NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DANIELLE MALANEY, Appellant v. JOHN MISSANELLI, D.O., BRISTOL OBSTETRICS & GYNECOLOGY, FRANKFORD HOSPITAL – TORRESDALE DIVISON, TAMARA BAVENDAM, M.D., AND LLOYD ANDERSON, M.D., Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 461 EDA 2011

Appeal from the Judgment Entered May 5, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): February Term, 2002, No. 1654

BEFORE: BOWES, OTT, and JENKINS, JJ.

MEMORANDUM BY BOWES, J.: **FILED MAY 29, 2014**

Appellant Danielle Malaney appeals from the May 5, 2011 judgment entered in favor of Appellees in this medical malpractice case, and challenges the trial court's denial of her motion for new trial. This appeal follows two remands for evidentiary hearings to determine whether the integrity of the jury process was compromised when a dismissed alternate juror tendered an envelope containing a note and cash to a courtroom deputy for delivery to a deliberating juror. We find that the evidentiary hearings and depositions were sufficient to develop a complete factual record in accord with this Court's prior directives. Furthermore, we find no abuse of discretion in the trial court's finding that there was no extraneous

influence concerning a matter central to the case, and hence, no prejudice that would warrant the grant of a new trial. Thus, we affirm.

The facts of the underlying medical malpractice action were summarized as follows by a prior panel of this Court.

> In April 2001, Appellant went to her gynecologist complaining of abdominal pain and vaginal bleeding. Dr. John Missanelli, a defendant herein, diagnosed endometriosis and performed a hysterectomy at Frankford Hospital ("Frankford"), which also is a defendant. During the surgery, Dr. Missanelli sutured Appellant's bladder to her vagina, causing a vaginal tear. On June 8, 2001, seven days after her discharge following surgery, Appellant presented to Frankford's emergency room with vaginal bleeding. Urologist Dr. Tamar Bavendam, a defendant, performed the surgery to repair the vaginal tear on June 27, 2001. Appellant also sued the anesthesiologist, Dr. Lloy Anderson, who participated in the June 27, 2001 operation. When Appellant underwent surgery to correct the condition, her legs were placed in a position called a dorsal lithotomy. Following surgery, Appellant suffered nerve damage and experienced severe upper leg pain and paralysis in her legs which was diagnosed as being caused by her leg placement during the operation. While some of her symptoms have resolved, she still suffers from pain, weakness, and instability. The case proceeded to a jury trial, where a verdict in favor of all defendants was reached.

Malaney v. Missanelli, 927 A.2d 664 (Pa.Super. 2007) (unpublished memorandum at 2-3).

In her first appeal, Ms. Malaney criticized the trial court's failure to order a new trial where it was disclosed that an envelope was delivered by the court's tipstaff to a juror as deliberations were commencing. The facts were as follows:

> After the jury was instructed in this matter, an alternate juror was discharged and left the courtroom. Appellant and her

> attorney personally observed the alternate juror return to the courtroom about two hours into deliberations and hand an envelope to the trial court's deputy, Lou Manzoni. Posttrial Motion Argument, 6/7/05, at 12. Appellant and the attorney then watched the alternate juror pause to whisper in Dr. Bavendam's ear as the alternate juror was leaving the courtroom. ***Id***. Mr. Manzoni told Appellant's counsel that the envelope was intended for a deliberating juror but assured counsel that he would not give the juror the envelope until after a verdict was reached. Counsel was not aware of the envelope's contents at that point.
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> After the jury verdict was rendered and the jury was discharged, Mr. Manzoni told Appellant's counsel that he had given the envelope, which contained both a note and "a lot of cash," to one of the deliberating jurors while the jury was still deliberating and that the deliberating juror became emotional after receiving the envelope. ***Id***. at 14-15. Mr. Manzoni explained that he changed his mind about waiting to give the juror the envelope until after the deliberations were concluded because the envelope contained money and that he did not want to be responsible for it.
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> The trial court was told by Mr. Manzoni informally that the alternate juror had given her jury pay to the deliberating juror because the deliberating juror was young and either had a young child or was pregnant. ***Id***. at 3, 16. The contents of the note were not revealed because there is no indication that Mr. Manzoni ever read it. The court concluded that no impropriety had occurred and declined to hold an evidentiary hearing.

Malaney, ***supra*** at 3-4.

This Court found on appeal that the note constituted "a **potentially** improper outside influence," but that the record was not sufficiently developed to determine whether a new trial was warranted. ***Malaney***, ***supra*** at 5. (emphasis original). We remanded for an evidentiary hearing, a procedure sanctioned in similar circumstances by our Supreme Court in ***Pratt v. St. Christopher's Hospital***, 866 A.2d 313 (Pa. 2005). We held

that, "Once the nature of the communication is ascertained, the trial court must decide, based on ***Pratt***, ***supra***, whether a new trial should be awarded." ***Malaney***, ***supra*** at 7.

An evidentiary hearing was conducted on October 3, 2007. Louis Manzoni, tipstaff to Judge DiVito, testified first, followed by Ms. Ann D. Hambrook, the discharged alternate juror who authored the note. In addition, two investigators and six jurors provided testimony. Mr. Manzoni testified that he was on the phone when one of the discharged alternate jurors, a woman, approached him. N.T., 10/3/07, at 12. He recalled that it was lunchtime and the jury had not yet begun to deliberate. She handed him an envelope "for juror number three or four." ***Id***. When he inquired what it contained, she responded that it was money. He did not know how much cash was in the envelope.

According to Mr. Manzoni, he telephoned the Judge, reported that he had an envelope with money in it from an alternate juror for a sitting juror, and advised that he did not want to be responsible for it. ***Id***. at 14. Mr. Manzoni advised plaintiff's counsel that he had money for juror number four and that he had the judge's approval to give it to her. ***Id***. at 15. Mr. Manzoni explained that he gave juror number four the envelope before deliberations commenced and advised her that it came from the alternate juror. Juror number four opened the envelope in front of him and read the card aloud. His recollection of its contents was that the author described

herself as complaining about jury duty, while juror number four did not complain, "and some other stuff that I don't recall, and she wanted her to have the money." ***Id***. at 17. Juror number four took the card and envelope containing the cash into the jury deliberation room as the jury was sitting down to lunch.

Ms. Ann Hambrook testified that she was an alternate juror on the case in 2004. She could not recall anything about the case or whether she was dismissed before or after the court charged the jury. After she was discharged, she cashed her $250 check for jury duty at Bank of America, placed it in a plain envelope, and handed it to the gentleman who was at the door of the jury room. She asked that he give it to a certain young female juror, and she described the woman. She may have provided the woman's name. Ms. Hambrook instructed him not to identify her to the recipient. Ms. Hambrook explained that she admired the young woman who had small children, worked nights, and who was nice about serving on the jury, while she herself was "quite crabby about having to be here." ***Id***. at 31. She added, "So I got embarrassed and I thought she was such a nice person, I wanted to do something nice for her." ***Id***. Her sole contact was the man at the door to the jury room and she specifically denied speaking to anyone at counsel table. Ms. Hambrook apologized for causing trouble, as "it certainly was not intended." ***Id***.

Benjamin Katz, the foreperson on the jury, testified that he recalled an envelope containing cash and a note. The note was read aloud to everyone who was in the room at the time. His recollection was that the older woman mentioned therein that she enjoyed being with everyone and she did not need the jury pay. She had befriended the young woman juror who had one or two children, and wanted her to have the money. He remembered that others in the room were touched by the letter and the gift. ***Id***. at 37.

Karen Krzesniak recalled a note and perhaps a check. She was told it was from the older woman who was the alternate juror. ***Id***. at 41. She did not recall it being read aloud or passed around. "Everyone just assumed it was a nice note because she [the recipient] had tears in her eyes and stuff." ***Id***. at 42.

Lisa Bullock was unaware of any note or envelope in the jury room and did not hear any conversations about it. ***Id***. at 47. Walter Smilowski recalled that at some point after the alternate juror was dismissed, an envelope containing a note and cash was in the deliberation room. The juror who received the note opened it while seated at the table and read it to the rest of the jurors. He believed that the note referenced the juror's situation "moneywise," and the fact that she had children and speculated that perhaps she not being compensated by her employer for her jury service time. He characterized the note and gift as a kind gesture from the alternate juror who did not need the money. ***Id***. at 52. Mr. Smilowski described the

recipient's reaction as "emotional" and "she cried," and the gesture appeared to have come as a surprise to her. ***Id***. He thought some of the other jurors had similar reactions but did not recall anyone commenting.

Raymond Burks II could not recall an envelope in the room but remembered a card and a discussion about it that occurred after the jury had reached a decision. ***Id***. at 57. He said everybody thought the gesture was very nice.

Appellant offered the testimony of Stephen Koerper, a claims investigator who was asked by plaintiff's counsel to serve subpoenas on jurors. He prepared a report summarizing his efforts to locate and serve the jurors, which was made part of the record. Plaintiff's Exhibit P-2. He made multiple attempts to personally serve the recipient of the envelope, Audrey Foster-Poindexter, but he was unsuccessful. However, his brother Edward left a copy of the subpoena in her mailbox after she purportedly did not attend a pre-arranged meeting with him scheduled for 6:30 pm on September 29, 2007.

Mr. Koerper was unsuccessful in making contact with or serving Tracey Jenkins-Smith. He described his efforts to make contact with Cynthia Thomas, Allison Hatchett, Andrew Gimblet, Jacqueline Grant, and Herbert Momplaisir. The investigator admittedly did not contact the court for any assistance in locating any of these jurors. ***Id***. at 71.

Edward Koerper, Jr. testified that he initiated his attempts to locate the jurors after discussions with plaintiff's counsel in late May or early June of 2007. He ultimately located Ms. Foster-Poindexter and spoke to her on July 7, 2007. He did not serve her personally, but he left a subpoena in her mailbox and messages on her answering machine with the date, time and location of the hearing.

Bradley T. Beckman, Esquire, plaintiff's trial counsel, appeared as a witness. He testified that Mr. Manzoni told him that the dismissed alternate juror wanted to permit juror number four to collect her pay for jury service. Mr. Manzoni advised her that she had to retrieve her own check. Mr. Manzoni assured counsel that he was not going to give anything to a sitting juror. Mr. Beckman testified that Ms. Hambrook returned to the courtroom after she was discharged. All of the lawyers and their clients were present. He stated that she approached Mr. Manzoni and she was carrying a greeting-card-size envelope. The two conversed, she gave Mr. Manzoni the envelope, and, as she was leaving, she stopped at the defense table and whispered something to Dr. Bavendam. Then she left the courtroom.

Attorney Beckman testified that, one half-hour to an hour later, while in the hall awaiting a verdict, he asked Mr. Manzoni whether he was going to give the envelope to the juror during deliberations. Mr. Manzoni told him that he was not going to give the envelope to the juror while the jury was deliberating. ***Id***. at 85-6. Mr. Beckman stated that he subsequently learned

from Mr. Manzoni that he delivered the envelope, that it contained a note and "a lot of cash," and that Mr. Manzoni gave it to the juror during deliberations. At that point, Mr. Manzoni stated that he would get the judge, and the judge telephoned plaintiff's counsel shortly after that exchange. Following their conversation, counsel prepared a letter requesting a new trial and an evidentiary hearing on the matter due to the appearance of impropriety. ***Id***. at 88. Counsel subsequently filed a formal petition for rule to show cause why there should not be an evidentiary hearing, but no rule issued.

At the close of the evidentiary hearing, the court permitted the parties to file briefs in support of their respective positions. On January 17, 2008, the trial court formally denied the motion for new trial and Ms. Malaney appealed to this Court a second time. A panel of this Court entered a judgment order dated February 18, 2009, remanding again and instructing the trial court to comply fully with the prior panel's directive. Specifically, it found the record incomplete since the trial court did not recall all of the jurors from the trial. ***Malaney v. Missanelli***, 970 A.2d 489 (Pa.Super. 2009) (judgment order at 2). Thus, this Court concluded that the trial court could not have determined whether there were any prejudicial effects on the deliberations that would warrant a new trial.

Following the second remand, the trial court entered an order directing the plaintiff to provide the names and addresses of the participating jurors.

Counsel for plaintiff provided all of the information in his possession regarding the jurors' identities and last known addresses. Counsel for Appellee advised the court that he was able to obtain addresses for the jurors plaintiff had been unable to locate, and he supplied those addresses to the court. The trial court issued subpoenas for all jurors and the one alternate juror, commanding them to appear at an evidentiary hearing on February 8, 2010. Two jurors and the alternate juror appeared and testified, two of whom had previously testified at the October 3, 2007 evidentiary hearing.

The trial court personally questioned these witnesses. Mr. Burks reiterated the substance of his prior testimony and advised the court that his verdict was not in any way influenced by what he saw or heard in regards to the envelope. N.T., 2/8/10, at 8-9. Mr. Katz confirmed his prior testimony that he personally saw Mr. Manzoni hand an envelope to a young woman juror and that she read the note to the jury and told them there was money in the envelope. He stated to the court that neither the note nor the cash in any way influenced his verdict and that his verdict was based solely on the evidence adduced at trial. ***Id***. at 12. Mr. Katz testified further that the substance of the note was that the recipient could use the money more than the giver. ***Id***. There was nothing in the note regarding the case. "It was all personal." ***Id***. at 13-14.

Ms. Cynthia Thomas was sworn in as a witness. She testified that she had no recollection of any note or its contents. ***Id***. at 16. In response to the court's inquiry of whether her verdict was based solely upon the evidence at trial, she responded "Absolutely." ***Id***. She stated that nothing outside the evidence influenced her verdict. ***Id***.

By order dated June 8, 2010, the trial court granted a defense motion to permit depositions of the remaining jurors. During the forty-five-day period allocated for this purpose, on July 22, 2010, the parties deposed Audrey Foster-Poindexter, the recipient of the envelope. Ms. Foster-Poindexter acknowledged that she received a card, not a note, and that it contained the jury pay of the alternate juror. Deposition of Audrey Foster-Poindexter, 7/22/10, at 6. She recalled that the sender thanked her because she came in every day without complaint. Ms. Foster-Poindexter started to read it aloud to the other jurors, but because she started to cry, someone else finished reading it. ***Id***. The card was handed to her by the person who escorted the jury in and out of the courtroom. She thought it was a nice gesture, and posited that she "must have touched her in some way because she gave me her pay." ***Id***. at 8. Ms. Foster-Poindexter confirmed that she received the card before the verdict and that the cash in it totaled $211. It was a thank you, and the card suggested that she give the money to her daughter. The card did not contain any reference to the case or suggest how she should vote. Ms. Foster-Poindexter explained that

she did not know the alternate juror's name, what she did for a living, her financial means, or her feelings about the particular case, or malpractice cases in general. ***Id***. at 9. At the time, she was only working one job, having taken a leave of absence from her other job so that she could be home with her daughter. ***Id***. at 9-10. She had no contact with the alternate juror after that day. It was after the deposition concluded that counsel for Ms. Malaney placed on the record that, as Ms. Foster-Poindexter was leaving the room, she made a comment that she felt sorry for the plaintiff and she "thought the guy was guilty and he should have performed the blue dot test." ***Id***. at 23. Counsel for Appellee Missanelli objected to counsel's testimony. ***Id***. at 25. Other counsel placed on the record their beliefs that further inquiry into the juror's thought processes was prohibited.

The court subsequently granted the defendants' request to keep the record open to permit them to locate and depose additional jurors. Andrew Gimblet, Alison Hatchet, and Herbert Momplaisir were deposed on September 15, 2010.[1] Neither Ms. Hatchet nor Mr. Gimblet recalled the incident. Mr. Momplaisir recalled a woman reading a note aloud from an older woman on the jury who had been discharged, and that the note

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[1] The trial court acknowledged the three depositions and concluded there was no evidence that the card and money had any prejudicial effect on the jury. The transcripts of those depositions are not in the certified record, but since they were supplied in the reproduced record, and their substance is not in dispute, our ability to review this case has not been impeded.

explained that she had cashed her check and wanted to give the money to the young woman to assist in the care of her young child. Ultimately, two jurors were never located.

On November 9, 2010, the trial court denied Ms. Malaney's motion for new trial, and judgment in favor of Appellees was entered on May 5, 2011. Ms. Malaney filed the instant appeal, and she presents one issue for our review:

> "Whether this Court should grant plaintiff a new trial because the trial court's failure to comply with this Court's directive that the trial court must recall *all* of the jurors, and the resulting inability of either the trial court or this Court to determine what effect the outside communication and payment to a deliberating juror during jury deliberations had on all deliberating jurors, has caused such fundamental unfairness to plaintiff that it can only be remedied by granting a new trial?"

Appellant's brief at 2.

In reviewing an order denying a motion for a new trial, our standard of review "is whether the trial court committed an error of law, which controlled the outcome of the case, or committed an abuse of discretion. A trial court commits an abuse of discretion when it rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." ***Polett v. Public Communs., Inc.***, 83 A.3d 205, 214 (Pa.Super. 2013) (quoting ***Mirabel v. Morales***, 57 A.3d 144, 150 (Pa.Super. 2012) (internal citations and quotation marks omitted)). We find no abuse of discretion for the reasons that follow.

This Court relied upon ***Pratt v. St. Christopher's Hospital***, 866 A.2d 313 (Pa. 2005), in initially remanding the instant case for an evidentiary hearing. In that case, a juror wrote a letter to the court after the trial and reported that certain jurors had discussed the medical issues in the case with outside medical professionals in order to resolve the issue of negligence. The court shared the letter with counsel, and plaintiff's counsel filed a motion for post-trial relief *nunc pro tunc* based upon the letter. The trial court denied the motion without a hearing, concluding that under the "no impeachment" rule, ***Carter v. United States Steel Corp.***, 604 A.2d 1010, 1013 (Pa. 1992), the jurors were incompetent to testify about what occurred during deliberations. The Supreme Court reversed and remanded for an evidentiary hearing, holding that such a hearing was necessary once a potentially improper outside influence had been revealed.

The ***Pratt*** Court acknowledged the "no impeachment" rule, *i.e.*, that generally, a juror is incompetent to testify post-verdict about what occurred during deliberations. ***Carter***, ***supra.*** However, a narrow exception has been carved out that permits post-verdict "testimony of extraneous influences which might have affected [prejudiced] the jury during deliberations." ***Id***. This exception permits a juror to testify regarding "the existence of an outside influence, but not as to the effect this outside influence may have had on deliberations." ***Id***. "Under no circumstances may jurors testify regarding their subjective reasoning processes." ***Id***. This

exception to the "no impeachment" rule is embodied in Pa.R.E. 606(b), which provides:

> Upon an inquiry into the validity of a verdict, . . . a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions in reaching a decision upon the verdict or concerning the juror's mental processes in connection therewith, and a juror's affidavit or evidence of any statement by the juror about any of these subjects may not be received. **However, a juror may testify concerning whether prejudicial facts not of record, and beyond common knowledge and experience, were improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.**

Pa.R.E. 606(b) (emphasis supplied).

Thus, the ***Pratt*** Court held that an evidentiary hearing should be conducted to ascertain the substance of the information received by jurors and to enable one to assess whether it prejudiced the deliberations. In making the prejudice determination, the Court sanctioned the use of the considerations articulated in ***Carter***, ***supra***: "(1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; (2) whether the extraneous influence provided the jury with information they did not have before them at trial; and (3) whether the extraneous influence was emotional or inflammatory in nature." ***Pratt***, ***supra*** at 317 (quoting ***Carter***, ***supra*** at 1016-17).

The thrust of Appellant's claim on appeal is that the trial court, despite two remands, did not strictly comply with this Court's previous mandates, and that a new trial is required. In sum, Ms. Malaney's position is that,

anything short of an in-court evidentiary hearing eliciting testimony from all twelve jurors and the alternate juror was insufficient to create a satisfactory record for purposes of her jury-tampering claim, and that only a new trial can alleviate the appearance of impropriety. She maintains that due to the fact that the trial court only observed the demeanor of six of the original thirteen jurors, and two of the jurors did not respond, the evidentiary hearing was inadequate.

We disagree and find the record sufficiently complete to permit the trial court to make the requisite determination. The trial court went to considerable lengths to comply with this Court's directives, and did so comply. The court caused thirteen subpoenas to be issued and charged the sheriff with the task of serving them. When only three jurors appeared, the trial court held the matter open to permit the sheriff to achieve personal service upon the remaining jurors. When the additional time still did not produce more jurors, the court agreed that sworn depositions would suffice. Depositions of four jurors were subsequently taken. Thus, sworn testimony that was subjected to cross-examination was procured from eleven of the thirteen jurors who were involved.

Furthermore, all of the evidence either adduced at evidentiary hearings or by deposition confirmed that the extraneous communication was simply a card conveying the alternate juror's appreciation to juror number four and the cash she received as compensation for serving on the jury. The

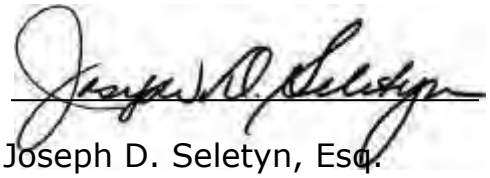
communication was wholly unrelated to the merits of the case. The trial court concluded, and we agree, that the card and money did not influence the verdict. We find no abuse of discretion in the denial of a new trial on this basis.

Nor do we find any merit in Ms. Malaney's contention that, if Ms. Foster-Poindexter had been examined in court rather than via deposition, her off-the-record remarks following the conclusion of her testimony would have been heard by the court and pursued. Any such inquiry would have clearly been foreclosed by the "no impeachment" rule. ***Pratt***, ***supra***.

Ms. Malaney, the moving party herein, had the burden of proving prejudice. ***Pratt***, ***supra***. The record does not support such a finding, and the trial court did not abuse its discretion in so concluding.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/29/2014