**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| MARILYN E. TAYLOR AND GREGORY L. TAYLOR<br><br>Appellants<br><br>v.<br><br>JOANNA M. DELEO, D.O.<br><br>Appellee | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br><br>No. 188 MDA 2012 |

Appeal from the Judgment Entered January 20, 2012
In the Court of Common Pleas of Dauphin County
Civil Division at No(s): 2009-CV-05258-MM

BEFORE: SHOGAN, J., LAZARUS, J., and OTT, J.

MEMORANDUM BY LAZARUS, J. Filed: January 25, 2013

Marilyn and Gregory Taylor (Taylors) appeal from the judgment entered in the Court of Common Pleas of Dauphin County, after a jury rendered a verdict for defendant Dr. Joanna M. DeLeo in the underlying medical malpractice case. The Taylors argue that the trial court committed several errors that should invalidate this result. We remand for a new trial.

The events that led to this medical malpractice suit unfolded over the course of many years and involved a series of laparoscopic procedures conducted on Mrs. Taylor that were intended to address chronic abdominal pain and severe acid reflux. N.T. Trial, 9/13/2011, at 225-74. Laparoscopic surgery, unlike more traditional "open" surgery, relies on making small incisions in the abdomen, which allow the insertion of surgical tools and of a

fiber optic camera by which the surgeon can see what she is doing. By not requiring large incisions, such surgery is less invasive and generally leads to faster recovery time. One known complication from a laparoscopic procedure is an abdominal adhesion, whereby scar tissue forms between internal organs and the wall of the abdominal cavity, which can cause pain and complications with digestion. Mrs. Taylor underwent three laparoscopic procedures in the early 1990s, before she was Dr. DeLeo's patient, which resulted in extensive adhesions.

Mrs. Taylor became Dr. DeLeo's patient in 1996, when Dr. DeLeo performed the first of what would be many surgical procedures. Doctor DeLeo performed a laparoscopic lysis (or cutting) of adhesions, removing the adhesions caused by her previous procedures, in an attempt to relieve Mrs. Taylor's chronic pain. Between March 15, 1999 and May 22, 2008, Dr. DeLeo performed a total of thirteen laparoscopic surgeries, although Mrs. Taylor claims she only received short-term relief from each procedure. On several occasions, Dr. DeLeo had to convert the laparoscopic procedure into a more traditional "open" surgery, or abandon the procedure all together, due to complications. On three occasions, Dr. DeLeo caused small tears, or enterotomies, in Mrs. Taylor's bowels, which she then repaired. ***Id.***

Four days after Dr. DeLeo performed her final surgery on Mrs. Taylor, Mrs. Taylor was admitted to the emergency room. She was suffering from tears in her colon, which allowed the contents of her bowels to leak into her

abdominal cavity. This had led to peritonitis and sepsis, potentially life-threatening conditions, that required multiple follow-up surgeries and, the Taylors claim, caused continuing debilitating effects.

The Taylors filed this lawsuit on theories of negligence and gross negligence, commencing the action by a Writ of Summons filed April 23, 2009. The central theory of the Taylors' case was that, while two or perhaps three laparoscopic procedures to lyse (or cut) the adhesions would have been reasonable, thirteen procedures constituted negligence and gross negligence, involving willful and wonton conduct, rendering Dr. DeLeo liable for punitive damages. The Taylors also claim that the final tears that required hospitalization and nearly resulted in Mrs. Taylor's death, must have occurred during the final procedure, and that Dr. DeLeo negligently failed to notice and repair the tears. Appellant's Brief, at 6.

Doctor DeLeo countered these claims by arguing that such procedures are a broadly accepted treatment for the chronic pain caused by abdominal adhesions, and that even repeated procedures are within a reasonable standard of care. Doctor DeLeo also presented evidence that the tears that led to Mrs. Taylor's hospitalization shortly following the final procedure must have occurred spontaneously and after the procedure, absolving her of any liability. N.T. Trial, 9/13/2011, at 428-33.

After a four-day trial, Judge Jeannine Turgeon issued a "two schools of thought" jury instruction, to which the Taylors objected. ***Id.*** at 633-34.

Judge Turgeon overruled the objection. ***Id.*** The jury found for Dr. DeLeo on all claims. On September 19, 2011, the Taylors filed Motions for Post-Trial Relief complaining of the same errors now raised on appeal. Taylors' Motions for Post-Trial Relief, 9/19/2011. On January 20, 2012, Judge Turgeon entered an order denying the Taylors' motions, and the Taylors filed this timely appeal.

The Taylors challenge the appropriateness and content of the "two schools of thought" jury instruction issued by the trial court.[1] In order to find a new trial is required based on a jury instruction, we must find legal error that is prejudicial to the appealing party. ***Reilly by Reilly v. Southeastern Pennsylvania Transp. Auth.***, 489 A.2d 1291, 1305 (Pa. 1985). If an instruction is erroneous, we then determine whether there was prejudice, inquiring if the faulty instruction "may have been responsible for the verdict." ***Chanthavong v. Tran***, 682 A.2d 334, 340 (Pa. Super. 1996). Where there was an erroneous instruction that "might have been responsible

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[1] The Taylors also appealed on three other grounds: that the trial court erred in precluding the cross examination of Doctor DeLeo about the "SAGES" Manual, a learned treatise; that the trial court erred in precluding the cross examination of one of Doctor DeLeo's expert witnesses on the report of the other, non-testifying, expert witness; and that the trial court erred in denying a new trial on the grounds that the jury verdict so shocks the conscience as to require a new trial. As we are remanding for a new trial on the first claim, we do not need to address in full these other issues. However, if we had ruled on these issues we would have found that the trial judge was within her discretion in denying the Taylors' motion on all three grounds.

for the verdict, a new trial is *mandatory*." ***Jones v. Montefiore Hospital***, 431 A.2d 920, 925 (Pa. 1981) (emphasis added).

We turn to the "two schools of thought" instruction. In medical malpractice suits, it is an absolute defense to a claim of negligence where a doctor chose one of two treatment options if expert testimony establishes that there is support for both options among competent medical authorities. ***Jones v. Chidester***, 610 A.2d 964 (Pa. 1992). As the ***Chidester*** Court explained, "a jury of lay persons is not to be put in a position of choosing one respected body of medical opinion over another when each has a reasonable following among the members of the medical community." ***Id.*** at 966.

This doctrine is applicable where there is evidence that reasonable numbers of respected doctors follow each school of thought, and that both schools are up-to-date and valid at the time of the treatment. See ***Tesauro v. Perrige***, 650 A.2d 1079 (Pa. Super. 1994) (rejecting "two schools of thought" defense where chosen treatment was supported only by out-of-date texts). Evidence need not be textual; the doctrine will apply where "the testimony of expert witnesses alone established that a considerable number of recognized and respected professionals advocate the course of treatment advocated by defendant." ***Gala v. Hamilton***, 715 A.2d 1108 (Pa. 1998). The Court has declined to "place a numerical certainty on what constitutes a 'considerable number.'" ***Chidester***, 610 A.2d at 40. However,

"[t]he writings and teachings of one individual are inadequate factual support for the proposition that a considerable number of professionals agree with the treatment." ***Tesauro***, ***supra*** at 1082.

The instruction was proposed by Dr. DeLeo and based on the Pennsylvania Standard Suggested Jury Instruction.[2] However, as the Taylors point out, Dr. DeLeo did not include the third paragraph of that standard instruction in her proposal, which states:

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[2] The instruction read at trial was:

> You have an argument that was presented to you that there were differing schools of thought as to how to approach the Plaintiff's conditions. Where competent medical authority is divided and it has to be competent medical authority that is divided, a physician will not be held responsible if in using their judgment they follow a course of treatment advocated by a considerable number of recognized and respected professionals in their given area of expertise. That is the "two schools of thought" doctrine.
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> The Defendant claims that in treating Plaintiff here she consciously chose to follow a course of treatment and she has the burden of proving by a fair preponderance of the evidence that a considerable number of recognized and respected professionals advocate the same course of treatment, that she was aware of these professionals advocating this same course of treatment at the time she treated the Plaintiff and that in treating the Plaintiff she consciously chose to follow their recommended course of treatment. So obviously if you find that the Defendant has met this burden of proof and she followed this other competent course of treatment, then that would not be negligence in this case.

N.T. Trial, 9/13/2011, at 624-25.

> These instructions apply only to the plaintiff's claim that [identify applicable theory of liability]. The plaintiff also contends that the defendant was negligent in [identify remaining theories of liability]. The "two schools of thought" doctrine has no application to [this other claim] [these other claims] and you may not consider the doctrine regarding [this other claim] [these other claims].

Pa.S.S.J.I. (Civ.) Section 14.50.

Judge Turgeon stated that the exclusion of this paragraph was an oversight. Trial Court Opinion, 10/23/2012, at 5-6 n.4. Both Judge Turgeon and Dr. DeLeo dismiss the failure to read this paragraph as irrelevant on the grounds that the Taylors only presented the theory that the use of the procedure itself constituted negligence, and thus there was no second theory of negligence to distinguish. ***Id.*** at 6-7; Appellee's Brief, at 20-22. The Taylors contend that their only theory of negligence was based on repeated use of the procedure. Appellant's Brief, at 6.

Thus, we must determine what theory or theories of negligence the Taylors actually advanced at trial in order to assess the appropriateness of the "two schools of thought" instruction. The Taylors argue that their theory of negligence was that repeated procedures beyond three to lyse the abdominal adhesions fell below a reasonable standard of care, and there is no support among respected practitioners for such a course of action that could justify the instruction. ***Id.*** In her opinion, Judge Turgeon agrees with this second assertion, stating "[t]here was not sufficient evidence to support

a two schools of thought jury instruction for this theory of negligence."[3] Trial Court Opinion, 10/23/2012, at 6. In fact, Dr. DeLeo's own expert, Dr. Pello, testified that he knew of no cases where a doctor had performed the procedure more than three times, nor of any learned treatise that advocated such an approach. N.T. Trial, 9/13/2011, at 440-41, 512.

However, Dr. DeLeo argues, and Judge Turgeon agrees, that the Taylors exclusively presented an argument at trial that the procedure itself constituted negligence. Appellee's Brief, at 12-13; Trial Court Opinion, 10/23/2012, at 6. Doctor DeLeo largely bases this claim on the jury interrogatory, which the Taylors had a part in creating, which asks the jury about only the four procedures in which Dr. DeLeo allegedly damaged Mrs. Taylor's bowel. Appellee's Brief, at 12-13. Additionally, the Taylors' expert witness, Dr. Steven Cohen, cast doubt on the efficacy of the procedure under any circumstances, testifying that he believed that cutting adhesions was counterproductive, as the operation could produce more adhesions. N.T. Trial, 9/13/2011, at 71-72. Doctor DeLeo argues that this testimony constitutes an argument against the procedure in general, suggesting this

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[3] Judge Turgeon emphatically *does not* state that she agrees with the factual assertions of the Taylors or that Dr. DeLeo was, in fact, negligent as the Taylors assert in their Supplemental Brief. Counsel for the Taylors has selectively quoted Judge Turgeon's summary from her opinion of the Taylors' own argument in an apparent attempt to convince this Court that Judge Turgeon agrees with the Taylors on the central questions of the case. Such distortions are transparent and counterproductive.

was the Taylors' only argument.[4] Appellee's Brief, at 13. If the Taylors' argument was based on the procedure itself being negligent, then the "two schools of thought" instruction would have been appropriate, as even Dr. Cohen testified that there was support among surgeons for the procedure, used only once, to treat chronic abdominal pain. N.T. Trial, 9/13/2011, at 114.

The Taylors bear some degree of responsibility for the confusion over what their actual claim was due to the way they developed their argument at trial. Regardless, their primary theory of negligence was based on repeated use of the procedure. The Taylors repeatedly contended that multiple surgeries formed the basis of their theory of negligence. While the Taylors' Second Amended Complaint does break the claims down by individual procedure, it refers to several of them as "unwarranted," which supports the theory that they were unwarranted in the context of multiple procedures. Second Amended Complaint, 8/4/2010, at ¶¶ 57, 93, 114. The Taylors also complained that Dr. DeLeo was guilty of "outrageous conduct in performing

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[4] An added source of confusion in this case is that the narrower argument, that the procedure is not universally accepted even when done only once, bolsters the Taylors' argument that conducting the procedure thirteen times was beyond any reasonable standard of care. Incongruously, by pointing out that the procedure itself is controversial, the Taylors were opening themselves to a potentially fatal "two schools of thought" jury instruction, as genuine controversy among experts and practitioners over a procedure essentially removes it from the purview of the jury.

thirteen operations over a period of eleven years with the last group of operations being five and seven months apart" each of which created more adhesions, which in turn required more surgery. ***Id.*** at ¶ 142. "Dr. DeLeo's numerous operations in the face of existing extensive adhesions preventing visual localizing of the operating area constituted a direct violation of all recognized standards of care." ***Id.*** at ¶ 143.

Moreover, the Taylors' trial strategy focused almost exclusively on the "repeated use" theory. Their counsel stated at various points that the focus of the complaint was multiple surgeries. For example, during closing arguments, counsel stated: "[n]ow you know what the case is about. Unnecessary surgery. Fourteen operations.[5] That is what the case is about." N.T. Closing Arguments, 9/16/2011, at 47. "We are here because except for the first two surgeries they were unnecessary. If you hadn't done surgery three through fourteen there wouldn't have been tears[.] There would not have been adhesions created to lyse adhesions . . . we are here because . . . surger[ies] two through fourteen were unnecessary." ***Id.*** at 50.

Additionally, the Taylors' expert witness, Dr. Steven Cohen, made the same case. "When you operate . . . for pain that is caused by adhesions, it is . . . counterproductive and it's dangerous[.] It's reckless and fool hearted

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[5] During the trial, the parties referred to either thirteen or fourteen operations. There were thirteen laparoscopic procedures on record during Dr. DeLeo's treatment of Mrs. Taylor.

to keep doing the same operation over and over and over . . . again and expect a different result." N.T. Trial, 9/13/2011, at 71-72. Doctor Cohen repeatedly underscored the point that there was an important distinction between a single procedure and multiple procedures. ***Id.*** at 114, 117, 120. The Taylors could have better crafted the jury interrogatories, but asking the jury about individual procedures cannot, on its own, convert a theory of negligence based on multiple procedures to one of negligence per procedure since the interrogatory could be read as asking if the individual procedures listed were negligent within the context of repeated applications of the procedure.

Thus, if the Taylors *only* presented the "repeated use" theory, the "two schools of thought" instruction was inappropriate, for as Judge Turgeon and the Taylors agree, it should not apply to multiple uses of the procedure. In the alternative, if we accept that the Taylors had advanced *both* theories of negligence, then Judge Turgeon should have included the third paragraph in her instruction to the jury. The Pennsylvania Supreme Court has held that where there are multiple theories of negligence, "a trial judge must specify on which allegation of negligence the 'two schools of thought' doctrine applies." ***Sinclair by Sinclair v. Block***, 633 A.2d 1137, 1141 (Pa. 1993). In either case, there was error.

To order a new trial, we must find that the error prejudiced the appealing party and "may have been responsible for the verdict."

***Chanthavong***, ***supra*** at 340. Here, there is a critical distinction between a single utilization of the procedure and its repeated use. The instruction Judge Turgeon read to the jury included the following language: "[w]hen competent medical authority is divided, a physician will not be held responsible if, in using his judgment, the physician followed a course of treatment advocated by a considerable number of recognized and respected professionals in his or her given area of expertise." N.T. Trial, 9/13/2011, at 624-25. This instruction, when paired with the jury interrogatory, that broke the claims out into individual procedures, may have led the jury to believe that if there were a credible case to be made for each procedure decontextualized from the entire course of treatment, then they must find that there was no negligence. Thus, the error may have contributed to the verdict and is, therefore, not harmless; and we must order a new trial. ***Montefiore Hospital***, 431 A.2d at 925.

Judgment reversed. Case remanded for new trial. Jurisdiction relinquished.