

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

MATTHEW S. BRENNEN AND LISA R. : IN THE SUPERIOR COURT OF
BRENNEN, HIS WIFE : PENNSYLVANIA

v.

JASON A. SMITH D.O. AND TRI- :
COUNTY UROLOGY ASSOCIATES, INC. : No. 1050 WDA 2025

Appellants

Appeal from the Judgment Entered July 28, 2025
In the Court of Common Pleas of Fayette County Civil Division at No(s):
2019-01783

BEFORE: McLAUGHLIN, J., KING, J., and BENDER, P.J.E.

MEMORANDUM BY McLAUGHLIN, J.:

FILED: October 26, 2026

Jason A. Smith, D.O., and Tri-County Urology Associates, Inc. ("Tri-County") (collectively, "Appellants") appeal from the judgment entered in favor of Matthew S. Brennen ("Matthew") and Lisa R. Brennen ("Lisa") (collectively, "the Brennens"). Appellants challenge the sufficiency of the evidence, rulings on evidence, the weight of the evidence, and the imposition of sanctions. We affirm.

Factual and Procedural History

The Brennens filed a complaint asserting malpractice claims against Appellants following a vasectomy performed by Dr. Smith. At the time, Dr. Smith was a shareholder in and worked at Tri-County.

A. Pre-Trial Discovery and Motions

In October 2019, before initiating the lawsuit, Matthew executed an authorization of release of protected information seeking his medical records. **See** Pl.'s Em. Mot. for Sanctions, filed Dec. 12, 2022, at Ex. A.¹ The request sought records of office visits, inpatient records, outpatient records, progress notes, and "all details from" the vasectomy surgery. **Id.** Tri-County provided 12 pages of medical records. **Id.** at Ex. B. In January 2019, the Brennens' counsel sent an authorization requesting full and complete medical records, "including but not limited to telephone messages" **Id.** at Ex. C. Appellants sent 11 pages of records. **Id.** In August 2019, the Brennens' trial counsel sent a second request for medical records, and received no response. **Id.** at Ex. D. The Brennens' counsel then filed the complaint, after which Appellants' trial counsel entered an appearance.

In response to the Brennens' first set of interrogatories, where the Brennens asked Dr. Smith to "provide a complete Bates-stamped copy of the medical record of Plaintiff," Dr. Smith stated, "See medical records produced by Tri-County[]." **Id.** at Ex. E. Dr. Smith submitted the same response to the requests for production of documents that sought medical records. **Id.** In response to interrogatories, both Dr. Smith and Tri-County stated "not applicable" to the interrogatory asking whether they believed there were any errors or omissions in the medical records relevant to the claims. **Id.** at E. In

¹ The motion sought sanctions against Dr. Smith, Tri-County, and trial counsel Alan Baum, Esquire.

response to Appellants' request for production of documents, the Brennens produced a CD containing the medical records previously provided to them by Appellants. **Id.** at Ex. F. Appellants did not supplement their discovery responses.

Nine days prior to trial, during the cross-examination of the Brennens' expert witness, Appellants' trial counsel referenced a medical record that the Brennens had not previously seen. **Id.** at ¶ 29. Appellants' trial counsel said the record had been in the medical chart. **Id.** Three days later, Appellants' trial counsel delivered to the Brennens' counsel the medical record referenced at the deposition, which was labeled "phone note." **Id.** at ¶ 31. The "phone note" purported to be a memo of a conversation between a Tri-County employee and a "lady," in which they discussed Matthew's pain.² **Id.** Appellants had not mentioned the phone note at any other deposition. The

² The phone note stated:

LADY CALLED FOR PT, STATING HE HAD VAS DONE BY SMITH TWO DAYS AGO DONE AT ELITE, SHE SAID HE WAS FINE YESTERDAY DIDN'T HAVE TO TAKE A PAIN PILL OR ANYTHING UNTIL TODAY BECAUSE HE IS IN EXTREME PAIN NOW. .. [SIC] SHE WAYS [SIC] HIS LEFT TESTICLE IS HIGH UP AND THERE IS PAIN IN HIS STOMACH, SHE ALSO SAID THAT THERE WAS A COMPLICATION AND SMITH HAD TO MAKE A BIGGER INCISION TO FIND THE VAS DEF. SHE WANTS SOMEONE TO CALL HER TO TELL HER WANTS [SIC] NORMAL AND WHATS [SIC] TO LOOK OUT FOR? (Phone number listed but excluded for privacy)

following day, Appellants' trial counsel produced a 41-page medical record. ***Id.*** at ¶ 34.

On December 9, 2022, the Brennens filed an emergency motion for sanctions, seeking default judgment against Appellants or that Appellants be precluded from using the additional medical records at trial and requested sanctions against Appellants' trial counsel. Pl.'s Em. Mot. for Sanctions, filed Dec. 9, 2022, at ¶¶ 49-51. The court heard argument, where Appellants' trial counsel stated he believed the entire medical record had been produced. N.T., Dec. 9, 2022, at 20. The court entered an order continuing the trial and stating the court would consider a request by the Brennens for any additional expenses incurred and indicated it would consider an award of counsel fees, if incurred. Order, Dec. 9, 2022. It provided:

[A]s a remedy for the failure of the defendants', or, counsel's to have at a minimum negligently delayed furnishing complete copies of all medical records previously requested, it is hereby ORDERED that plaintiffs' costs incurred for investigation or further discovery; obtaining any updated medical report or reports; supplemental video depositions for use in discovery purposes, or, for use at trial; including any costs incurred for rescheduling expert witnesses or other witnesses for trial shall be paid by the defense.

In addition, the Court will consider awarding counsel fees to Plaintiffs' counsel for all hours incurred pursuant to this ORDER.

. . .

Plaintiff [sic] may petition for any and all other expenses attributable to defendants', or, counsel's conduct.

Id.

The Brennens through discovery sought the work history and contact information for Eliza Wonsettler, who was the employee who allegedly took the phone message, and an audit trail and meta data from the record program. Mot. to Exc. Document, filed June 9, 2023, at ¶¶ 8-13. Tri-County responded that it could not provide the documents because it had sold the practice and had not preserved the information. ***Id.*** at ¶¶ 12-14. It did not provide contact information for Wonsettler. ***Id.***

The trial court summarized the ensuing discovery as follows:

After the continuation of trial, [the Brennens] sent a second request for production of documents to [] Tri-County. In it, they requested a clinic audit report for [Matthew's] electronic medical record, the entire note history, audit trail and activity from any phone messaging system including the phone note, the audit log and screen shots of any drop-down menu options related to any phone notes. [Appellants] responded that they could not access the documents requested but that they would supplement their response with additional documents as they became available. [Appellants] allegedly sold their practice after [the Brennens] filed this suit but failed to retain the documents related to this case.

[The Brennens] also sought discovery information about the author of the note, an employee of Tri-County, Eliza Wonsettler. On December 29, 2022, [the Brennens] sent interrogatories to Tri-County requesting information about her work history and for the contact information for this employee. Tri-County responded that they were unable to access the information related to her employment history. They only provided that she left voluntarily for a new position, TriCounty was unable to provide any contact information about this employee, as she had left their employment.

Trial Ct. Op., filed Oct. 18, 2023, at 3-4 ("Mot. for Recon. Op.").

In July 2023, the Brennens sought to exclude the phone note. The court granted the motion. Appellants filed a motion for reconsideration or certification for immediate appeal, and at a hearing on the motion Appellants' counsel stated he had located Wonsettler. ***Id.*** at 4. Trial counsel had not provided her contact information to the Brennens' counsel. ***Id.***³ The court denied reconsideration and the certification. Appellants appealed, and this Court dismissed the appeal as premature.

In November 2023 and again in January 2024, Appellants sought to preclude Dr. Navalgund from opining that Matthew would never obtain 100% pain relief and that his loss of sexual function, loss of sensation, and psychological condition were permanent. ***See, e.g.,*** Defs.' Mot. to Exclude Exp. Opinions, filed Nov. 2, 2023, at 2; Defs.' First Mot. *in Limine* to Preclude Unqualified Expert Opinions of Yeshvant Navalgund, M.D., filed Jan. 12, 2024, at 2.⁴ They argued the opinion testimony was outside the scope of Dr. Navalgund's report. The court denied the motion.

B. Jury Trial

At trial, Matthew testified that he first met Dr. Smith in September 2018, when Matthew was 40 years old. N.T., June 10, 2024, at 117. He had been

³ Counsel stated that they had located Wonsettler and were preparing supplemental discovery responses. N.T., Aug. 23, 2023, at 7.

⁴ Appellants initially filed the motion after the court invited the parties to submit argument with respect to objections raised during the deposition and resubmitted it as a motion *in limine*. Defs.' First Mot. *in Limine* to Preclude Unqualified Expert Opinions of Yeshvant Navalgund, M.D., filed Jan. 12, 2024, at 1.

referred to Dr. Smith for a vasectomy. **Id.** Matthew said Dr. Smith did not perform a physical examination at the September appointment. **Id.** at 119. He testified that Dr. Smith performed the vasectomy the following month, in October 2018. Matthew does not recall any discussions with Dr. Smith on the date of surgery or on a later date. **Id.** at 125, 127. Matthew testified that as the anesthesia wore off after the surgery, the pain got "worse, and worse, and worse." **Id.** at 128. He stated he did not know what to expect and thought "it might be normal until it lasted -- it just kept getting worse and worse, and then [he] couldn't hardly move." **Id.** Matthew stated he was not able to return to work after three or four days, as he had been told, because he had to go through a second surgery. **Id.** He did not return to work for 12 months. **Id.**

Matthew stated that on the third day after surgery, Lisa called Dr. Smith's office, who told her to take Matthew to the hospital. **Id.** at 129. He testified that when she called, he was "literally stuck in a fetal position," and could not "straighten [his] body out." **Id.** He said that when he tried to straighten his body, "it felt like somebody had both hands inside just twisting and ripping [his] insides out." **Id.**

Matthew testified that the hospital note that said "onset two days" was consistent with his memory of when the pain started, as it started as soon as the anesthesia started to wear off. **Id.** at 131. He said there had been no times when he was pain free. **Id.** He said the hospital note that he "report[ed] severe pain of the left testicle with associated swelling on the left side of his scrotum significantly worsened by walking, sitting, or urination" was accurate.

Id. at 132. Matthew testified that he was admitted to the hospital because there was no blood flow to his left testicle. **Id.** at 135.

Matthew said that when he was discharged and switched from the higher narcotics used in the hospital to regular narcotics, the pain started to come back. **Id.** at 137. He stated that he eventually went to West Virginia University Medicine. **Id.** at 138. Matthew testified that there they performed a surgery to remove the left testicle and "all the plumbing inside." **Id.** at 139, 142. He said the surgeon was Dr. Henry Fooks. **Id.** at 139. Matthew continued to feel pain and numbness after the surgery and continued to see Dr. Fooks. **Id.** at 149, 155. In July 2019, Dr. Fooks referred him to the West Virginia University Pain Clinic. **Id.** at 149, 155. Matthew said that Dr. Yeshvant Navalgund was part of the pain management clinic and that while a patient at the clinic he learned the numbness would be permanent. **Id.** at 155, 160.

Matthew said that Dr. Navalgund referred him to a nerve specialist, Dr. Brandmeir, at West Virginia University Medicine. **Id.** at 160. He said that Dr. Brandmeir told him that the pain would be permanent. **Id.** at 161. Matthew testified that six years after surgery he has a "real dull sensation that . . . never goes away." **Id.** at 162. He stated that when he starts doing physical activities or moving around a lot, the pain increases, and that although sometimes he will not have pain for a few hours, "[o]ther times it'll literally drop [him] in his tracks whenever it hits." **Id.** He said he has to "just lay there and wait for it to release until [he] can get back up and start moving again." **Id.** He said he has returned to work but the pain sometimes prevents him

from performing at work. **Id.** He testified that he can no longer complete some elements of his job that he previously performed. **Id.** at 163. Matthew further testified that he and Lisa cannot have sex as much as prior to the surgery and “[i]t all depends on the pain, the numbness.” **Id.** at 167.

A urologist practicing at Allegheny Health Network, Dr. Thomas M. Jaffe, testified for plaintiffs as an expert in “urology and vasectomy procedure.” N.T., June 11, 2024, at 19, 33. Dr. Jaffe reviewed Matthew’s medical records, Dr. Smith’s deposition transcripts, and the trial testimony of Dr. Fooks and Dr. Navalgund. **Id.** at 21-22. Dr. Jaffe testified that Dr. Smith did not meet the standard of care in his dealings with Matthew. **Id.** at 24. He stated that the “only structure that should be involved in a vasectomy is” the vas deferens (“vas”). **Id.** at 34-35. He stated that urologists were supposed to meet with patients in their office prior to the vasectomy surgery to find out any medical problems or prior surgeries, to help determine whether they will be anxious, and to examine them. He stated, “You want to make sure you can feel the vas[], normally.” **Id.** at 40. He stated the “anatomy is important because it kinda tells you whether you can do [the vasectomy] in the office, whether or not any special techniques might need to be done, or any extra equipment, etc.” **Id.** at 41. He stated that “the bottom line is you really want to know . . . where the vas is, what it feels like, and what you need to do to access it safely and divide it safely.” **Id.** Dr. Jaffe testified that the standard of care mandates that urologists examine the patient’s genitals during the pre-operative office visit and that Dr. Smith violated the standard of care when he

did not do so. **Id.** at 43, 45. He further testified the failure to perform the exam increased the risk that Matthew would suffer complications during the surgery. **Id.** at 47.

Dr. Jaffe testified regarding Dr. Fooks's notes following the surgery removing the testicle. The notes stated that the spermatic cord had been rotated greater than 180 degrees, which is called torsion, that the testicle was ischemic, which meant it did not get blood, and that Dr. Fooks found several clips "within the distal spermatic cord." **Id.** at 78-79. Dr. Jaffe opined that the torsion did not have anything to do with the ischemic testicle. **Id.** at 79. Dr. Jaffe testified that clips or sutures should not have been placed in the distal cord during a vasectomy. **Id.** at 79-80. Dr. Jaffe testified that during a vasectomy, the surgeon should "isolate the vas away from the spermatic cord, because everything is so close and tight together." **Id.** at 80. Dr. Jaffe testified that Dr. Smith's operative note said that he placed a single clip across what he thought might be a vas, but that the report was not accurate because Dr. Fooks located multiple clips and sutures. **Id.** at 80-81. He stated that the standard of care does not allow a doctor to put clips and sutures across the spermatic cord. **Id.** at 85. Dr. Jaffe testified that the clips and sutures caused Matthew's left testicle to die. **Id.** at 87.

Dr. Jaffe further testified that cutting a structure that the surgeon could not identify is a violation of the standard of care. **Id.** at 85. He stated that when Dr. Smith had trouble locating the vas on the left side, he should have stopped the surgery. **Id.** at 86. Dr. Jaffe testified that he had no doubt that

Dr. Smith's conduct caused Matthew's ischemic left testicle, hospital visits, and continued problems. **Id.** at 90.

Dr. Jaffe also testified that a "40-year-old male should not have spontaneous twisting of his testicle . . . [and] there is no association with vasectomy and developing torsion." **Id.** at 97. He said that "the only way a testicle can twist in this scenario is that it twists around something[]like a lead point and in this case it would either [be] the sutures or the clips that the testicle twisted around." **Id.**

On cross-examination, Dr. Jaffe testified that there are times where urologists do not see a patient until the day of the surgery. He said that he would prefer that the patient not be prepped and draped prior to deciding whether the doctor can do the procedure, but agreed it was not a violation of the standard of care if the examination occurred after the patient was "prepped and draped." **Id.** at 119-20. He then stated that, "Well they need to be examined, period. Before you do any procedure." **Id.** at 121. When asked whether he agreed that there was no single standard of care that required an office visit during which a "physical examination, hands-on of the genitals is conducted," Dr. Jaffe responded, "There is a standard of care, you should examine the patient prior to the procedure." **Id.** at 125. He stated that he "[did not] think prepping and draping and then finding the vas to do the vas is an examination." **Id.** at 126. Dr. Jaffe agreed that one approach when the vas cannot be felt is for the doctor to open the patient and look for the vas. **Id.** at 124.

When asked whether the vas was in the spermatic cord, Dr. Jaffe stated, "Technically, I suppose." **Id.** at 130. He stated that after a vasectomy, the vas is outside the spermatic cord, but agreed that clips may be found within the cord after a vasectomy. **Id.** at 130-31. Dr. Jaffe agreed that a testicular torsion could cause ischemia. **Id.** at 150.

Dr. Smith testified in defense that he met with the Brennens in September 2018 to discuss the vasectomy. **Id.** at 161. He stated that he did not do a physical exam at that time. **Id.** at 162. Dr. Smith further testified that he did not do a clinical exam prior to Matthew being sedated. **Id.** at 169. Dr. Smith testified he was sure he placed a clip on the vas, even though the operative report stated that after "[c]areful inspection of the entire cord revealed only one very small firm structure which I cannot verify the vas. But did place a clip on it in case that was the atrophic vas deferens on the left." **Id.** at 173. When read his note that stated he informed Matthew and Lisa that he could not verify the left vas and therefore they should use an alternate form of birth control until semen analysis, Dr. Smith said that this meant that he "did not identify any normal vas[.]" **Id.** at 174.

On questioning by his counsel, Smith testified that the vas has a "very specific . . . color and diameter," and agreed that if he saw "something that's white and firm, regardless of its size, there's a good chance that's the vas." **Id.** at 235. He said the "only other possibility in [his] head [was] a nerve structure" and that here it "was much firmer and bigger in diameter than you typically would find with a nerve structure." **Id.** He testified that vascular

structures are "different colors[and] softer in composition." **Id.** at 236. He stated that he could "unequivocally 100 percent say [he] did not clip or cut the spermatic artery." **Id.** at 245.

Lisa testified that her understanding was that the procedure would last 10 to 15 minutes but that it would be 30 to 45 minutes until she could see Matthew. However, it was one and a half to two hours between when they took Matthew for surgery and when she could see him. N.T., June 12, 2024, at 24. She said that Dr. Smith came to talk to her and told her:

"This did not go as planned. When I went to the right side I [was] able to verify at best, when I got to the left, I was not able to, but I put a clamp on it to be safe" and my exact words were, "What is the worst-case scenario?" And he said, "Do not have unprotected sex for six weeks." That was the worst-case scenario.

Id. at 25. She said that Dr. Smith said that Matthew's pain would be worse than previously described and he would have to take more time off from work and keep up on the pain medication. She stated that he said that instead of "the small incision, he had to do one below as well." **Id.**

Lisa said the first day Matthew "pretty much slept" and he walked to the bathroom he had "shoulders hunched forward not up like he did before he went into surgery." **Id.** at 28. She testified that the next day was the same, and she told him to keep taking the pain medication and that they had warned him it would get worse. **Id.** She said by the second day he "was in excruciating pain, . . . it[] stayed the same but it was to the point where he was nonstop." **Id.** at 29. She said she called the doctor's office, who told her to go straight

to the emergency room. **Id.** She said she was prompted to call because Matthew had almost passed out when he tried to stand up too straight. **Id.** Lisa testified she called an ambulance because she could not get Matthew to walk from the bed. **Id.**

Lisa testified that Matthew still had pain and numbness that affected him. **Id.** at 37. She testified neighbors have called because they have seen Matthew lying next to the tractor due to the pain. **Id.** at 37-38. She said that when he over exerts himself, he will "go down to the ground, he'll have to take a minute." **Id.** at 38-39.

The video deposition of Dr. Henry Fooks, Jr. was played for the jury. Dr. Fooks testified that while on call in October 2018, he received a call from the hospital emergency department that Matthew was there complaining of testicular pain after having had a vasectomy seven days prior. N.T. of Dep. of Fooks, Dec. 5, 2022, at 6. He testified that thereafter he was Matthew's treating physician. **Id.** at 8. He testified that he held all of his opinions regarding Matthew to a reasonable degree of medical certainty. **Id.** at 10. He was offered as an expert in the field of urology. **Id.** at 21.

Dr. Fooks testified that based on the history taken at the hospital, Matthew had been in pain since immediately following the vasectomy. **Id.** at 24-25. He stated that he surgically removed Matthew's left testicle. **Id.** at 39. He agreed that his operative note stated that the "cord appeared to be rotated greater than 180 degrees," and stated that meant the cord was twisted. **Id.** at 40. He testified that torsion was "very rare, very rare" for a 40-year-old

man **Id.** at 41. Dr. Fooks stated that he noticed clips and sutures and "if the clips and the sutures were on the spermatic artery to the main artery to the testicle, if there is a clip or sutures on that, then it can compromise blood flow," and that he "would be leaning that way" as to what happened in this case. **Id.** at 42. He agreed that his report noted that there were multiple metal clips and there were sutures "within the spermatic cord." **Id.** at 43. He testified that during a vasectomy, clips and sutures would not "intentionally" be placed across the spermatic cord. **Id.** Dr. Fooks testified that he would not recommend to his residents that they clip across something he or she could not identify. **Id.** at 49-50. Dr. Fooks testified that at his appointments two weeks after surgery, in December 2018, and in July 2019, Matthew continued to have pain and numbness. **Id.** at 56-58. Dr. Fooks stated he referred Matthew to the West Virginia University Pain Management Clinic. **Id.** at 59.

Dr. Fooks stated that he had never seen multiple clips and sutures placed across a spermatic cord following a vasectomy except for Matthew. **Id.** at 62. He further testified that occlusion or interruption of the spermatic artery can cause testicular ischemia. **Id.** at 62-63. He agreed that during the surgery his conclusion was that the clips and sutures placed during the vasectomy surgery were the cause of the ischemia. **Id.** at 63.

On cross-examination, Dr. Fooks testified he did not see or note that the clip was across the artery. **Id.** at 80. He said it was possible the torsion created the lack of blood flow. **Id.** at 81. He agreed the lack of blood flow occurred sometime after the vasectomy but he did not know when. **Id.** at 82.

On re-direct examination, Dr. Fooks testified that at the time of the surgery, he believed the spermatic artery had been clipped and did not believe the torsion caused the lack of blood flow. **Id.** at 96. He further stated that “if he really had to hang [his] hat on something” it would be that the clips and sutures caused the testicle to “infarct” (*i.e.*, die). **Id.** at 97.

The jury further saw the video deposition of Dr. Navalgund. Dr. Navalgund testified he was an interventional pain management physician and he testified as an expert in the fields of anesthesiology and pain management. N.T. Dep. of Navalgund, Dec. 2, 2022, at 6, 12. He stated Matthew was his patient and had complaints of groin pain, pain radiating to his testicle, pain and numbness of the pelvic bone just above the penis, and the medial thigh. **Id.** at 13. He described the pain treatment his office provided to Matthew. **Id.** at 20-43. Dr. Navalgund testified that Matthew was “never going to get 100 percent pain relief.” **Id.** at 43. He stated Matthew continued to complain of pain at the most recent visit prior to the deposition. **Id.** at 43-44. He testified Matthew had “chronic pain.” **Id.** at 61. He further testified that “[t]here is no doubt that . . . the permanency that he has experienced is the permanency of loss of sexual function and psychological condition that he is in, as well as the loss of sensation over the site of his penis, groin as well, as his thigh.” **Id.** at 78. He agreed that Matthew’s problems were the direct result of the vasectomy. **Id.** at 79-80.

On cross-examination, Dr. Navalgund testified that the pain from ischemia to a nerve would “spike initially as the ischemia progressed” such

that “there would be the normal procedural pain, and then there would be an uptick after that normal procedural pain.” **Id.** at 86. The pain for testicular torsion would be “[v]ery acute[.]” and it can “cause severe pain” often “driving individuals immediately to an emergency room.” **Id.**

Dr. David Albala testified as a defense expert in urology. N.T., June 13, 2024, at 5, 21. He said that you do not need to do a physical exam at a prior office visit, but “whether you do it in an office or before the surgery, as long as you do it, and it was done,” and that “the standard of care is to examine the patient before the surgical procedure.” **Id.** at 23, 72. He testified that based on the documentation, Dr. Smith “did the vasectomy in a standardized fashion that is acceptable within the standard of care.” **Id.** at 28. He stated that a doctor should “make the best judgment [he] can,” and that Dr. Smith “made the best judgment that he could. He felt that it was an [a]trophic vas, and that’s reasonable to put clips on it. So, I think that what he did was reasonable and that’s what a reasonable, thoughtful physician would do, and that’s what I would’ve done.” **Id.** at 31. He further stated that an atrophic vas typically does not carry sperm. **Id.** He pointed out that neither Dr. Smith nor Dr. Fooks stated that the clipped structure was an artery. **Id.** at 33-34. He stated that even if Dr. Smith had clipped the artery, the testicle still would be viable, and the torsion is what caused the ischemia. **Id.** at 38-40. When asked whether “the act of clipping or cutting or suturing around the spermatic cord would inherently be the clipping or cutting or suturing the spermatic artery,” and stated, “Correct. If you ligated the whole structure.” **Id.** at 59.

On cross-examination, the Brennens' counsel asked whether if "the jury concludes that the medical records are to be believed and that no genital examination is performed of Mr. Brennen by Dr. Smith, that jury should then find that Dr. Smith violated standard of care with respect to physical examination," and Dr. Albala agreed that "that would be a true statement." ***Id.*** at 72.

The jury entered a verdict in favor of the Brennens and against Appellants. It awarded \$3,750,000 damages to Matthew for past and future pain and suffering; \$500,000 for past and future embarrassment and humiliation; \$3,750,000 for past and future loss of life's pleasures; and \$500,000 for past and future disfigurement. The jury awarded Lisa \$250,000 in damages for past loss of consortium and \$750,000 for future loss of consortium.

C. Post-Trial Proceedings

After trial, the Brennens filed a motion to confirm sanctions seeking \$150,907.83 in fees and costs.⁵ Mot. to Confirm Sanctions, filed July 29, 2024. They attached documents related to the costs and fees and affidavits in support. Appellants filed a motion for post-trial relief as well as a motion for

⁵ The motion to confirm sanctions stated the court had authority to issue sanctions under Rule 4019 and 42 Pa.C.S.A. § 2503. Motion to Confirm Sanctions, filed July 29, 2024, at ¶ 5.

reconsideration of the December 2022 sanction order.⁶ The motion for reconsideration argued that the Brennens had not requested the documents from Tri-County, the party who possessed the records, and therefore argued there “ha[d] been no failure to make discovery.” Motion for Reconsideration, filed July 1, 2024, at ¶ 30. They maintained “[Appellants] neither concealed nor negligently failed to produce documents previously requested during discovery. The documents at issue were not in the possession of Dr. Smith, the only defendant who was requested to produce them.” **Id.** at ¶ 32.

The court held a hearing. At the hearing, Appellants were represented by new counsel, who continue to represent them on appeal. Appellants’ trial

⁶ The trial court describes the procedural history of the motion for reconsideration as follows:

On December 15, 2022, Attorney Alan Baum filed in the Office of the Prothonotary of Fayette County, Pennsylvania, a Motion for Reconsideration. [T]he published (and available online) Rule[s] of Civil Procedure for Fayette County require counsel to provide a copy of a motion to the Court Administrator to be listed for argument in Motions Court with the assigned judge **See** F.C.R. 203.3. [Baum] failed to do so.¹ The Motion for Reconsideration of our December 9, 2022 Order sat idly by in the Prothonotary’s Office.²

¹ On June 27, 2024, after the jury verdict, [trial counsel] e-filed with the Prothonotary a (second) motion to reconsider our Order of December 9, 2022.

² Nor did [Baum] provide a courtesy copy of the Motion to Reconsider to this Court, by regular mail, email or any other means.

Trial Ct. OP., filed Nov. 25, 2025, at 8 (“Rule 1925(a) Op.”).

counsel also was present. Appellants did not object to the Brennens' affidavits and exhibits and did not present any evidence.⁷ At the hearing, Appellants' trial counsel reiterated the claims that the Brennens sought the medical records only from Dr. Smith and that there was no discovery violation, and contended that he justifiably believed all records had been produced. N.T., Oct. 24, 2024, at 80-92. He claimed his conduct and the conduct of his clients was not willful or intentional. ***Id.*** at 83. Trial counsel further claimed the Brennens were not prejudiced and there was no negligence. ***Id.*** at 83, 86. Counsel for Appellants argued there was no prejudice because the court continued the trial and argued a sanction should not be ordered without a violation of a court order or rule. ***Id.*** at 112.

In July 2025, the court granted in part the motion to confirm sanctions and awarded \$60,010 in fees and \$2,147.83 in costs. It stated the fees were "necessitated by at least the negligent failure of the defendant[] or[] counsel to provide full and complete medical records during discovery in a timely manner prior to trial." Order, July, 17, 2025. The court found that "while [it] may suspect nefarious conduct by" Appellants or their counsel "[it] do[es] not believe that the record will support a finding of knowing, deliberate, dilatory, obdurate, or vexatious conduct but the record does support at least the negligent conduct by one or more defendants[] or[] counsel, or their staff

⁷ Trial counsel stated that he believed the hourly rate charged was excessive, but that he "had no evidence to present to dispute the reasonableness." N.T., Oct. 24, 2024, at 116-17. He stated he did not want to cross-examine anyone on the charges or amounts. ***Id.*** at 117.

employees, in failing to timely produce all pertinent medical records.” ***Id.*** It then stated that it “believe[d] the partial relief granted herein, and; that provided by Order of December 9, 2022; and the exclusion of the untimely evidence were a sufficient remedy.” ***Id.***

The trial court denied the motion for post-trial relief and motion for reconsideration. In July 2025, judgment was entered. Appellants timely appealed.⁸

Appellants raise the following issues:

1. Did the trial court err in denying JNOV where [the Brennens’] experts failed to establish a standard of care [Appellants] breached that caused [the Brennens’] harm, particularly where [the Brennens’] own experts undermined [the Brennens’] negligence theories, failed to present their testimonies to a reasonable degree of medical certainty, and left the jury to speculate about [Appellants’] negligence?
2. Did the trial court abuse its discretion by denying a new trial after excluding a critical piece of evidence on hearsay grounds, where the court refused to give [Appellants] an opportunity to establish the evidence’s admissibility, two hearsay exceptions applied, and the excluded evidence (a note reflecting that [Matthew] was “fine” the day after surgery) would have undermined [the Brennens’] entire theory of the case, causing severe prejudice to [Appellants]?
3. Did the trial court abuse its discretion in refusing to grant a new trial after allowing [the Brennens’] expert to testify beyond the fair scope of his report, where the expert’s testimony on the permanency of [Matthew]’s injury caused [Appellants] significant surprise and prejudice?
4. Did the trial court abuse its discretion in refusing to grant a new trial on weight-of-the-evidence grounds, where the

⁸ Appellants’ trial counsel filed a separate appeal of the sanction order, which is docketed at 1054 WDA 2025.

overwhelming weight of the evidence does not support the verdict, [the Brennens'] experts did not present evidence of negligence to a reasonable degree of certainty, and [Appellants'] experts established that [Appellants] did not breach a standard of care that caused Mr. Brennen's harm?

5. Did the trial court abuse its discretion in imposing monetary sanctions, where [the Brennens] did not seek monetary sanctions against [Appellants], it is unclear against whom such sanctions were imposed or for what conduct, fees or costs are not recoverable as a matter of law, and the court imposed sanctions without evidence or a finding of bad faith or sanctionable conduct?

Appellants' Br. at 5-6 (suggested answers omitted).

Analysis

A. Whether Sufficient Evidence Supported the Verdict

In their first issue, Appellants argue that this Court should grant judgment notwithstanding the verdict ("JNOV") because the Brennens did not establish an objective standard of care that Dr. Smith breached and that caused harm. They point to testimony from the Brennens' experts that supports that urologists can first examine patients after they have been prepped for surgery, and claim that pre-operative exams are not required. They maintain that Dr. Jaffe testified that clips and sutures must be used during a vasectomy.⁹ Appellants argue that without expert testimony establishing an objective standard of care, the Brennens failed to prove the first element of their claim: duty.

⁹ They also cite Dr. Jaffe's testimony that the standard of care does not require that a sample be sent to pathology. The Brennens do not pursue this claim on appeal.

Appellants further allege that without evidence of an objective standard of care, the Brennens could not establish a breach of duty. They also argue that there was no evidence Dr. Smith clipped an artery, claiming Dr. Fooks' testified that he did not know if the artery was clipped and Dr. Fooks's notes did not say the clip was on the artery. They argue that without evidence Dr. Smith clipped the artery, there was no evidence he breached the standard of care.

Appellants also assert that the experts did not testify, to a reasonable degree of medical certainty, that the misplacement of clips caused harm and that they could not do so because there was no evidence a clip was misplaced. They claim the Brennens' theory is akin to *res ipsa loquitur* and argue the court wrongly stated that the experts did not need to detail a specific cause. They claim that Dr. Fooks admitted that he did not know when the left testicle became deprived of blood—at the time of the vasectomy or later—and did not know when the testicle twisted.

Appellants claim the Brennens failed to prove Dr. Smith caused testicular torsion. They claim Dr. Jaffe testified the torsion did not have anything to do with the ischemic testicle and claim the Brennens maintained that the injury occurred during the vasectomy and the torsion had nothing to do with it.

Appellants further maintain the Brennens failed to support any theory with science, claiming the experts did not point to medical studies or literature to support the opinion the misplaced clip caused harm.

Appellants maintain the court should not have excused the failure to adduce sufficient evidence by relying on the experts' catch-all statements that the testimony was to a reasonable degree of medical certainty. They claim it is the substance of the testimony that matters, not the magic words. They claim the court recognized the equivocal nature of Dr. Fooks's deposition testimony when it addressed Appellants' motion *in limine*, but allowed the testimony reasoning it would be tidied up for trial. Appellants, however, point out that Dr. Fooks did not testify in person at trial, but rather by prerecorded video deposition.

"A motion for JNOV challenges the sufficiency of the evidence presented at trial." ***Koller Concrete, Inc. v. Tube City IMS, LLC***, 115 A.3d 312, 321 (Pa.Super. 2015). JNOV is appropriate where either the movant is entitled to judgment as a matter of law or "the evidence was such that a verdict for the movant was beyond peradventure." ***Carlino v. Ethicon, Inc.***, 208 A.3d 92, 103 (Pa.Super. 2019) (citation omitted). In deciding a motion for JNOV, the court must consider the evidence in the light most favorable to the verdict winner. ***Id.*** at 890. Review of a motion for JNOV does not involve an assessment of the weight of the evidence or any conflicts in the evidence. ***Koller Concrete, Inc.***, 115 A.3d at 321. JNOV is an "extreme remedy" that should only be granted in a clear case. ***Id.***

Medical malpractice is "defined as the unwarranted departure from generally accepted standards of medical practice resulting in injury to a patient, including all liability-producing conduct arising from the rendition of

professional medical services.” **Grossman v. Barke**, 868 A.2d 561, 566 (Pa.Super. 2005) (quotation marks and citations omitted). To establish a medical malpractice claim, a plaintiff must prove: a “duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of the harm.” **Id.** (quoting **Toogood v. Rogal**, 573 Pa. 245, 824 A.2d 1140, 1145 (2003) (op. announcing judgment of court)). To carry that burden, “a medical malpractice plaintiff must present expert testimony to establish the applicable standard of care, the deviation from that standard, causation and the extent of the injury.” **Id.** (citation omitted).

Generally, “[a] plaintiff [must] present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards” **K.H. ex rel. H.S. v. Kumar**, 122 A.3d 1080, 1098 (Pa.Super. 2015) (quoting **Mitzelfelt v. Kamrin**, 584 A.2d 888, 892 (Pa. 1990)) (alteration in **K.H.**). “A specialist acting within his or her specialty . . . is expected to exercise that degree of skill, learning and care normally possessed and exercised by the average physician who devotes special study and attention to the diagnosis and treatment of diseases within the specialty.” **Id.** at 1095 (quoting **Maurer v. Trs. of Univ. of Pa.**, 614 A.2d 754, 758 (Pa.Super. 1992)).

“To be admissible, the opinion of an expert witness must be rendered within a reasonable degree of medical certainty.” **Carrozza v. Greenbaum**,

866 A.2d 369, 379 (Pa.Super. 2004) (citation omitted). “Whether an expert’s opinion is reasonably certain must be decided after considering the expert’s testimony in its entirety.” **Id.** (citation omitted). Further, an expert’s use of “less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty.” **Id.** (citation omitted).

The trial court concluded JNOV was not proper here. It found there was sufficient evidence to establish a breach of the standard of care by Dr. Smith, as he did not do a physical examination of Matthew until he was on the surgery table. It concluded that “[t]he evidence presented showed that had a preoperative examination occurred, then the problem on the left side in locating the vas would have been able to be dealt with differently.” Rule 1925(a) Op. at 13.

The trial court found that Dr. Jaffe, Dr. Fooks, and Dr. Navalgund offered opinions to a reasonable degree of medical certainty. **Id.** at 16. It reasoned that the use of less definite language did not render the entire opinion speculative. **Id.** at 17. It pointed out that at the beginning of the testimony the doctors testified they were testifying to a reasonable degree of medical certainty. **Id.** It found the testimony established the experts believed Dr. Smith’s treatment was deficient and breached the standard of care. **Id.** It found they did not need to detail a specific cause. **Id.** The court noted Dr. Fooks testified he observed multiple clips and sutures on the artery and that

they were where the torsion occurred. ***Id.*** The doctors opined that the placement caused the torsion. ***Id.***

We agree that the Brennens presented sufficient evidence to support the verdict. They established that there was a standard of care that a physician was required to examine the patient prior to surgery, and that Dr. Smith breached this standard when he failed to examine Matthew until he started the procedure. Even Appellants' expert testified that this breached the standard of care. N.T., June 13, 2024, at 72. Dr. Jaffe testified that this breach increased the risk of harm to Matthew. N.T., June 11, 2024, at 47.

Further, the Brennens established there was a standard of care that required physicians not to place clips when they were unsure what a structure was. Here, the evidence established that Dr. Smith acknowledged in his notes and to the Brennens that he was unsure whether the structure he placed the clips on was the vas. The notes from the removal surgery established the clips and sutures were "within the distal spermatic cord," and Dr. Jaffe testified that clips or sutures should not have been placed in that location during a vasectomy. ***Id.*** at 79-80. Finally, plaintiffs' experts testified that Dr. Smith's actions during the vasectomy caused the Brennens' harm, and the Brennens testified about the harm suffered.

Accordingly, the Brennens presented sufficient evidence to establish a standard of care, that Dr. Smith breached the standard, and that the breach caused harm. That Dr. Fooks's testimony was at times equivocal does not require a different result. Dr. Jaffe's testimony and Dr. Fooks's testimony

about the procedure support the conclusion that Dr. Smith breached standards of care. In **Carrozza**, 866 A.2d at 379-81, we faced a similar situation. An expert twice stated his opinion was within a reasonable degree of medical certainty, but also stated that his opinions were “more likely than not” and to a “reasonable degree of probability.” **Id.** at 381. We examined the expert’s testimony in its entirety found the opinions were to the requisite degree of certainty. **See id.** This case is in the same camp as **Carrozza**. Although Dr. Fooks in spots used other language, he also testified that his opinions were all to a reasonable degree of medical certainty. **See** N.T. of Dep. of Fooks, Dec. 5, 2022, at 10.

As to the lack of citations to medical studies or literature, there is no requirement that an expert testify as to the scientific support for his or her testimony. **See Charlton v. Troy**, 236 A.3d 22, 33 (Pa.Super. 2020) (noting expert was not required to base his opinion on any generally accepted authorities and that “[e]xpert testimony alone is evidence sufficient to support the verdict”); **Smith v. Grab**, 705 A.2d 894, 900 (Pa.Super. 1997) (finding expert’s “failure to cite an article or text on point goes to the weight of his testimony, not its admissibility”).¹⁰ Accordingly, we conclude the Brennens presented sufficient evidence to support the verdict.

¹⁰ **Snizavich v. Rohm and Haas Co.**, 83 A.3d 191, 197 (Pa.Super. 2013), relied on by Appellants, is distinguishable. There, this Court found the trial court did not err when it granted a motion pursuant to **Frye v. United States**, 293 F. 1013 (D.C.Cir.1923), to exclude expert testimony. The expert had
(Footnote Continued Next Page)

B. Whether the Trial Court Erred In Precluding the Phone Note

Appellants contend a new trial is required because the trial court erred when it excluded the phone note memorializing a conversation between a Tri-County employee and “a person believed to be [Lisa].” Appellants’ Br. at 41-42. They claim the phone note was critical because it says Matthew was fine a day after surgery, which was inconsistent with the theory that his artery had been clipped. They claim it was error to exclude the note because the court determined before trial that the person who provided the information was not identified in the record, and claimed that “nearly a year before trial” they had found the receptionist that took the note and she could testify. Appellants also claim they could have asked Lisa at trial about the note. ***Id.*** at 42.

Appellants maintain the note was not hearsay because it would not have been used to establish Matthew was fine, but that Lisa said he was. Appellants further claim they were denied the opportunity to attempt to admit the note under several hearsay exceptions. They argue it was a business record, and that it was an abuse of discretion for the court to determine before trial that a witness could not provide sufficient information to establish the exception. They contend that they could have established the receptionist recorded the

reviewed nine documents, eight of which were the decedent’s medical history, work history, and work conditions. The ninth was a report that found a statistically higher occurrence of brain cancer among those who worked where the decedent had worked, but was inconclusive as to the cause of the workers’ brain cancer and did not have any scientific authority to support the conclusion. Here, Appellants did not file a ***Frye*** motion, but rather challenge the sufficiency of the evidence, and the doctor’s experience differed from the experience at issue in ***Snizavich***.

information at or near the time of the occurrence and it was kept in the ordinary course of business.

Appellants next claim the note was admissible under the medical treatment exception because the statements were made in furtherance of Matthew's diagnosis and treatment, and it was immaterial that the information was not conveyed by Matthew. Appellants further claim the note is admissible as a statement of a party opponent, noting Lisa could take the stand and explain or contradict the statement.

Appellants claim the note was highly relevant and they were prejudiced by its exclusion. They claim the denial of pain after surgery is inconsistent with arterial injury.¹¹

The admissibility of evidence is within the sound discretion of the trial court, and we will not overturn such decisions absent an abuse of discretion or misapplication of law. ***See Lykes v. Yates***, 77 A.3d 27, 32 (Pa.Super. 2013). "An abuse of discretion is not merely an error of judgment. It requires a showing of manifest unreasonableness, partiality, ill-will, or such lack of support as to be clearly erroneous. Under this standard, the party challenging the trial court's discretion on appeal bears a heavy burden." ***SLT Holdings, LLC v. Mitch-Well Energy, Inc.***, 217 A.3d 1248, 1251 (Pa.Super. 2019)

¹¹ Appellants also maintain they properly authenticated the note, noting it contained Matthew and Lisa's phone numbers and the events memorialized in the call were corroborated by medical records. The Brennens did not argue, and the trial court did not find, that Appellants could not authenticate the phone note.

(citation omitted). We also do not reverse such a ruling unless the objecting party sustained prejudice. **Lykes**, 77 A.3d at 32.

Hearsay is an out-of-court statement offered “to prove the truth of the matter asserted in the statement.” Pa.R.E. 801(c). It is inadmissible unless an exception applies. Pa.R.E. 802.¹² “[W]here a document contains multiple levels of hearsay, each level of hearsay must satisfy a recognized exception.” **Bayview Loan Serv. LLC v. Wicker**, 206 A.3d 474, 483 (Pa. 2019). One exception to this rule is the business records exception:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

. . .

(6) Records of a Regularly Conducted Activity. A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a “business”, which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;

(C) making the record was a regular practice of that activity;

¹² The trial court did not address whether the note was hearsay. In this section, Appellants claim it would not have been admitted to establish “Matthew was fine, but that Lisa said he was.” We conclude it was hearsay, as it would have been admitted to establish a truth – that Lisa made the statement contained in the note. **See** Pa.R.E. 801(c), 802.

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Pa.R.E. 803(6).

“In evaluating the trustworthiness of business records, the court will look to the sources of the information therein, method and time of preparation, and the qualifications of the custodial witness.” ***Sycamore Restaurant Grp., LLC v. Stampfi Hartke Assocs., LLC***, 174 A.3d 651, 658 (Pa.Super. 2017). “Where it can be shown that the entries were made with sufficient contemporaneousness to assure accuracy and that they were made pursuant to the business practices and not influenced by the litigation in which they are being introduced,” sufficient indicia of reliability have been “provided to overcome their hearsay nature.” ***In re Estate of Indyk***, 413 A.2d 371, 373 (Pa. 1979) (footnote omitted).

The trial court found it did not err in excluding the phone note. The court found that the note was inadmissible as a business record under Rule 803(6)(E) because it was untrustworthy. Rule 1925(a) Op. at 22. It found that there was no evidence as to who provided the information set out in the record and reasoned the Rule required more than speculation. ***Id.*** The court pointed out the note was purported to be a record of a phone message but was not produced until shortly before trial and the message was from an unnamed lady. ***Id.*** at 20-21. It noted Appellants did not reference the note during Lisa’s

deposition, even though they alleged she was the “lady.” ***Id.*** at 21. It further stated that that Appellants produced no contact information for the employee who took the message. ***Id.*** The court found Appellants failed to establish the note’s trustworthiness and therefore it was not an admissible business record. ***Id.*** at 22.

The court did not abuse its discretion in finding the phone note did not qualify under the business exception because it was unreliable. The court was not required to wait until trial to make this determination. Appellants did not produce the phone note with the medical records, and the Brennens were not aware of its existence until shortly before the originally scheduled trial. After the trial was continued, Appellants did not produce the former employee who allegedly wrote the note, provide contact information for that employee, or provide other relevant data to determine whether and when the phone note had been taken. To the extent Appellants claim the statements are admissible as statements of medical diagnosis or as an admission of a party opponent, such exceptions, if applicable, would apply only to one layer of hearsay—the statements from the “lady” to the receptionist. The exceptions would not apply to the second layer of hearsay—the phone note itself.

C. Whether the Trial Court Erred in Permitting Dr. Navalgund to Testify

Appellants maintain this Court should order a new trial because the trial court improperly permitted Dr. Navalgund to testify beyond the scope of his report to render an opinion on the permanency of Matthew’s harm. They say that Dr. Navalgund testified Matthew would never obtain 100% pain relief and

characterized the loss of sexual function, sensation, and psychological condition as permanent, while his expert report did not contain these opinions. They argue the reference to chronic pain in the report does not suffice, as there is a difference between chronic and permanent pain. They argue that nothing supports the finding that Dr. Navalgund developed the opinion while treating Matthew. Appellants claim they were prejudiced by the testimony, as they could not make a meaningful response during the videotaped trial deposition.

The admission of expert testimony is within the trial court's sound discretion, and this Court will not disturb the decision without a showing of manifest abuse of discretion. ***Whitaker v. Frankford Hosp. of City of Phila.*** 984 A.2d 512, 522 (Pa.Super. 2009). Pennsylvania Rule of Civil Procedure 4003.5(a) authorizes the discovery of expert information "acquired or developed in anticipation of litigation or for trial[.]" Pa.R.Civ.P. 4003.5(a). Further, Rule 4003.5(c) establishes that "the direct testimony of [an] expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings[.]" ***Id.*** at 4003.5(c). There is no "hard and fast rule" to determine whether "a particular expert's testimony exceeds the fair scope of his or her pretrial report[.]" ***Woodard v. Chatterjee***, 827 A.2d 433, 442 (Pa.Super. 2003) (citation omitted). Instead, we determine "whether, under the particular facts and circumstances of the case, the discrepancy between the expert's pre-trial report and his trial testimony is of a nature which would prevent the adversary from making a

meaningful response, or which would mislead the adversary as to the nature of the appropriate response.” **Id.** (citation omitted) (emphasis omitted). The Rule’s purpose is to provide notice to parties to “prevent[] surprise testimony at trial concerning grounds never raised during the discovery.” Pa.R.Civ.P. 4003.5 cmt.

Dr. Navalgund’s report cites The Guides to Evaluation of Permanent Impairment, 6th Edition. Letter dated Aug. 3, 2021, from Dr. Navalgund to Rosen & Perry PC, at 1. Using the guidelines, Dr. Navalgund provided impairment ratings for Matthew’s losses.¹³ **Id.** at 2. At his video deposition, Dr. Navalgund stated that Matthew was “never going to get 100 percent pain relief” and that “[t]here is no doubt that . . . the permanency that he has experienced is the permanency of loss of sexual function and psychological condition that he is in, as well as the loss of sensation over the site of his penis[and] groin as well[] as his thigh.” N.T., Dec. 22, 2022, at 43, 78.

Appellants filed a motion to preclude the testimony, arguing it was not within the fair scope of Dr. Navalgund’s expert report. The trial court denied the motion. The court reasoned that Appellants could not have been surprised

¹³ In his report, Dr. Navalgund had used The Guides to Evaluation of Permanent Impairment, 6th Edition to rate Matthew’s impairment. Letter from Dr. Navalgund to Rosen & Perry PC, dated August 3, 2021. He rated the primary loss of “testicular disease by way of orchiectomy” as 11%, second loss of “penile disease by way of loss of sensation and sexual function,” as 10%, and tertiary loss of “severe intractable pain” as 2%. **Id.**

by the testimony as Dr. Navalgund's report assigned a permanent pain rating and discussed that Matthew had chronic pain:

After the surgery, when [Matthew's] pain continued and increased, [Matthew] was directed to a pain clinic operated by Dr. Navalgund. [Matthew] received treatment from Dr. Navalgund from 2019 to the time of trial. As a result, Dr. Navalgund developed his opinions in his treatment efforts to minimize [Matthew's] symptoms and pain. His conclusions were developed not in anticipation of litigation but in his efforts to treat his condition and symptoms. In his medical notes, which were provided to the defense, Dr. Navalgund made it clear that [Matthew's] groin pain on the left side is chronic and his leg pain is also chronic.

Dr. Navalgund in his report clearly indicated that [Matthew's] impairments are permanent in nature. Dr. Navalgund noted in his report that his rating of [Matthew's] impairment was based on the "The Guides to Evaluation of Permanent Impairment, 6th Edition." The length of time Dr. Navalgund has treated [Matthew], his characterization of it as chronic and his assigning him a permanent impairment rating provided the defense with prior knowledge that Dr. Navalgund was going to submit an opinion on the permanency of [Matthew's] condition after the vasectomy. Having already received Dr. Navalgund's medical records, counsel could not have been surprised by testimony.

1925(a) Op. at 15.

The trial court did not abuse its discretion. Here, the report assigned a permanent impairment rating, Dr. Navalgund continued to treat Matthew, and Dr. Navalgund characterized Matthew's pain as chronic. Dr. Navalgund's testimony was not a surprise and any discrepancy should not have prevented Appellants from making a meaningful response.

D. Whether the Verdict Was Against the Weight of the Evidence

Appellants claim the trial court applied the wrong standard to their weight claim, as it was not required to view the evidence in the light most favorable to the verdict winner. They claim a review of the entire record supports a finding the verdict was against the weight of the evidence.

We review the trial court's ruling on a weight claim for abuse of discretion. We do not rule on "the underlying question of whether the verdict is against the weight of the evidence." **Helpin v. Trs. of Univ. of Pa.**, 969 A.2d 601, 615 (Pa.Super. 2009), *aff'd*, 10 A.3d 267 (Pa. 2010) (quoting **Commonwealth v. Widmer**, 744 A.2d 745, 753 (Pa. 2000)).

The trial court accurately set forth the standard for a weight claim and found the verdict was not against the weight of the evidence:

A weight of the evidence claim challenges the jury's verdict on the grounds that it is contrary to the evidence presented at trial. A weight claim does not dispute the sufficiency of the evidence to support the verdict but instead argues that the verdict is so contrary to the weight of the evidence that it shocks the conscience and warrants a new trial. A motion for a new trial should be denied unless "the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." A weight claim is addressed to the discretion of the trial judge. A trial judge cannot grant a new trial based on a conflict in the testimony or because the trial judge on the same facts would have arrived at a different conclusion. **Armbruster v. Horowitz**, 813 A.2d 702 (Pa. 2002). A jury verdict should be upheld unless it appears to have been the product of passion, prejudice, partiality, or corruption, or where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to

the loss suffered by the plaintiff. **Kiser v. Schulte**, 648 A.2d 1, 4 (Pa. 1994).

Rather, a motion for a new trial should be denied unless “the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice and the award of a new trial is imperative so that right may [be] given another opportunity to prevail.” **Mader v. Duquesne Light Co.**, 241 A.2d 600. 612-613 (Pa. 2020).

. . .

Sufficient evidence was presented which the jury accepted that Dr. Smith’s treatment fell below the standard of care, the doctor’s failure to do a pre-operative examination, failure would have identified the physical abnormality which was present on Mr. Brennen’s left side. In this case, the testimony established that Mr. Brennen suffers a sensory loss to the left side of his penis, severe and permanent pain to the left scrotum and thigh. The neuropathic pain is chronic and permanent. Mr. Brennen is unable to perform his job as before and after requires assistance or accommodation. Within his family he suffers from sexual dysfunction which is affecting his relationship with his spouse. And an inability to interact with his children as before in many ways. Accordingly the verdict did not shock our conscience or sense of justice.

Trial Ct. Op. at 18-19.

The court did not abuse its discretion. The court applied the correct standard. Although it stated the Brennens presented sufficient evidence, it provided the proper standard for against the weight of the evidence claims and concluded that the verdict did not shock the conscience or sense of justice. This claim fails.

E. Whether the Court Erred in Imposing Sanctions

Appellants contend the Brennens did not seek monetary sanctions and it is unclear against whom the sanctions were awarded. They claim the only

sanction the Brennens sought against Appellants was a default judgment, and argue a court cannot issue sanctions *sua sponte*. They maintain the sanction order is unclear. Appellants argue they could not have brought this argument below, because the basis of the sanctions was unclear and the sanctions were not awarded until more than a year after trial.

Appellants further maintain the Brennens' counsel are not entitled to attorneys' fees. They claim Rule 4019 requires a motion to compel before the issuance of sanctions, and argue that here there was no motion to compel that Appellants failed to obey. They further allege costs for going to trial cannot be a sanction. Rather, the costs have to be a result of the violation, and here the Brennens incurred the costs after the trial was continued.

Appellants allege the court failed to apply the **Breary**¹⁴ factors that courts use when deciding to award monetary damages, claiming the court focused on the first two factors, prejudice and willfulness, and did not consider the importance of the excluded evidence or the number of violations. They

¹⁴ Courts apply the following factors when deciding whether to award monetary sanctions:

- (1) the prejudice, if any, endured by the non-offending party and the ability of the opposing party to cure any prejudice;
- (2) the noncomplying party's willfulness or bad faith in failing to provide the requested discovery materials; (3) the importance of the excluded evidence in light of the failure to provide the discovery; and (4) the number of discovery violations by the offending party.

City of Phila. v. Fraternal Order of Police Lodge No. 5 (Breary), 985 A.2d 1259, 1270-71 (Pa. 2009) (citations omitted).

claim they were punished twice—with the costs of a continued trial and with exclusion of the note.

Appellants maintain the Brennens were not prejudiced because they were able to prepare for trial after discovery of the phone note. Appellants further maintain that the court concluded that nothing supported a finding “of knowing, deliberate dilatory, obdurate, or vexatious conduct.” Appellants’ Br. at 60 (citation omitted). They argue sanctions cannot be issued without a finding of willful disregard or disobedience.

Appellants further contend that the court did not determine who was responsible to pay the sanction and claim the court did not have a hearing. They maintain the hearing was about the amount of the fees, not whether the fee sanction was warranted. Appellants additionally argue that the phone note was crucial to their case, which allegedly militates against sanctions, and assert that there were no other discovery violations.

“[T]he specific sanctions imposed under Pa.R.C.P. 4019 for violation of discovery rules are left to the sole discretion of the trial court.” ***SLT Holdings***, 217 A.3d at 1251 (quoting ***Christian v. Pennsylvania Fin. Resp. Assigned Claims Plan*** 686 A.2d 1, 5 (Pa.Super. 1996)). “[C]ourts are afforded great discretion in fashioning remedies or sanctions for violations of discovery rules and orders.” ***Fraternal Order of Police Lodge No. 5 (Breary)***, 985 A.2d at 1269.

Rule 4019 provides, in relevant part:

(a)(1) The court may, on motion, make an appropriate order if

(i) a party fails to serve answers, sufficient answers or objections to written interrogatories under Rule 4005;

. . .

(viii) a party or person otherwise fails to make discovery or to obey an order of court respecting discovery.

. . .

(c) The court, when acting under subdivision (a) of this rule, may make

(1) an order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing in evidence designated documents, things or testimony, or from introducing evidence of physical or mental condition;

(3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or entering a judgment of non pros or by default against the disobedient party or party advising the disobedience;

(4) an order imposing punishment for contempt, except that a party may not be punished for contempt for a refusal to submit to a physical or mental examination under Rule 4010;

(5) such order with regard to the failure to make discovery as is just.

. . .

(g)(1) Except as otherwise provided in these rules, if following the refusal, objection or failure of a party or person

to comply with any provision of this chapter, the court, after opportunity for hearing, enters an order compelling compliance and the order is not obeyed, the court on a subsequent motion for sanctions may, if the motion is granted, require the party or deponent whose conduct necessitated the motions or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order of compliance and the order for sanctions, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

. . .

(3) If the motion for sanctions is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Pa.R.Civ.P. 4019.

The trial court held a hearing and found that Appellants did not challenge the fees submitted by the Brennens or present any evidence. Trial Ct. Op., filed Nov. 25, 2025, at 7-8 ("Sanctions Rule 1925(a) Op."). The court pointed out that it scheduled the October 2024 hearing to address all pending matters, and that Appellants and their counsel did not present any testimony or exhibits. ***Id.*** The court found that although it could not identify a party who deliberately falsified the production of documents, Appellants and their trial counsel had multiple opportunities to correct the record and did not do so. ***Id.*** at 9. It noted that whether unintentional neglect or an intentional attempt to gain a tactical advantage, counsel had the entire medical record and continually maintained it had been provided to the Brennens. ***Id.*** It pointed out that Dr. Smith, Tri-County, and their trial counsel never provided an

explanation as to why or how the entire medical record had not been produced. ***Id.*** at 9-10. The court found it had discretion to impose monetary sanctions for discovery violations and pointed out Appellants presented no testimony as to who should be responsible for payment of the sanction. ***Id.*** at 10.

The court noted that in its “extensive service on the bench, it ha[d] never encountered a situation where more than half of the discovery in a case was not disclosed and was handled in such a negligent manner.” ***Id.*** It found the late disclosure prejudiced the Brennens. ***Id.*** It concluded that in “the absence of evidence to the contrary,” it believed “the responsibility of the sanctions should be born between” Tri-County and its trial counsel. ***Id.*** It reasoned Tri-County was the offending party that first created and failed to correct the wrong, as it was the entity that employed the person who sent the 11 and 12 page records and signed an affidavit attesting they were complete. ***Id.*** It further reasoned that the attorneys and law firm had the entire record and failed or neglected to provide it even though requested. ***Id.***

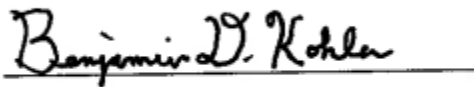
Here, Appellants’ and counsel’s conduct violated Rule 4019(a)(i) and (viii) and therefore the court properly awarded fees and costs as a sanction under Rule 4019(c)(5). That subsection of the rule permits the court to enter “such order with regard to the failure to make discovery as is just.” Pa.R.Civ.P. 4019(c)(5). Unlike Rule 4019(g), cited by Appellants, Rule 4019(c)(5) does not require a motion to compel discovery before the issuance of a sanction. ***See Weist v. Atlantic Richfield Co.***, 543 A.2d 142, 145 (Pa.Super. 1988)

(citing **Griffin v. Tedesco**, 513 A. 2d 1020, 1023 (Pa.Super. 1986)). Moreover, we conclude the court properly awarded sanctions against both Tri-County and Counsel, as both were responsible for the discovery violation.

Further, Appellants waived their claim the court did not properly apply the **Breary** factors because they did not raise such a claim in the trial court, either in the motion for reconsideration or at the hearing.¹⁵ Further, Appellants did not raise in the trial court any claim based on the trial court's failure to cite a rule on which the sanctions were based. They therefore waived the issue.

Judgment affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 10/26/2026

¹⁵ We note that counsel argues they did not act intentionally and that the Brennens were not prejudiced, but did not otherwise reference or discuss the factors.