the complaining parties. Evidentiary rulings which did not affect the verdict will not provide a basis for disturbing the jury's judgment.

Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 707 (Pa. Super. 2000), *appeal denied*, 785 A.2d 90 (Pa. 2001) (citation omitted).

Regarding the trial court's refusal to issue a requested jury instruction, the law provides:

> Our standard of review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error of law which controlled the outcome of the case. Error in a charge occurs when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. Conversely, a jury instruction will be upheld if it accurately reflects the law and is sufficient to guide the jury in its deliberations.
>
> The proper test is not whether certain portions or isolated excerpts taken out of context appear erroneous. We look to the charge in its entirety, against the background of the evidence in the particular case, to determine whether or not error was committed and whether that error was prejudicial to the complaining party.
>
> In other words, there is no right to have any particular form of instruction given; it is enough that the charge clearly and accurately explains the relevant law.

James v. Albert Einstein Med. Ctr., 170 A.3d 1156, 1163–64 (Pa. Super. 2017).

Smith claims he was entitled to an "increased risk of harm" instruction, and that the trial court erred in denying his request for one. Timar claims that Smith's argument for the instruction was proven to be "medically preposterous in this case." Timar's Opening Brief at 14.

This Court has explained the circumstances under which an increased risk of harm instruction is appropriate in a medical malpractice case:

> First, we ask whether the plaintiff's expert could testify to a reasonable degree of medical certainty that the acts or omissions complained of could cause the type of harm that the [plaintiff] suffered. The second step is to determine whether the acts

> complained of caused the actual harm suffered by appellant. However, this standard is relaxed in cases such as the instant case, where it is impossible to state with a reasonable degree of medical certainty that the negligence actually caused the injury. Rather, if the expert can opine to a reasonable degree of certainty that the acts or omissions could have caused the harm, then it becomes a question for the jury with regard to whether they believe it caused the harm. In other words:
>
> > Once there is sufficient testimony to establish that (1) the [defendant] failed to exercise reasonable care, that (2) such failure increased the risk of physical harm to the plaintiff, and (3) such harm did in fact occur, then it is a question properly left to the jury to decide whether the acts or omissions were the proximate cause of the injury. The jury, not the medical expert, then has the duty to balance probabilities and decide whether defendant's negligence was a substantial factor in bringing about the harm.

Vogelsberger v. Magee-Womens Hosp. of UPMC Health Sys., 903 A.2d 540, 563–64 (Pa. Super. 2006), *appeal denied*, 917 A.2d 315 (Pa. 2007).

Increased risk of harm instructions are common in cases of alleged misdiagnosis or failure to diagnose. For example, in ***Mitzelfelt v. Kamrin***, 584 A.2d 888 (Pa. 1990), the plaintiff was left partially paralyzed in her extremities and was confined to a wheelchair after a spinal decompression surgery. All the testifying experts agreed that twenty percent of patients experience complications after this procedure. ***Id.*** at 894. In addition, plaintiff produced evidence that blood pressure dropped significantly during surgery, and an expert testified that a drop in blood pressure was enough to compromise blood flow to the plaintiff's spine and therefore increase the risk of the partial paralysis she suffered.

The ***Mitzelfelt*** Court explained that, in the ordinary medical malpractice case, the plaintiff must establish a deviation on the part of the defendant from acceptable medical standards, and that the deviation caused the plaintiff's injury. ***Id.*** at 892. The Court recognized, however, that this standard is impossible in some cases:

> An example of this type of case is a failure of a physician to timely diagnose breast cancer. Although timely detection of breast cancer may well reduce the likelihood that the patient will have a terminal result, even with timely detection and optimal treatment, a certain percentage of patients unfortunately will succumb to the disease. This statistical factor, however, does not preclude a plaintiff from prevailing in a lawsuit. Rather, once there is testimony that there was a failure to detect the cancer in a timely fashion, and such failure increased the risk that the woman would have either a shortened life expectancy or suffered harm, then it is a question for the jury whether they believe, by a preponderance of the evidence, that the acts or omissions of the physician were a substantial factor in bringing about the harm.

Id. Thus, in ***Mitzelfelt***, the plaintiff was entitled to an increased risk of harm instruction because the anesthesiologist allowed a dangerous drop in blood pressure during the surgery, even though plaintiff's experts could not testify to a reasonable degree of medical certainty that the drop in blood pressure was the direct cause of the plaintiff's partial paralysis. In other words, plaintiff produced evidence that the defendant's mistake created an increased risk of harm beyond that which is normally attendant to the procedure she underwent. Our Supreme Court concluded:

> The trial court correctly instructed the jury that the plaintiff must prove that the acts of the defendant were a substantial factor in bringing about the harm and that [a] causal connection between the injuries suffered and the defendant's failure to exercise

> reasonable care may be proved by evidence if the risk of those injuries was increased by the defendant's negligent conduct.

Id. at 894.

Similarly, in ***Zieber v. Bogert***, 773 A.2d 758 (Pa. 2001), the defendant doctor diagnosed irritable bowel syndrome when the patient actually had a lymphoma of the small bowel. ***Id.*** at 759. The plaintiff eventually received a proper diagnosis, treatment, and remission of the cancer. But he introduced evidence that he was at greater risk for recurrence because of the initial misdiagnosis. ***Id.*** at 760. The ***Zieber*** Court held that "a doctor properly may be allowed to explain the possible future effects of an injury, and with less definiteness than is required of opinion testimony on causation." ***Id.*** at 761. Thus, there was a jury question as to whether the doctor's negligence increased the plaintiff's risk of suffering a recurrence of cancer. ***Id.***

In ***Klein v. Aronchick***, 85 A.3d 487, 495 (Pa. Super. 2014), the defendant doctor prescribed a drug for an off-label use. The plaintiff introduced evidence that her long-term, off-label use of the drug contributed to her progressive, permanent kidney disease. ***Id.*** at 489. The trial was, in part, a battle of experts as to whether the medical literature supported a conclusion that the drug directly caused kidney disease, but plaintiff's expert was not permitted to testify that the drug increased the risk of kidney disease. The ***Klein*** Court reversed for a new trial, reasoning that direct causation and increased risk of harm are not mutually exclusive theories of recovery, and

that the plaintiff's expert should have been permitted to testify as to the increased risk of harm. ***Id.*** at 495-97.

The law of increased risk of harm in Pennsylvania has evolved from our Supreme Court's seminal opinion in ***Hamil v. Bashline***, 392 A.2d 1280, 1286 (Pa. 1978). There, the plaintiff brought her husband to the defendant hospital and reported that he was having severe chest pain. ***Hamil***, 392 A.2d at 1283. The first EKG machine the hospital tried to use was malfunctioning, and hospital personnel were unable to locate another one. The plaintiff, after waiting at the hospital and obtaining no treatment for her husband, took him to a private doctor's office where he died during an EKG. At trial, the plaintiff's expert testified that the husband was suffering a heart attack, and he explained the treatment he believed the hospital could and should have provided, regardless of the malfunctioning EKG machine. In the expert's opinion, timely and proper treatment at the hospital would have given the decedent a 75% chance of survival. ***Id.*** The trial court found that the expert failed to offer an opinion to the required degree of medical certainty, and therefore entered a directed verdict in favor of the hospital.

The ***Hamil*** Court, relying in part on § 323 of the Restatement (Second) of Torts, held that an increased risk of harm is a viable theory of recovery. Where the victim of an accident "[m]ight have saved himself by taking advantage of a precaution which it has been shown defendant negligently failed to afford, courts have generally let a jury find the failure caused the

harm, though it is often a pretty speculative matter whether the precaution would in fact have saved the victim." ***Id.*** at 1287 (quoting F. Harper and F. James, The Law of Torts, Vol. 2, s 20.2, at 1113 (1956)). "Such cases by their very nature elude the degree of certainty one would prefer and upon which the law normally insists before a person may be held liable." ***Id.***

The ***Hamil*** Court cited favorably to a Fourth Circuit opinion in explaining why, in such a case, the defendant should not be able to escape liability because of the speculative nature of the proof of causation:

> When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable.

Id. at 1288. With these legal principles in mind, we turn to the instant record.

Smith testified that he never complained to Timar of having neck pain. N.T. Trial, 10/9/23, at 55-57. He was on his back for the cervical manipulation, with Timar behind him. He described the October 25, 2018, manipulation as a "quick crack, and then a quick crack the other way." ***Id.*** at 59. Timar manipulated Smith's neck "once to the right, once to the left." ***Id.*** Smith did not experience pain in his neck or headaches afterward. ***Id.*** Dr. Marc Cohen, testifying as an expert on Smith's behalf, said that there was no reason to perform the cervical manipulations in this case because Smith reported only mild pain in his lower back. N.T. Trial, 10/10/23, at 216.

Smith also produced the expert testimony of Dr. Drew Falconer, a neurologist, who opined that Timar's manipulation of Smith's neck resulted in an increased risk of a vertebral artery dissection. Falconer explained:

> [A] chiropractic manipulation, what we teach our students, is that manipulating the neck, moving the skull on the neck or the bones of the neck presents what we call shearing forces onto those blood vessels. So picture that little tube going through the bony canal, and then imagine the bones themselves shifting side to side or the skull shifting on top, all of a sudden that blood vessel is going to shift within hard bony structures. And when you have something that is muscle and you hit it with something hard, it bruises or can become damaged. And so what we teach our students is that chiropractic manipulation raises that risk of dissection because you're putting those blood vessels at risk by moving them sharply and quickly against very hard not necessarily soft or smooth bony structures. And when you take something like a blood vessel and move it against something hard it, of course, raises the risk of being damaged.

Id. at 41-42.

On cross examination, Falconer was asked about literature reflecting no causal link between cervical manipulations and vertebral artery dissections. Falconer responded that direct causation is difficult to find, but that there is an association between cervical manipulations and artery dissections, just as there is an association between playing football and sustaining a concussion. ***Id.*** at 114-15. The concussion is not guaranteed if you play football, but there's a known association between the two. ***Id.*** A V4 dissection, which Smith sustained, is less likely than a V3 dissection (in the neck, below the base of the skull), but it is not clear how much less likely. ***Id.*** at 119-20.

One of Timar's experts, Dr. Joel Meyer, a neuroradiologist, testified as follows:

> Q. Okay. I just wanted to ask, before you get into the actual imaging, just a couple background. The jury's heard a lot about the vertebral artery and locations of it. But if you could just kind of generally describe the segments of the vertebral artery as they go up from V1 to V4?
>
> A. Vertebral artery is divided into four segments. The one that's at issue in this case is the V4 segment. The part that's in the head. There's a V3 segment that's prior to the head as the artery is curling around the C1, 2 level, that's called V3. And V2 is in the neck, and then V1 is as it comes out of the subclavian artery prior to it going into certain areas of the neck.
>
> Q. And doctor, based on your experience and training, do you have an opinion as to whether or not a dissection of the V4 vertebral artery can be caused by chiropractic care?
>
> A. Not an isolated dissection of V4 as you see in this case. It's not possible that a chiropractor could do that. If they wanted to do it and tried to do it, they couldn't do it.
>
> Q. Why's that?
>
> A. Because it's in the head. It's not something that can be accessed from working on a patient's neck or touching their head outside. It's inside of your head.

N.T. Trial, 10/11/23, at 155-56. According to Meyer, a V4 dissection would typically result from trauma to the skull, but there was no evidence of trauma to Smith's skull. ***Id.*** at 163. Meyer opined that the dissection was isolated—that it began and ended within the skull rather than being propagated from below the skull. ***Id.*** Some dissections can begin in the V3 region (the neck) and work their way up into the V4 region in the base of the skull, but that did

not occur in this case. ***Id.*** at 164. Further, an acute dissection would have been very painful in the moment. ***Id.*** at 164.

Timar also produced the expert testimony of Dr. Harold Pikus, a neurosurgeon who operates on vertebral arteries, who testified that an acute vertebral artery dissection would be painful when it happened. N.T. Trial, 10/12/23, at 40-41. It would require a major head injury, such as a fracture at the base of the skull. ***Id.*** at 43-44. Pikus opined that it was not possible for Timar to have caused Smith's injury in this case:

> Q. And is it possible to weaken the vessel with chiropractic therapy of the cervical spine?
>
> A. No, it's not.
>
> Q. Why not?
>
> A. Well, again, the vessel is in the intra cranial part, the part that's up in the head, the fourth segment that is, is insulated from forces outside the head by virtue of the fact that it's so tethered by all those tissues to the brain itself, and it's so densely incorporated into the dura, the covering of the brain, and spine. And also it's physically remote. So what you're espousing is – what you're postulating is that some force in the neck would travel all the way down the vertebral and not injure anything until it got all the way down up [sic] into the head. And that just doesn't really seem physically possible.

Id. at 44. According to Pikus, any manipulation significant enough to injure the vertebral artery would have torn other blood vessels and caused hemorrhaging. ***Id.*** at 32. Pikus estimated that Smith's dissection was two to three days old when he had his MRI done on November 4, 2018. ***Id.*** at 39. Like Meyer, Pikus stated that a traumatic dissection would have been painful at the time it occurred. ***Id.*** at 40-41

According to Pikus, "The best available medical evidence on this issue indicates that there is no causal relationship between chiropractic care and vertebral artery dissection." ***Id.*** at 46. "There is an association, and that association is on the basis of the fact that people who have dissections in the neck have neck pain. And people with neck pain sometime [sic] go to chiropractors." ***Id.*** Pikus opined that Smith suffered a spontaneous dissection, possibly caused by blood turbulence and/or a weak vessel. ***Id.*** at 50. High blood pressure, hypertension, or congenital disorders, for example, can cause weakening in the wall of a blood vessel. ***Id.*** at 50-51.

Responding to Pikus's report Falconer said:

> Like we talked about earlier, dissection damages the wall, it doesn't cause – or the trauma damages the wall, it doesn't necessarily cause a dissection up front. Back to that common understanding, we teach our medical students that it doesn't have to be right up front. In fact, we frequently see people 10, 15, 20 days **after some sort of traumatic event where they did develop a dissection**. And the pathology is a simple one. Back to the whole idea of manipulating. The wall, this muscular tube, it's pulled in a way where a portion of it is made weak. Well, the weakness doesn't have to rip right up front. And the data supports this, that you can have a traumatic event, like I mean, any of the things that can cause dissection, and then have that blood vessel be weak and it takes a few days for it to actually rip[.].

N.T. Trial, 10/10/23, at 101 (emphasis added).

Our review of the record and the applicable law lead us to conclude that the trial court erred in refusing to give an increased risk of harm jury instruction in this case. Smith's theory of negligence in this case was that the cervical manipulation was unnecessary, given that his complaints were limited

to low back pain. The jury found Timar negligent. Further, the record establishes, per Falconer, that there is an "association" between patients who have cervical manipulations and patients who suffer vertebral artery dissections. Falconer gave a detailed explanation of how a cervical manipulation might increase the risk of a dissection.

Similarly, in the caselaw discussed above, the defendants committed an act of misfeasance that resulted in an increased harm to the plaintiff. In ***Mitzelfelt***, for example, the record demonstrated that twenty percent of spinal decompression patients suffer complications afterward. That is, there was an inherent risk to the procedure the plaintiff underwent. Also, the defendant anesthesiologist permitted the plaintiff's blood pressure to drop to a dangerously low level during the procedure. And so, in addition to the inherent risk of the procedure, there was specific evidence of a defendant doing something wrong during the procedure that increased the plaintiff's risk of suffering complications.

Similarly, in a failure-to-diagnose case such as ***Zieber***, the plaintiff was under some risk of recurrence of cancer regardless of the defendant's negligence, but the defendant's initial misdiagnosis was a specific act of misfeasance that increased that risk. And in ***Hamil***, the decedent was at risk of dying from a heart attack regardless of what the hospital did, but the plaintiff produced evidence of specific actions the hospital could have taken to give the decedent a 75% chance of survival.

As explained in ***Hamil***, the increased risk of harm instruction is necessary to avoid imposing on plaintiffs a potentially impossible burden of proving causation where the defendant's misfeasance is one of several factors that might have contributed to the plaintiff's injury. Defendants cannot use the other potential contributing factors as a shield behind which they are protected from answering for their misfeasance.

The defendants in ***Hamil***, ***Klein***, ***Mitzelfelt***, and ***Zieber*** could have protected themselves by avoiding the misfeasance that they committed during the procedure or treatment of their patient. Similarly, in the instant matter, Timar could have protected himself by not doing an unnecessary procedure. And, while the record confirms that there are multiple possible causes for a vertebral artery dissection, Timar, through his negligence in performing an unnecessary cervical manipulation, added one to the list.

Returning to the analysis in ***Vogelsberger***, an increased risk of harm instruction is appropriate where (1) the [defendant] failed to exercise reasonable care, that (2) such failure increased the risk of physical harm to the plaintiff, and (3) such harm did in fact occur. ***Vogelsberger***, 903 A.2d at 563-64. Here, the jury found Timar to be negligent, Smith put on evidence that he underwent an unnecessary procedure that increased the risk that he would sustain a dissection, and he sustained a dissection. We therefore conclude that the trial court erred in refusing to give the increased risk of harm instruction.

Timar would have us reach the opposite conclusion, based upon harmless error, because Smith's evidence of the association between cervical manipulations and vertebral artery dissections was speculative and unsupported by competent medical expert testimony. Timar's Brief at 22. "The harmless error doctrine underlies every decision to grant or deny a new trial." ***Grove v. Port Auth. of Allegheny Cty***., 218 A.3d 877, 888 (Pa. 2019). "A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake." ***Id.*** Instantly, the jury was never made aware that it could find in favor of Smith if it believed Timar's negligence increased the risk of the vertebral dissection that Smith suffered. Timar's harmless error argument is, in essence, an argument that Smith's experts were not competent or credible. That was for the jury to decide. And because of the omission of the increased risk of harm instruction, the jury had no chance to make that decision. We cannot conclude that the omitted instruction was harmless error in this case.

Because we have concluded that Smith is entitled to a new trial, we must now determine the scope of the new trial. Smith argues for a new trial limited to causation and damages. Timar argues that, if a new trial is awarded, it should be awarded as to all issues.

> [N]ew trials may be limited to specific issues only when this procedure will be fair to both parties. Where the question of

> negligence or contributory negligence is not free from doubt, it is an abuse of discretion for the trial judge to grant a new trial on the issue of damages alone. Specifically: a trial court may grant a new trial limited to the issue of damages only where (1) the question of liability is not intertwined with the question of damages, and (2) the issue of liability is either (a) not contested or (b) has been fairly determined so that no substantial complaint can be made with respect thereto.

Kindermann v. Cunningham, 110 A.3d 191, 193 (Pa. Super. 2015) (internal citations and quotation marks omitted), *appeal denied*, 119 A.3d 351 (Pa. 2015).

The dispute here is whether the issue of Timar's negligence has been fairly determined. Timar argues that there is no indication in the record of the basis for the jury's finding of negligence. Timar's Opening Brief at 26-29. Smith argues that the jury's verdict unequivocally found that Timar deviated from the standard of care in performing unnecessary cervical manipulations. Timar's Opening Brief at 31. Timar counters that he could have been found negligent for improperly writing in his treatment notes that Smith's visits were wellness visits, when they should have been labeled as maintenance care. ***Id.*** at 27-28.

We find Timar's argument on this point to be strained. It is abundantly clear from the record that Smith's only theory of negligence was that the cervical manipulations should not have been performed. The parties litigated that issue and the jury found that Timar was negligent. We conclude, therefore, that the issue of negligence has been fairly determined. The new trial will be limited to causation and damages, or in other words, whether

Timar's negligence in fact increased the risk of Smith suffering the vertebral artery dissection, and if so, the measure of damages.

We now turn to Timar's arguments on cross appeal, in which Timar argues that the trial court erred in excluding important causation evidence. Timar argues that evidence of Smith's drug and alcohol use should have been admitted because drug and alcohol use could account for a spontaneous vertebral artery dissection. Timar's Brief on Cross Appeal, at 2-8.

First, we consider the propriety of this cross appeal. The Pennsylvania Rules of Appellate Procedure provide that only a party aggrieved by an appealable order is permitted to file an appeal. Pa.R.A.P. 501. Protective cross appeals by non-aggrieved parties are disfavored in Pennsylvania, and refusing to hear them streamlines appeals and eliminates any concern over whether a non-aggrieved party waives an issue by failing to raise it in a protective cross appeal. ***Lebanon Valley Farmers Bank v. Commonwealth***, 83 A.3d 107, 112 (Pa. 2013). Moreover, an appellee should not be required to file a cross appeal because the court below ruled against it on an issue, as long as the judgment granted appellee the relief it sought. ***See*** Pa.R.A.P. 511, note (*citing* ***Lebanon Valley*** and ***Basile v. H&R Block, Inc.,*** 973 A.2d417, 421 (Pa. 2009)).

The trial court's refusal to permit evidence of Smith's drug and alcohol use was due to deficiencies in the testimony of Timar's experts. Trial Court Opinion, 9/3/24, at 4-5. The trial court noted that Pikus never tied alcohol or

cocaine use to Smiths' dissection or stroke. Pikus testified that cocaine use can cause vasculitis, but there was no evidence that Smith had vasculitis. ***Id.*** at 5. Because these matters will be relitigated at a new trial, and because they may be presented differently than they were at the previous trial, addressing the matter at this stage will not serve the goal of judicial economy. Timar, as the non-aggrieved party, is prohibited by rule from appealing, and protective appeals by non-aggrieved parties are disfavored by our Supreme Court. We therefore decline to review Timar's evidentiary argument without prejudice to his ability to relitigate the issue on retrial.

In summary, we have concluded that the trial court erred in declining to provide an increased risk of harm instruction, and that the error was prejudicial. We have concluded that the issue of Timar's negligence was fully and fairly litigated, and the new trial will be limited to causation and damages. The parties will receive a full and fair opportunity to relitigate the issues of causation and damages at the new trial, including the relevance and admissibility of Smith's alcohol and cocaine use. We therefore vacate the judgment in favor of Timar and remand for further proceedings in accordance with this opinion.

Judgment vacated. Case remanded. Jurisdiction relinquished.

Judge Dubow joins the opinion.

Judge Sullivan notes dissent.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

Date: 9/9/2026