[J-19-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

THOMAS BRUCKSHAW, AS ADMINISTRATOR OF THE ESTATE OF PATRICIA BRUCKSHAW AND THOMAS BRUCKSHAW, IN HIS OWN RIGHT AS HUSBAND OF DECEDENT PATRICIA BRUCKSHAW	:	No. 47 EAP 2011
	:	Appeal from the Judgment of Superior Court entered on 9/17/2010 (reargument denied 11/22/2010) at No. 2638 EDA 2008, affirming the Judgment entered 9/12/2008 in the Court of Common Pleas, Philadelphia County, Civil Division, at No. 2940 March Term, 2005.
v.	:	
THE FRANKFORD HOSPITAL OF THE CITY OF PHILADELPHIA AND THE FRANKFORD HOSPITAL OF THE CITY OF PHILADELPHIA T/A FRANKFORD HOSPITAL TORRESDALE DIVISION AND FRANKFORD HEALTH CARE SYSTEM, INC. ANDJEFFERSON HEALTH SYSTEM, INC. AND BRIAN P. PRIEST, M.D. AND RANDY METCALF, M.D.	:	ARGUED: March 6, 2012
APPEAL OF: THOMAS J. BRUCKSHAW	:	

CONCURRING AND DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: December 18, 2012**

I agree generally with the majority's holding that a juror can only be removed by the trial court, on the record, with notice to the parties, and for cause. If there are exceptions to this rule, they are not presented to us here. I do not agree with the majority's conclusion that, as prejudice cannot be demonstrated, a new trial must be the remedy, or that "[t]he mischief of uncertainty is what distinguishes this case from those where we have required a showing of prejudice." Majority Slip Op., at 23.

There is uncertainty because there is no record, and there is no record because appellant failed to request a hearing for the purpose of determining what happened and why. Under the majority's pronouncement, the absence of a record results in victory for the very party who bears the burden of creating one. If the absence of a record absolves the losing litigant of the burden of proving prejudice, the losing party will never want to make a record.

It may be that a hearing would have revealed little, and conversely, it may have revealed a lot.[1] It may have revealed matters with relevance beyond this case, for as the majority properly notes, "we cannot discern the cause of this jury irregularity." Id., at 24. Indeed, we cannot tell if there were nefarious or innocent motivations, or any motivations at all. At the very least, a hearing would avoid reviewing courts having to speculate about the specifics of what "apparently" happened, whether a postulated but unverified "court officer" actually "made the substitution," or whether it was done by the jurors themselves. These are factual speculations on which pronouncements of legal principles should not be based.

I cannot support "distinguishing" this case so as to excuse the absence of prejudice we would otherwise require, on the basis of an incomplete record, when the very reason for that incomplete record lies at the feet of the party who is rewarded thereby. The majority's holding that a new trial is appropriate when there is no record provides every incentive to the complaining party to maintain the "mischief of uncertainty"

---

[1] The record also lacks an explanation of why appellant was excused from the normal penalties of waiver. Without a hearing, no analysis exists that would excuse the want of a timely objection to the interloping foreman before the verdict was announced and recorded, beyond the acknowledgement that "no one noticed." There were complications of seating that made it more difficult to keep track of which juror was which, but the relative difficulty of executing a duty does not excuse that duty. Surely we cannot endorse the concept that no one had an obligation to pay attention before the jury was excused.

— we should not award a new trial in such circumstances absent a showing of actual prejudice resulting from the substitution. In the end, a hearing may have led to a new trial, but such a result should not be the de facto result of appellant avoiding that hearing. As such, I must dissent.