J. A35040/12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DAVID WEART and PAMELA WEART, HIS WIFE,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
SURGICAL ASSOCIATES OF BRADFORD and NATHANIEL L. GRAHAM,	:	
	:	No. 1798 WDA 2011

Appeal from the Judgment entered October 26, 2011,
in the Court of Common Pleas of McKean County,
Civil Division, at No(s): 577 C.D. 2008.

BEFORE: PANELLA, ALLEN, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: January 31, 2013

Appellants, David and Pamela Weart (the Wearts), appeal from the judgment entered in favor of Appellees, the Surgical Associates of Bradford and Dr. Nathaniel L. Graham, after a jury found Appellees were not negligent in this medical malpractice action. Upon review, we vacate the judgment and remand for proceedings consistent with this memorandum.

In a jury trial held between April 4 - 8, 2011, the Wearts sought to show that in July 2006, Dr. Graham negligently performed hemorrhoid surgery on Mr. Weart, which resulted in continual fecal incontinence. On April 8, 2011, the jury returned a verdict in favor of Appellees. The Wearts filed a timely motion for post-trial relief, which was denied, after argument,

*Retired Senior Judge assigned to the Superior Court.

on October 13, 2011. The Wearts filed a timely notice of appeal. Both the Wearts and the trial court complied with Pa.R.A.P. 1925.

On appeal, the Wearts present five issues for our review:

> [1.] Is it reversible error in a medical malpractice case for a trial court to charge the jury with the "error in judgment" instruction following this Court's decision in ***Pringle v. Rapaport***[, 980 A.2d 159 (Pa. Super. 2009) (*en banc*),] notwithstanding any other components to the charge?
>
> [2.] Did the trial court abuse its discretion when it excluded the results of a diagnostic ultrasound test that occurred two weeks before trial, where the [Appellees] filed a supplemental expert report prior to trial that addressed the test results, and where the trial court thereafter entered a pre-trial order that *expressly allowed* use of those results as to Mr. Weart's internal sphincter muscle?
>
> [3.] Did the trial court improperly suggest to the jury that it had adopted the defense viewpoint of the accuracy of the Netter Medical Diagram when it admonished jurors during deliberations that they could not use the diagram as an accurate depiction of the anatomy of Mr. Weart's bowel?
>
> [4.] Did the trial court deprive [the Wearts] of an impartial trial when it impliedly adopted the defense viewpoint of the accuracy of the Netter Medical Diagram?
>
> [5.] Did the failure of Juror #4 during *voir dire* to acknowledge his prior relationship with Dr. Graham deprive [the Wearts] of their constitutional right to an impartial trial of fact for which an evidentiary hearing on that issue was warranted?

Wearts' Brief at 3 (capitalization and answers omitted).

We first consider the Wearts' argument that the trial court erred in giving the "error in judgment" instruction prohibited by ***Pringle v.***

Rapaport, 980 A.2d 159 (Pa. Super. 2009) (*en banc*).[1] The jury instruction at issue in ***Pringle*** was the following:

> Folks, if a physician has used his best judgment and he has exercised reasonable care and he has the requisite knowledge or ability, even though complication resulted, then the physician is not responsible, or not negligent. The rule requiring a physician to use his best judgment does not make a physician liable for a mere error in judgment provided he does what he thinks best after careful examination.
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> * * *

[1] A panel of this Court reaffirmed the holding in ***Pringle***, ***supra***, in ***Passarello v. Grumbine***, 29 A.3d 1158 (Pa. Super. 2011), reargument denied (Nov. 10, 2011). On May 23, 2012, our Supreme Court granted a petition for allowance of appeal to consider the following issues:

> (1) Whether the Superior Court violated longstanding precedent and deviated from existing law by granting [respondents] a new trial based on a purportedly faulty "error in judgment" jury instruction in circumstances where [respondents] failed to object to the instruction at trial, and, accordingly, failed to preserve the issue for appeal[?]
>
> (2) Whether the Superior Court contravened controlling precedent by not considering a trial court's jury charge in its entirety to determine whether a trial court's reference to the error-in-judgment concept was harmless and the charge in its entirety was a correct statement of law[?]
>
> (3) Whether the Superior Court contravened controlling precedent by relying on its decision in ***Pringle v. Rapaport***, [ ] 980 A.2d 159 (Pa. Super. 2009) to vacate a verdict in circumstances where the instruction given by the trial court was a proper statement of the law even assuming ***Pringle*** applied[?]

Passarello v. Grumbine, 44 A.3d 656 (Pa. 2012), *appeal granted*, 44 A.3d 654 (Pa. 2012) and *appeal granted*, 44 A.3d 656 (Pa. 2012). The appeal was argued before our Supreme Court in December 2012, and an opinion on the matter has not been filed.

> Physicians who exercise the skill, knowledge and care customarily exercised in their profession are not liable for a mere mistake of judgment. Under the law, physicians are permitted a broad range of judgment in their professional duties, and they are not liable for errors of judgments unless it is proven that an error of judgment was the result of negligence.

Pringle, 980 A.2d at 164 (emphases omitted). This Court reiterated our well-settled standard of review when reviewing a jury instruction.

> Our standard of review when considering the adequacy of jury instructions in a civil case is to determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. It is only when the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue that error in a charge will be found to be a sufficient basis for the award of a new trial.

Id. at 165 (internal quotations and citations omitted). We concluded "that the [error or mistake of judgment] instruction is inherently confusing for juries and thus has no place in medical malpractice cases." ***Id***. at 173. We reasoned that the "charge wrongly suggests to the jury that a physician is not culpable for one type of negligence, namely the negligent exercise of his or her judgment." ***Id***. Furthermore, the "charge wrongly injects a subjective element into the jury's deliberations." ***Id***. at 174. As such, this Court determined that the Pringles were entitled to a new trial.

Instantly, the jury instruction at issue reads as follows:

> A physician is not liable for mere mistakes of judgment. So long as a physician makes medical judgments with a degree of skill, knowledge, and care as that usually exercised in the medical profession, then he is not negligent. The mere fact that he erred in his diagnosis, and in this case it isn't a diagnosis, but in his performance of his duties, would not render him liable. It's if he

> does not meet the standard of care that is expected of a surgeon that he would be considered to be negligent.

N.T., 4/8/2011, at 102.

This instruction is nearly indistinguishable from the instruction given in ***Pringle***, ***surpa***, which entitled the Pringles to a new trial. Appellees contend this jury instruction is distinguishable when read in the context of the entire jury instruction, and "the trial court in this case made only a passing reference to a 'mere mistake of judgment.'" Appellees' Brief at 16. Appellees further suggest we consider the fact the language was read *sua sponte*, as neither party requested it, and request that we affirm the judgment entered in favor of Appellees.

Under the rationale set forth by this Court in ***Pringle***, ***supra***, we cannot agree with Appellees' argument. It is of no moment that neither party requested the instruction. The standard by which we must review the instruction is whether the "the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue." ***Pringle***, ***supra***. The issue is what the jury heard, not which, if any, party requested it. In this case, what the jury heard could, as in ***Pringle***, ***supra***, be confusing or misleading on a material point of law; accordingly, we are constrained to vacate the judgment and remand for a new trial.

Even if our Supreme Court should reverse ***Pringle***, ***supra***, we would still vacate the judgment in this case due to trial court error with regard to the Wearts' final issue. The Wearts contend they were deprived of their

right to a fair trial because of a tainted jury. Specifically, the Wearts assert that Juror No. 4 "did not disclose during *voir dire* that he had recently been a patient of Dr. Graham" which meant he was dishonest during *voir dire*. Wearts' Brief at 25. Thus, the Wearts assert they were "deprived of their constitutional right to an impartial jury." ***Id***.

> In addressing this contention, we observe that, [t]he purpose of the *voir dire* examination is to secure a competent, fair, impartial and unprejudiced jury. The Rules of Civil Procedure provide for *voir dire* to permit the parties to obtain pertinent information about potential jurors including any [r]easons the prospective juror believes he or she cannot or should not serve as a juror and [s]uch other pertinent information as may be appropriate to the particular case to achieve a competent, fair and impartial jury.

Wytiaz v. Deitrick, 954 A.2d 643, 646 (Pa. Super. 2008) (internal quotations and citations omitted).

In ***Commonwealth v. Rosario***, 182 A.2d 75 (Pa. Super. 1962), this Court held that incorrect answers to clear *voir dire* questions misled the appellant's counsel, and thus prevented an intelligent exercise of the appellant's right of peremptory challenge. In Rosario, the appellant contended that he questioned the prospective jurors about whether they were related to any law enforcement officers. After the verdict was rendered, the appellant's counsel learned that two of the chosen jurors were parents of members of the Pennsylvania State Police. The trial court denied the appellant's motion for a new trial. This Court ordered a new trial, reasoning that "incorrect answers to clear questions misled counsel, without

any fault or neglect on his part, and this prevented an intelligent exercise of the [appellant's] right of peremptory challenge." ***Rosario***, 182 A.2d at 76. Furthermore, this Court refused to "speculate as to whether the [appellant] was harmed in fact by this deprivation of his right." ***Id***. Thus, this Court ordered a new trial.

Here, at the argument on post-trial motions, counsel for the Wearts asserted that he was contacted by another juror by e-mail after the trial, who advised counsel that Juror No. 4 had stated that "Dr. Graham had saved his life and he felt indebted to him." N.T., 5/31/2011, at 3. Counsel further stated that to the best of his recollection, Juror No. 4 did not state that during *voir dire*.

The transcript reveals that during *voir dire*, the trial court asked the following question to the *venire*: "Any of you related by blood or marriage or close association to Dr. Nathaniel Graham? And there may be patients too." N.T., 4/4/2011, at 19. Numerous jurors responded to that question and the trial court then engaged each individually in off the record inquiry. ***Id***. at 19-22. Most of those jurors were identified by name, but two men and two women were not named or identified by number. ***Id***. at 21-22. None of the four unidentified jurors was dismissed from the jury at that time.

The trial court concluded that "[b]ecause these individuals were not named in the record, nor were they called upon, it is unclear whether Juror [No.] 4 was one of these individuals. Therefore, it is difficult for [the

Wearts] to prove that it was Juror [No.] 4 who failed to answer the [trial court's] question[.]" Trial Court Opinion, 10/14/2011, at 10. Thus, the trial court concluded an evidentiary hearing was not warranted in this case. We disagree.

First, we point out that it is inconceivable that the Wearts' counsel would not have asked the trial court to strike for cause any juror who was a patient of Dr. Graham. Even had the trial court not struck Juror No. 4 for cause, the Wearts' counsel would almost certainly have utilized a peremptory strike. As such, we hold that the trial court erred in not holding an evidentiary hearing surrounding the circumstances of Juror No. 4.

Accordingly, we vacate the judgment and remand for a new trial because of the error in judgment instruction. However, should the Supreme Court reverse ***Pringle***, ***supra***, we would still remand for an evidentiary hearing on the issue of juror taint.[2]

Judgment vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judge Allen concurs in the result.

[2] Due to our conclusions that the judgment should be vacated on two separate grounds, the Wearts' other issues on appeal are moot.