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New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

JOHN TEREHOFF, an Infant by his Mother and Natural Guardian YEKATERINA GAVRISHEVA,

Plaintiff-Respondent-Appellant,

– against –

RUBIN FRENKEL, M.D. and BAY OB/GYN, P.C.,

Defendants-Appellants-Respondents.

AMICI CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, MEDICAL SOCIETY OF THE STATE OF NEW YORK AND AMERICAN COLLEGE OF OBSTETRICIANS AND GYNOCOLOGISTS IN SUPPORT OF DEFENDANTS

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STATE OF NEW YORK SUPREME COURT
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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Pursuant to Section 500.1(f) of the Rules of Practice of the New York State Court of Appeals, counsel for proposed *amici curiae* American Medical Association ("AMA") and American College of Obstetricians and Gynecologists ("ACOG") certifies that AMA and ACOG have no corporate parents, subsidiaries or affiliates.

Dated: May 3, 2022

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INTEREST OF *AMICI CURIAE*[1]

Ensuring the veracity of expert medical testimony, both with respect to whether a physician violated a standard of care and whether any such violation caused injury to a patient, is of utmost importance to *amici* American Medical Association (AMA), Medical Society of the State of New York (MSSNY), and American College of Obstetricians and Gynecologists (ACOG). The AMA is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policymaking process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including New York, and in every medical specialty.

MSSNY is an organization of approximately 30,000 licensed physicians, residents, and medical students in New York State. Members participate in both the state society and in their local county medical societies. MSSNY is a non-profit organization committed to representing the medical profession as a whole and advocating health-related rights, responsibilities, and issues. MSSNY strives to

[1] No party or its counsel authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than *amici curiae* or their counsel—contributed money intended to fund preparing or submitting the brief.

promote and maintain high standards in medical education and in the practice of medicine in an effort to ensure that quality medical care is available to the public.

The AMA and MSSNY appear on their own behalves and as representatives of the AMA Litigation Center. The Litigation Center is a coalition among the AMA and the medical societies of every state. The Litigation Center is the voice of America's medical profession in legal proceedings across the country. The mission of the Litigation Center is to represent the interests of the medical profession in the courts. It brings lawsuits, files *amicus* briefs, and otherwise provides support or becomes actively involved in litigation of general importance to physicians.

ACOG is the nation's leading group of physicians providing health care for women. With more than 60,000 members, it represents obstetricians-gynecologists in the United States, including in the State of New York. ACOG advocates for quality health care for women, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases awareness among its members and the public of the changing issues facing women's health care. ACOG has previously appeared as *amicus curiae* in various courts throughout the country. ACOG's briefs and guidelines have been cited by numerous courts seeking authoritative medical data regarding childbirth. The parties have consented to the filing of this brief.

QUESTIONS PRESENTED DISCUSSED IN THIS BRIEF

1. Did the Supreme Court err in denying the motion to preclude Plaintiffs-Respondents-Appellants' expert's testimony that the infant plaintiff's autism spectrum disorder was caused by his premature delivery at 25 weeks?

2. Is the verdict finding that the infant plaintiff's premature birth caused him to develop autism unsupported by, or in the alternative, against the weight of the evidence?

3. Is the verdict finding that Dr. Frenkel departed from the standard of care unsupported by, or in the alternative, against the weight of the evidence?

4. Does the $0 award for future pain and suffering provide a basis for vacating only this portion of the judgment and holding a new trial only on such damages?

STATEMENT OF FACTS

This case involves the pre-term birth of a child, John, born at 25 weeks of gestation at a weight of 1.7 pounds. When John was three years old, he was diagnosed with an autism spectrum disorder. John and his mother, Ms. Gavrisheva, are alleging her treating obstetrician-gynecologist, Dr. Frenkel, failed to diagnose her with pre-term labor, and that this failure caused John's autism.

Amici adopt the Defendant's Statement of Facts to the extent relevant to *amici's* arguments in this brief. In broad terms, the facts are as follows: Ms. Gavrisheva visited Dr. Frenkel on March 3, 2007 when John was at about 24 weeks

of gestation. Ms. Gavrisheva stated she had occasional spotting for about a day. Dr. Frenkel did not observe any signs of cramping or contractions. A physical examination showed Ms. Gavrisheva's cervix was soft and closed, and a sonogram revealed a cervical length that was normal for that time in pregnancy.

Ms. Gavrisheva called the next day because of additional spotting, and Dr. Frenkel advised her to go to Methodist Hospital. No contractions were observed, though she was prescribed tocolytics to stop contractions from starting. Her cervix was 4-5 cm dilated, and the treating physician noted that Ms. Gavrisheva may have cervical insufficiency. Ms. Gavrisheva was admitted to the hospital that day, March 4, 2007, for monitoring. During the night of March 6 and in the morning of March 7, she developed complications, with a portion of the umbilical cord observed below the cervix. An emergency Caesarean section was performed on March 7, 2007.

Ms. Gavrisheva and John are alleging here that Dr. Frenkel committed medical negligence in failing to diagnose Ms. Gavrisheva with pre-term labor on March 3, that had Dr. Frenkel administered tocolytics that day (as opposed to the next day when she received tocolytics) John's birth would have been delayed by two weeks, and being born at 25 weeks instead of 27 weeks of gestation was the cause of John's autism. The jury awarded plaintiffs $2.25 million for past pain and suffering, about $2.4 million for future lost earnings, nearly $1.5 million for future medical expenses, and $0 for future pain and suffering.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Medical negligence litigation, such as the case at bar, often involves complex medical issues, severe injuries or ailments, and highly sympathetic plaintiffs. This case is no different. Jurors must work through the facts and assign liability, even though the vast majority of medical injuries and other adverse outcomes do not result from medical negligence, but pre-existing conditions, inherent risks of procedures, or unpreventable complications. For this reason, New York courts require testimony from medical experts to be based on generally accepted scientific principles so that juries can make competent decisions on the key medical science issues, namely whether the physician met the medical standard of care to the patient and whether any breach in that standard of care could and did cause the injuries alleged.

Here, the trial court failed to adhere to this responsibility. First, Plaintiffs needed to provide expert testimony that Dr. Frenkel breached a medical duty of care to Ms. Gavrisheva, *which is judged at the time the services were rendered*, in failing to diagnose Ms. Gavrisheva with pre-term labor. But, Plaintiffs' expert clearly based her testimony on hindsight, stating "to know that [Ms. Gavrisheva] went in a day later and was four to five centimeters . . . She had to have something going on." Def. Br. at 51. She then offered a bunch of tests that she speculated Dr. Frenkel could have conducted based on knowledge he could not have had. It is longstanding law in New York and other states that negligence claims of any kind, including medical

negligence, cannot be founded on hindsight. *See Henry v. Bronx Lebanon Med. Ctr.*, 53 A.D.2d 476 (1976); *see also Zawadzki v. Knight*, 76 N.Y.2d 898, 900 (1990) (affirming that expert testimony cannot be based on a later occurring adverse event).

Second, Plaintiffs had to show it is accepted in the field of pediatric neurology that a difference in gestation from 25 weeks to 27 weeks—presuming administering tocolytics a day earlier could have delayed birth by two weeks—caused John's autism. There is no such accepted medical science. As set forth in the *Frye* hearing, it is unknown what causes autism spectrum disorders, though studies have identified risk factors, including pre-mature birth. The studies Plaintiffs' expert relied on raised statistical associations or correlations between pre-maturity and autism as a precursor for additional studies. But, there is too large a gap for any expert to bridge to assert either general causation—namely, that generally accepted medical science suggests pre-maturity *causes* autism—or specific causation—namely, that not delaying John's birth by two weeks *caused* his autism. Thus, the court was wrong to conclude at the *Frye* hearing that "prematurity/low birth weight is a cause of autism."

The dangers of allowing insufficient scientific evidence to drive liability outcomes were evident in the jury's verdict; it reached what traditional signs suggest was a compromise verdict. Specifically, it awarded past pain and suffering and future economic costs, but not future pain and suffering. Juries often reach such compromise verdicts when they do not believe the defendant caused the injuries

alleged, but still want to take care of the plaintiff irrespective of wrongful causation. These verdicts do not represent justice, and the Court should not accept Plaintiffs' invitation to undo only part of the compromise by ordering a damages-only retrial.

Amici respectfully request that this Court reverse the judgment and find the testimony of Plaintiffs' experts inadmissible. New York patients and physicians must be able to rely on the state's courts to follow sound law and produce just outcomes, even in difficult situations. This includes making sure experts facilitate a jury's ability to focus on the right information and arrive at appropriate conclusions.

ARGUMENT

Designating someone as an "expert" provides the witness with a cloak of authority. Justice can be undermined when a plaintiff is injured and his or her expert devises a plausible-enough-sounding theory for finding a source of compensation. As a result, the parties rely on courts to properly screen expert testimony. Medicine is highly specialized, and partisan experts can make almost any theory sound credible.[2] Otherwise, as Judge Posner of the U.S. Court of Appeals for the Seventh Circuit has cautioned, "hired guns" would testify in technical and esoteric areas, as with medical science, and jurors would not be able to distinguish among experts. *Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967, 973 (7th Cir. 2001).

[2] "Plausibility is not a substitute for evidence, however great may be the emotional wish to believe." E. Bright Wilson, Jr., *An Introduction to Scientific Research* 26 (1952).

In medical negligence claims, juries rely on such experts to help them "differentiate between adverse events and medical errors." David Sohn, *Negligence, Genuine Error, and Litigation*, 6 Int'l J. Gen. Med. 49, 50 (2013). Adding to this challenge is that studies have shown that juries are more likely to be charged with deciding a case that does not involve negligence than one that does. A Harvard Public Health Study found that only about 27 percent of adverse events are caused by medical negligence. *See* Troyen A. Brennan *et al.*, *Incidence of Adverse Events and Negligence in Hospitalized Patients*, 151 Qual. Saf. Health Care 51 (2004). Also, a study for the U.S. Congress found that 80 percent of the lawsuits their experts reviewed did not contain medical negligence. *See The Perverse Nature of the Medical Liability System*, U.S. Congress Joint Economic Committee, Research Report 109-2 (Mar. 2005). Here, the record suggests that cervical insufficiency could have caused the pre-mature birth, which tocolytics could not have staved off.

The court had an obligation, therefore, to ensure Plaintiffs' and Defendants' experts presented the jury with sound scientific testimony to help them sort through these questions. It did not, both with respect to the medical standard of care and whether any such breach caused the injury alleged. Physicians must not face liability in New York merely because a patient experienced an adverse event.

I. THE COURT ERRED IN ALLOWING EXPERT TESTIMONY ON THE STANDARD OF CARE TO BE BASED IN HINDSIGHT

An expert testifying on whether a physician violated a standard of care is limited to judging the defendant's course of treatment decisions at the time the services were rendered, not through hindsight. Yet, the heart of testimony provided by Plaintiffs' expert here consisted of speculation on what various additional tests might have been ordered based on "know[ing] that she went in a day later and was four to five centimeters" dilated. Such hindsight testimony is not permitted—in New York or other states. *See Micciola v. Sacchi*, 36 A.D.3d 869, 828 (N.Y. App. Div. 2007) ("[H]indsight reasoning . . . is insufficient to defeat summary judgment.").

Medical negligence cases are particularly susceptible to hindsight bias. *See Kortus v. Jensen*, 237 N.W.2d 845, 851 (Neb. 1976) (providing initial research into hindsight biases in medical malpractices cases). "[T]he existence of these biases suggest that it may be difficult for finders of fact to evaluate fairly (*e.g.*, without reference to whether the decision, in retrospect, turned out to be the right choice)." Michael A. Haskel, *A Proposal for Addressing the Effects of Hindsight and Positive Outcome Biases in Medical Malpractice Cases*, 42 Tort & Ins. L. J. 895, 905 (2007). They have a tendency to try to "find someone to blame" for an adverse event to justify awarding money to a sympathetic plaintiff. David P. Sklar, *Changing the Medical Malpractice System to Align with What We Know About Patient Safety and Quality Improvement*, 92 Acad. Med. 891 (2017). Hindsight bias has particularly

detrimental effects when it calls for re-writing standards of care in "important, highly consequential situations." Hal R. Arkes, *The Consequences of Hindsight Bias in Medical Decision Making*, 22(5) Curr. Directions in Psych. Sci. 356, 359 (2013).

If a court is going to determine a medical standard of care is legally deficient, it must do so only based on sound medical decision-making. A fundamental purpose of civil litigation is to force defendants to change their liability-creating conduct—here the course of treatment provided to pregnant women. OB/GYN standards of care, like other physician standards of care, are developed through disciplined and well-defined data-driven processes. *See* Policy Priorities, Am. College of Obstetricians & Gynecologists ("Sound health policy must always be science- and evidence-based, so that physicians can provide patients with factual, compassionate, and individualized care and counseling.").[3] Organizations, including *amicus* ACOG, use these standards to promote "standardization of the delivery of patient care," including through Practice Bulletins, Committee Opinions, and Patient Safety Checklists. Clinical Guidelines and Standardization of Practice to Improve Outcomes, Comm. on Patient Safety and Quality Improvement, Opinion No. 792,

[3] https://www.acog.org/advocacy/policy-priorities

Am. College of Obstetricians and Gynecologists (2019).[4] "When standardized care is used, quality increases, variation decreases, and cost decreases." *Id.*[5]

If Dr. Frenkel was supposed to have ordered the battery of tests that Plaintiffs' expert raised based on hindsight, it would lead to unacceptable levels of defensive medicine. *See* Scott Spear, *Some Thoughts on Medical Tort Reform,* 112 Plastic & Reconstructive Surgery 1159 (Sept. 2003) ("[T]he fear of being sued . . . leads to an increase in the quantity of care rather than an increase in the efficiency or quality of care."). Tests and other procedures would be ordered to ward off potential liability, not for medical reasons. But, these tests could have their own risk that are not worth taking in many patients. Standards of care present the best medical judgment of the procedures that are medically appropriate in a given situation.

Further, when liability is based on elusive standards of care, some physicians will eliminate high-risk procedures and turn away high-risk patients. *See* Brian Nahed et al., *Malpractice Liability and Defensive Medicine: A National Survey of Neurosurgeons*, PLoS ONE, vol. 7, no. 6, at 6 (June 2012) ("Reductions in offering 'high-risk' cranial procedures have decreased access to care for potentially life-saving neurological procedures."); Mass. Med. Soc'y, *Investigation of Defensive*

[4] https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2019/10/clinical-guidelines-and-standardization-of-practice-to-improve-outcomes

[5] *See also* Vikram Talaulikar & Uday Nagarsekar, *Evidence-Based Medicine: An Obstetrician and Gynaecologist's Perspective*, J Obstetrics & Gynecology of India 62, 146-153 (2012) ("the concept of evidence-based medicine (EBM) has found a firm footing in the lives of clinicians all over the world").

Medicine in Massachusetts, at 3-5 (Nov. 2008) (finding 38% of physicians in the sample reduced the number of high-risk services or procedures they performed; 28% reduced the number of high-risk patients they saw). Such a result would hinder, not advance, the health care interests of New York residents.

II. THE COURT ERRED IN ALLOWING EXPERT TESTIMONY ON CAUSATION TO BE BASED ON STUDIES THAT DO NOT ESTABLISH THE NECESSARY CAUSAL CONNECTIONS

There simply is no generally accepted medical science that being born pre-maturely *causes* autism, let alone that not delaying a pregnancy from 25 weeks to 27 weeks could be *the cause* of any person's autism. Potential causes and risk factors for autism have been widely studied over the past twenty years, and autism spectrum disorders are believed to develop from a combination of genetic and environmental influences. As the leading autism advocacy group has underscored, "it's important to keep in mind that increased risk is not the same as *cause*." Autism Speaks, What Causes Autism, *at* https://www.autismspeaks.org/what-causes-autism (last visited April 28, 2022). Extreme pre-maturity has been identified as a potential risk factor, particularly among girls, but it is not a factual or legal *cause* of autism.[6]

[6] *See* Eric J. Moody, *Autism Risk Linked to Prematurity Is More Accentuated in Girls*, PLOS ONE (2020) at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7452728/#:~:text=A%20statistically%20significant%20increase%20in,%2C%20even%20at%20near%2Dterm ("Females drove this direct risk related to degree of prematurity, while males had an elevated risk throughout prematurity weeks, even at near-term.").

The court's error, here, can be seen from the response to the studies presented by Plaintiffs' expert at the *Frye* hearing. These studies suggested a correlation between extreme pre-mature births and autism. But, as this expert acknowledged, follow-up research is still necessary before any statistical association between these two events can be turned into a causal inference. The concern, therefore, is not that Plaintiffs' expert made up any connection between the two out of "thin air," as the court suggested was the standard she was judging the admissibility of the expert's testimony, but that Plaintiffs' expert was permitted to testify that the medical community generally accepts that pre-maturity actually causes autism. Experts must meet the higher bar of general acceptance, which could not be done here.

To be clear, correlation is not the same as causation. Correlation is only an association between two or more variables; a measurement of the size and the relationship between the variables. *See* David Kaye & David Freedman, Reference Guide on Statistics, Federal Judicial Center, Reference Manual on Scientific Evidence, at 211, 262 (3rd. ed. 2011). Causation refers to the presence of a cause and effect relationship between two distinct events. *See id.* ("Researchers—and the courts—are usually more interested in causation."); *see also* Naomi Altman & Martin Krzywinski, *Points of Significance: Association, Correlation and Causation*, 12 Nature Methods 899, 899-900 (2015) (discussing the difference between correlation, association and causation). The correlation-causation fallacy is one of

the most widely shared scientific misconceptions among the public at large. *See* Christian Borgelt & Rudolph Kruse, *Probabilistic Networks and Inferred Causation*, 18 Cardozo L. Rev. 2001, 2015 (1997); *see also* April Bleske-Rechek et al., *Causal Inference from Descriptions of Experimental and Non-Experimental Research: Public Understanding of Correlation-Versus Causation*, 142 J. Gen. Psychol. 48, 68 (2015). "[T]he vast majority of all correlations are, without doubt, noncausal." *Id.*

Indeed, courts evaluating medical negligence claims have widely recognized it is "axiomatic in logic and in science that correlation is not causation." *Craig ex rel. Craig v. Oakwood Hosp.*, 684 N.W.2d 296, 312 (Mich. 2004) (rejecting claim that a child's cerebral palsy was caused by doctor's negligence in treating mother during labor). In pregnancy-related allegations, where much remains unknown, "[c]are must be taken to avoid the *post hoc ergo propter hoc* fallacy, that is, finding an earlier event caused a later event merely because it occurred first." *Jelinek v. Casas*, 328 S.W.3d 526, 533 (Tex. 2010); *see* also *Reeps v. BMW of N. Am.*, 2012 WL 6729899, at *8 (N.Y. Sup Ct. Dec. 16, 2012) (recognizing in case alleging in utero injury from vehicle's gasoline vapors the "well-known scientific principle that 'association is not causation,' or 'correlation is not causation'" and that "[c]ourts are well aware of this principle, and sometimes expressly cite it.").[7]

[7] *See also Nelson v. Enid Med. Associates, Inc.*, 376 P.3d 212, 229 (Okla. 2016) ("Most if not all elementary textbooks on statistics explain a statistical truism that correlation is not causation"); *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416, 418 (N.Y. App. Div. 1st Dep't 2008)

Blaming genetic, unexplained, or other birth-related adverse outcomes on OB/GYNs, without requiring wrongful causation, will exacerbate the already sky-rocking liability insurance premiums afflicting many New York practitioners. Physician malpractice insurance rates in this State are generally the highest in the nation. *See 2022 New York Physician's Guide to Medical Malpractice Insurance*, MEDPLI[8]; *see also* Ariel Zilber, *Why New York Is the Second-worst State in the US for Doctors*, N.Y. Post, Mar. 22, 2022 (ranking New York 50th among states for most expensive insurance). These rates have surged in recent years in light of the Covid-19 pandemic and other factors. *See* José R. Guardado, *New Data Show the Highest Prevalence of Medical Liability Premium Increases in 15 Years*, Am. Med. Ass'n Policy Research Perspectives (2021)[9] (reporting more than 30% of premiums increased in 2020, representing the highest percentage increase since 2005).

OB/GYNs, in particular, experience among the highest insurance rates among all physicians. *See id.* As a recent report by *amicus* American Medical Association found, "an obstetrician/gynecologist in Los Angeles might pay $49,804 per year for

(recognizing in case alleging injury from mold exposure that "'association is not equivalent to 'causation"') (quoting Michael Green et al., Reference Guide on Epidemiology, Federal Judicial Center, Reference Manual on Scientific Evidence, at 336 (2d ed. 2000)).

[8] https://medpli.com/2022-new-york-physicians-guide-to-medical-malpractice-insurance/

[9] https://www.ama-assn.org/system/files/2021-03/prp-mlm-premiums-2020.pdf

liability insurance while the same obstetrician/gynecologist could pay $186,772 in New York." Medical Liability Reform—Now!, Am. Med. Ass'n (2022 ed.), at 19.[10]

Unsurprisingly, the high costs of insurance has contributed to physician shortages—nationally and in New York. *See The Complexities of Physician Supply and Demand: Projections From 2019 to 2034*, Ass'n of Am. Med. Colleges (June 2021), at viii[11] (noting "physician demand will grow faster than supply); *New York Physician Supply and Demand through 2030*, Center for Health Workforce Studies, Univ. of Albany (2009), at 3 (predicting same for New York). In fact, shortages of OB/GYNs in New York has been a persistent concern in cities and rural areas of the State. *See* Jaime Rosenberg, *Physician Shortage Likely to Impact OB/GYN Workforce in Coming Years*, Am. Journal of Managed Care, Sept. 21, 2019 (listing Buffalo, NY among top ten metropolitan areas most likely to experience serious OB/GYN shortages); Anne McCloy, *Local Expert Explains Obstetrician Shortage Impacting Rural Areas Across New York State*, CBS 6 News Albany, Sept. 13, 2019 (reporting that hospital shut down its delivery room due to obstetrician shortage).

III. COMPROMISE VERDICTS DO NOT ADVANCE JUSTICE

Finally, the Court should not accept Plaintiffs' invitation to award a new trial only on future pain and suffering damages. The inconsistency between the $0 award

[10] https://www.ama-assn.org/system/files/mlr-now.pdf

[11] https://www.aamc.org/media/54681/download?attachment

for future pain and suffering and the substantial future economic damages award is the hallmark of a "compromise verdict."[12]

A compromise verdict results when some jurors do not view a defendant as liable, but vote for liability in exchange for a lower damages award. *See*, *e.g.*, *Boesing v. Spiess*, 540 F.3d 886, 889 (8th Cir. 2008); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1445-46 (10th Cir. 1988). Here, the jurors likely believed Defendants were not liable for John's autism. They agreed to a Plaintiff verdict to award funding for the future economic costs that John and his family will have to bear, likely out of sympathy for their financial situation, but clearly did not want to make Dr. Frenkel pay for pain and suffering he did not cause. In these cases, the liability finding and damage awards are inextricably intertwined. Justice is not served by undoing only half of the compromise.

The concern here is not that the jury failed to understand the extent of Plaintiffs' alleged injuries such that another jury is needed to assess proper damages, but that physicians, hospitals, and other defendants will be subject to much greater liability than the jury thought was just. *Amici*, therefore, respectfully urge the Court to deny Plaintiffs' appeal for a damages-only retrial. It is well-settled that partial re-trials, including as sought here, are permitted only for distinct portions of the

[12] In the medical liability arena, history has shown that verdicts are "frequently . . . the result of compromise." *Werk v. Big Bunker Hill Mining Corp.*, 17 S.E.2d 825, 829 (Ga. 1941).

judgment that are erroneous and separable. It must "clearly appear[] that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Refining Co.,* 283 U.S. 494, 500 (1931). Accordingly, courts have developed a presumption against damages-only re-trials. *See Pryer v. C.O. 3 Slavic*, 251 F.3d 448 (3d Cir. 2001).

Damages-only retrials must be barred, as here, when there are *any* "indications" a jury "rendered a compromise verdict." *Collins v. Marriott Int'l, Inc*., 749 F.3d 951, 960 (11th Cir. 2014). When the "indicia of a compromise are present," the issues of liability and damages are inseparable. *Mekdeci v. Merrell Nat'l Labs.*, 711 F.2d 1510, 1514 (11th Cir. 1983); *see also Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 17 (2nd Cir. 1992) ("[A] new trial on damages only is not proper if there is reason to think that the verdict may represent a compromise among jurors."). Even when it suspects a damages award is too low, it must leave the verdict intact or order a full re-trial. *See* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 Harv. L. Rev. 771, 796 (1998). What courts must not do, though, is step into the role of the jury by keeping the liability portion of a jury's compromise and discarding its low monetary award.

CONCLUSION

For these reasons, *amici* request that the Court reverse the ruling below and find the expert testimony on the standard of care and causation inadmissible.

Respectfully submitted,

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Dated: May 3, 2022

CERTIFICATE OF COMPLIACE

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals in the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief, exclusive of the material omitted under Rule 500.13(c)(3), is 4358 words.

The brief was prepared with Microsoft Word 2016 using Times New Roman proportionally spaced typeface in 14-point font.

Dated: May 3, 2022

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Scott A. Chesin