NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DANIEL S. AND LAURA WHITE, Individually and as Parents and Guardians of C.W., a minor,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
RICHARD BEHLKE, M.D., AND OB-GYN CONSULTANTS, LTD., AND COMMUNITY MEDICAL CENTER HEALTH CARE SYSTEMS d/b/a COMMUNITY MEDICAL CENTER and/or COMMUNITY MEDICAL MEDICAL CENTER,	:	
APPEAL OF: RICHARD BEHLKE, M.D., AND OB-BYN CONSULTANTS, LTD.	:	
Appellants	:	No. 1213 MDA 2009

Appeal from the Judgment entered on June 29, 2009
in the Court of Common Pleas of Lackawanna County,
Civil Division, No. 03-CV-2663

BEFORE: STEVENS, MUSMANNO, JJ. and McEWEN, P.J.E.

MEMORANDUM: FILED: October 12, 2010

Richard Behlke, M.D. ("Dr. Behlke") and Ob-Gyn Consultants, Ltd. ("Ob-Gyn") (collectively "Defendants"), appeal from a judgment in favor of Daniel S. and Laura White, and their minor child, C.W. (collectively "Plaintiffs"). We affirm.

The pertinent facts of this case are fully set forth in the trial court Opinion, and we adopt that statement of facts herein by reference. ***See*** Trial Court Opinion, 6/17/09, at 2-12.

After the jury rendered its verdict in favor of Plaintiffs, Defendants filed post-trial Motions, and the Plaintiffs filed a Petition for delay damages. The trial court denied Defendants' post-trial Motions and granted the Plaintiffs' Petition for delay damages. The trial court molded the verdict to reflect a total of $27,352,195.21 in favor of Plaintiffs. Judgment was entered, and Defendants then filed this timely appeal. The trial court requested that Defendants file a concise statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). The Defendants complied in a timely fashion.

The Defendants raise the following issues on appeal:

> 1. Whether the trial court erred in denying [Defendants'] request for JNOV where (i) Plaintiffs' experts admitted that they could not opine as to the amount of physical or mental injury Plaintiffs' child sustained as a result of a naturally-occurring *in utero* hemorrhage before his mother sought medical care and (ii) Plaintiffs' experts, therefore, could not opine that *any physical or mental injury* Plaintiffs' child sustained actually was caused or was increased by the physicians' conduct?
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> 2. Whether the trial court violated Pa.R.C.P. 221 and abused its discretion by allowing Plaintiffs, after the close of evidence and closing arguments, to exercise an additional peremptory strike to remove a seated juror and to substitute an alternate in her place?
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> 3. Whether the trial court erred and/or abused its discretion in instructing the jury on an increased risk of harm theory where Plaintiffs' experts failed to offer any quantification of the chances for a particular, more successful, outcome had Defendants performed differently?

> 4. Whether the trial court erred and/or abused its discretion by permitting expert testimony from Plaintiffs which: (i) clearly was lacking in the necessary level of factual foundation and required degree of medical certainty; (ii) was presented by an expert unqualified under MCARE and (iii) was well beyond the fair scope of a medical expert's report and whether a new trial should be granted or the verdict reduced on weight of the evidence grounds?

Brief for Appellants at 5 (emphasis in original).[1]

The Defendants first contend that they are entitled to judgment n.o.v. because the Plaintiffs failed to prove causation under either a proximate cause analysis or under a theory of increased risk of harm. The Defendants assert that the Plaintiffs failed to prove causation under a proximate cause theory because their expert, Dr. Curtis Cetrulo ("Dr. Cetrulo"), admitted that he could not quantify, nor could anyone in the medical or scientific community, the amount of harm that C.W. sustained after Mrs. White arrived at the hospital and was seen by Dr. Behlke.

Defendants contend that Plaintiffs failed to prove causation under a theory of increased risk of harm. Defendants assert that Plaintiffs presented no evidence that, where a patient suffers a massive fetal/maternal hemorrhage, certain injuries can be avoided if certain specific action is taken.

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[1] The last part of Defendants' issue No. 4, *i.e.*, "whether a new trial should be granted or the verdict reduced on weight of the evidence grounds," was not raised in Defendants' Rule 1925(b) Concise Statement. Therefore, that issue is waived. ***See Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998).

"When considering a challenge to the trial court's ruling denying a motion for judgment n.o.v., we must view the evidence in the light most favorable to the verdict winner and give [the verdict winner] the benefit of every reasonable inference arising therefrom while rejecting all unfavorable testimony and inferences." ***Graham v. Campo***, 990 A.2d 9, 13 (Pa. Super. 2010). "We will reverse the denial of a motion for j.n.o.v. only if the trial court abused its discretion or made an error of law that controlled the outcome of the case." ***Id.***

> There are two bases upon which a judgment N.O.V. can be entered: one, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant.

Lanning v. West, 803 A.2d 753, 756 (Pa. Super. 2002).

We have completely reviewed the record and the applicable law with regard to the Defendants' claim that they are entitled to judgment n.o.v. After review, we conclude that this claim lacks merit. The trial court has thoroughly discussed this claim, and we affirm on the basis of the well-reasoned trial court Opinion with regard to this issue. ***See*** Trial Court Opinion, 6/17/09, at 13-22, 26-27.

The Defendants next contend that they are entitled to a new trial for various reasons. First, the Defendants assert that the trial court erred by allowing Plaintiffs to substitute an alternate juror after the close of evidence.

"[W]hen presented with a challenge involving a motion for a new trial, we will reverse a trial court's decision to deny the motion only if the trial court abused its discretion." ***Graham***, 990 A.2d at 13. "An abuse of discretion exists when the trial court has 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." ***Id.***

> The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.

Harman ex rel. Harman v. Borah, 756 A.2d 1116, 1122 (Pa. 2000) (citation omitted).

"The substitution or withdrawal of a juror is within the sound discretion of the trial judge, whose decision will not be reversed in the absence of an abuse of that discretion." ***Starr v. Allegheny Gen. Hosp.***, 451 A.2d 499, 506 (Pa. Super. 1982). Rule 221 of the Pennsylvania Rules of Civil Procedure provides as follows with regard to peremptory challenges in the jury selection process:

> **Rule 221. Peremptory Challenges**
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> Each party shall be entitled to four peremptory challenges, which shall be exercised in turn beginning with the plaintiff and following in the order in which the party was named or became a party to the action. In order to achieve a fair distribution of challenges, the court in any case may

> (a) allow additional peremptory challenges and allocate them among the parties;
>
> (b) where there is more than one plaintiff or more than one defendant or more than one additional defendant, consider any one or more of such groups as a single party.

Pa.R.C.P. 221.

In the instant case, the procedure that led to the issue raised by Defendants regarding juror substitution is thoroughly described by the trial court in its Opinion. ***See*** Trial Court Opinion, 6/17/09, at 27-29. We adopt that discussion for purposes of this Memorandum.

After reviewing the record, the parties' arguments, and the applicable law, we conclude that the trial court did not abuse its discretion in denying Defendants' Motion for a new trial on this basis. We agree with the reasoning of the trial court and affirm on the basis of its Opinion with regard to this issue. ***See*** Trial Court Opinion, 6/17/09, at 29-32.[2, 3]

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[2] We note that we discourage the procedure the trial court employed on the last day of trial to substitute a juror.

[3] We also note that the recent decision of this Court in ***Lockley v. CSX Transportation, Inc.***, 2010 PA Super 167 (No. 1292 EDA 2009, filed Sept. 13, 2010), is distinguishable as that case involved the trial court's striking of a juror for cause after the juror was empaneled. ***Id.*** at 10. The present case involves the substitution of an alternate juror for a juror who had previously been struck via a peremptory challenge. Further, the Court in ***Lockley*** determined, as did the trial court here, that no prejudice had been established in the removal of the juror and the substitution of an alternate. ***Id.*** at 13.

Defendants next contend that a new trial should have been granted because the trial court erred in instructing the jury that Dr. Behlke could be liable if his conduct increased the risk of harm that Plaintiffs had sustained. Defendants refer to their previous argument regarding increased risk of harm in connection with their argument concerning judgment n.o.v.

"Our standard of review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error of law which controlled the outcome of the case." ***Underwood ex rel. Underwood v. Wind***, 954 A.2d 1199, 1204 (Pa. Super. 2008).

> Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error. In reviewing a trial court's charge to the jury we must look to the charge in its entirety.

Id.

After reviewing the record pursuant to our standard of review, we conclude that the trial court did not err in denying Defendants' request for a new trial on this basis. We affirm on the basis of the trial court's well-reasoned Opinion with regard to this issue. ***See*** Trial Court Opinion, 6/17/09, at 42-47.

Defendants next assert that Plaintiffs' experts' testimony was totally lacking in factual foundation.[4] ***See*** Brief for Appellants at 32. The Defendants state this argument in conclusory fashion and do not explain how the experts' testimony was lacking in factual foundation, nor do they provide any appropriate citation to the record. Therefore, this issue is waived. ***See*** Pa.R.A.P. 2119 (providing that, "[i]f reference is made to the pleadings, evidence, charge, opinion or order, or any other matter appearing in the record, the argument must set forth, in immediate connection therewith, or in a footnote thereto, a reference to the place in the record where the matter referred to appears"); ***Bombar v. West American Ins. Co.***, 932 A.2d 78, 96 (Pa. Super. 2007) (holding that appellant waived challenge on appeal by failing to adequately develop argument on appeal).

Next, Defendants assert that they are entitled to a new trial because the trial court improperly allowed Plaintiffs' expert, Dr. Eileen Tyrala, to testify where she was unqualified to offer her opinion, and where she testified beyond the scope of her expert report. Defendants claim that Dr. Tyrala was not qualified to testify pursuant to section 512(b) of the Medical

[4] Defendants' other claim, raised at page 30 of their appellate brief, that Plaintiffs' expert failed to state his causation opinion "to a reasonable degree of certainty," was not raised in the Statement of Questions Involved section of Defendants' appellate brief. Therefore, that issue is waived. Pa.R.A.P. 2116 (stating that no question will be considered on appeal unless stated in the statement of questions involved or fairly suggested thereby). In addition, we note that the trial court discussed this issue in its Opinion, and we agree with the trial court's reasoning. ***See*** Trial Court Opinion, 6/17/09, at 18-22.

Care and Reduction of Error Act ("MCARE Act") because she had not practiced or taught neonatology within the last eight years.

"[T]he decision to admit or to exclude evidence, including expert testimony, lies within the sound discretion of the trial court." ***Ettinger v. Triangle-Pacific Corp.***, 799 A.2d 95, 110 (Pa. Super. 2002). Our standard of review of such a decision is very narrow; "we may only reverse upon a showing that the trial court clearly abused its discretion or committed an error of law." ***Id.*** "To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." ***Id.***

Section 512 of the MCARE Act provides in pertinent part as follows:

> **§ 1303.512. Expert qualifications**
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> . . .
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> **(b) Medical testimony.--**An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:
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> (1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.
>
> (2) Be engaged in or retired within the previous five years from active clinical practice or teaching.
>
> Provided, however, the court may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience.

40 P.S. § 1303.512.

After reviewing the record, we conclude that the trial court did not err in denying Defendants a new trial on this basis. Defendants' claim lacks merit for the reasons stated in the well-reasoned trial court Opinion. ***See*** Trial Court Opinion, 6/17/09, at 32-37.

Defendants also assert that Dr. Tyrala testified beyond the scope of her expert report because the expert report contained no reference to the administration of Pitocin.

"The fair scope rule . . . provides that an expert witness may not testify on direct examination concerning matters which are either inconsistent with or go beyond the fair scope of matters testified to in discovery proceedings or included in a separate report." ***Woodard v. Chatterjee***, 827 A.2d 433, 441 (Pa. Super. 2003) (citation omitted).

Again, Defendants have failed to provide appropriate citations to the record in the section of their brief relating to this issue. ***See*** Brief for Appellants at 33-34. Accordingly, we deem this issue waived. ***See*** Pa.R.A.P. 2119; ***Bombar***, 932 A.2d at 96.[5]

[5] Moreover, if this issue were not waived, we would conclude that it lacks merit for the reasons stated in the trial court's well-reasoned Opinion. ***See*** Trial Court Opinion, 6/17/09, at 37-42.

Judgment affirmed.[6]

Judgment Entered.

Deputy Prothonotary

Date: October 12, 2010

[6] Defendants' argument concerning remittitur, set forth at pages 35-36 of Defendants' appellate brief, is waived, as it was not raised in Defendants' Rule 1925(b) Concise Statement or in the Statement of Questions Involved section of their appellate brief. ***See Lord***, 719 A.2d at 309; Pa.R.A.P. 2116 (stating that no question will be considered on appeal unless stated in the statement of questions involved or fairly suggested thereby).