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In the Superior Court of Pennsylvania

No. 755 EDA 2014

NIAJAH DEEDS, a Minor by her Legal Guardian, JULIA RENZULLI,

Plaintiff/appellant,

v.

UNIVERSITY OF PENNSYLVANIA MEDICAL CENTER,
HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, and
TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA.

ANSWER OF PLAINTIFF/APPELLANT IN OPPOSITION TO THE APPLICATION FOR REARGUMENT OR RECONSIDERATION

On appeal from the judgment of the Court of Common Pleas of
Philadelphia County, Pennsylvania, Civil Trial Division, dated
January 28, 2014 at May Term, 2011, No. 2558

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I. INTRODUCTION

The application for panel reconsideration or reargument that defendant/appellee the Hospital of the University of Pennsylvania (HUP) has submitted falls far short of establishing that either type of extraordinary relief is appropriate here.

It is noteworthy that even though the arguments of the plaintiff/ appellant have remained consistent throughout the course of this appeal, HUP's application for reconsideration/reargument relies on six opinions (out of a total of only nine contained in the application's Table of Authorities) that neither HUP in its brief for appellees nor plaintiff in her opening and reply briefs ever once cited while this case was pending before the panel. Surely a post–decision application is not the time for a party to be raising new arguments relying on authority that could have and should have been cited earlier had it been relevant.

On the merits, the application fails to present a plausible case for either panel reconsideration or full–court reargument. Notwithstanding the revamped nature of the legal authority on which HUP now relies, none of the arguments for panel reconsideration contained in the application offer

anything new beyond what HUP has either already argued or could have argued in briefing the case before the panel.

And with regard to full–court reargument, HUP's application fails to establish that the panel's ruling either creates a conflict of Pa. Superior Court authority or that the panel's ruling conflicts with Pa. Supreme Court precedent. Indeed, as plaintiff demonstrates below, HUP's one attempt at demonstrating that the panel's ruling on the collateral source doctrine somehow violates binding Pa. Supreme Court precedent is plainly incorrect. Both the Pa. Supreme Court (in a ruling that remains good law) and this Court (in numerous rulings that remain good law) have recognized that violations of the collateral source rule, such as HUP committed here, infect not only the jury's consideration of damages, but also the jury's consideration of liability.

Although the panel's decision elicited a terse two–page dissent from Judge Strassburger, HUP's application for reargument fails even to invoke the existence of that dissent as a ground for reargument, because it is clear that Judge Strassburger's lone disagreement with the majority was over whether plaintiff suffered prejudice from the errors that caused the majority to order a new trial. That sort of case–specific inquiry, of no

consequence to other appeals, is not the type of exceedingly important legal issue that full–court reargument exists to consider and decide.

Accordingly, for these reasons, which are explored in more detail below, HUP's application for reconsideration/reargument should be denied.

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

This appeal involves the most innocent and non–culpable victim imaginable — a newborn baby. Unfortunately, that newborn baby —a child named Niajah Deeds — was negligently allowed by physicians working for the Hospital of the University of Pennsylvania to remain for approximately two days in her birth mother's toxic intrauterine environment before being born with cerebral palsy resulting from asphyxiation that occurred before birth but after her mother's placenta separated from the mother's uterus.

As a result of defendants' negligence, Niajah Deeds required assistance with all activities of daily living and full–time custodial care. She had significant visual impairment, could not communicate normally, and received all of her nutrition through a tube in her stomach. In 2008, when

Niajah was seven years old, Julia Renzulli agreed to provide foster care to Niajah after authorities had removed the child from her mother. More recently, Ms. Renzulli became Niajah's legal guardian.

At the trial of this case, plaintiff argued that when Niajah Deeds' birth mother presented at HUP on January 18, 2001 with symptoms of preeclampsia, the hospital and its doctors and nurses should have adequately evaluated the birth mother to see if she had that condition, which deprives the fetus of oxygen and manifests itself through the placenta's separation from the mother's uterus. According to plaintiff's expert medical witnesses, Niajah Deeds' severe and permanent impairments resulted directly from the negligence of HUP and its doctors and nurses.

HUP, by contrast, pursued the strategy in its defense of blaming Niajah Deeds' birth mother for Niajah's impairments. Yet the defense crossed the line from permissible to impermissible when, unwilling to rely exclusively on a strategy of blaming the birth mother, the defense improperly informed the jury that all of Niajah Deeds' current medical and other needs were being fully and adequately attended to due to a combination of daytime care in an educational environment and

governmentally funded medical care at other times. R.2494a. Under Pennsylvania law, it is clear that such evidence of collateral sources for injury compensation is *per se* inadmissible and must result in a new trial even if the jury found for the defendants, as here, on the question of liability, because the jury's consideration of liability and damages are necessarily intertwined in cases like this.

In lawsuits involving claims of medical malpractice arising from care received at healthcare facilities run by the University of Pennsylvania, these corporate defendants have a longstanding practice of refusing to clarify until the last possible moment the proper corporate party or parties that will be ultimately responsible for paying damages in the event that defendants are found liable. In this very case, it was not until the end of the first day of trial that the parties reached a stipulation concerning which defendant should appear on the jury verdict sheet. R.752a. Once the defendants agreed with the plaintiff that only a single defendant should appear on the jury verdict sheet, counsel for plaintiff asked the trial court to preclude two separate attorneys for defendants from participating in the trial of this case as though they were separately representing distinct defendants. R.918a–22a.

The trial court refused to require defendants to participate only through a single attorney in questioning witnesses and presenting closing argument. R.925a, 946a–47a. Thus, even though only a single defendant appeared on the jury verdict slip, and even though this case proceeded exclusively against that lone defendant following the close of the first day of trial, the trial court nevertheless allowed multiple defense counsel to question witnesses and provide closing arguments to the jury, as though this suit was proceeding against more than one separately represented defendant.

At the completion of the evidence and arguments of counsel, the jury by a vote of 10–to–2 returned a verdict in favor of the defendant on plaintiff's claim, finding no liability. R.2526a–29a. This appeal followed.

A three–judge panel of this Court heard oral argument in this case on December 10, 2014. Fewer than two months later, on January 30, 2015, the panel majority issued a 19–page opinion ordering a new trial and ruling in plaintiff's favor on two of the three questions presented.

III. THE APPLICATION FOR RECONSIDERATION OR REARGUMENT EN BANC SHOULD BE DENIED

A. The Panel's Holding That HUP's Counsel's Repeated Violations Of The Collateral Source Rule Necessitated A New Trial Was Correct And Does Not Merit Reconsideration Or Reargument

As HUP's brief for appellee at pages 20 through 23 confirmed, it took approximately four pages of defense counsel's relentless questioning of plaintiff's damages expert, Nurse Corrigan, for defense counsel to finally succeed in HUP's improper quest to get Nurse Corrigan to testify that the costs of plaintiff's medical care was currently being funded by Medicaid.

In this case, it was defense counsel who through relentless questioning of plaintiff's expert witness purposefully and intentionally placed inadmissible collateral source evidence, necessitating a new trial, before the jury. In fact, defense counsel's questioning put plaintiff's expert witness to the choice of either testifying untruthfully under oath or telling the jury that plaintiff's current medical needs were being funded by Medicaid. Faced with the choice between committing perjury or testifying truthfully, of course plaintiff's expert had no alternative but to provide the jury with the particular improper evidence that defense counsel's relentless questioning had been aimed at uncovering.

Here, defense counsel intentionally and affirmatively introduced the objectionable collateral source evidence into this case. Whether they did so through the mouths of defense witnesses or through their cross–examination of witnesses for the plaintiff made no difference at all.

This Court's rulings, together with a ruling from 1962 from Pennsylvania's highest court, make clear that a defendant's violation of the collateral source rule necessitates a new trial even where the jury found in favor of the defendant on the issue of liability rather than damages. *See Nigra* v. *Walsh*, 797 A.2d 353, 360 (Pa. Super. Ct. 2002) (even though, as here, the jury's verdict found that the defendant was not liable, this Court nevertheless held that the plaintiff was entitled to a new trial because the defendant's violation of the collateral source rule may have unfairly influenced the jury's liability determination) (citing *Lobalzo* v. *Varoli*, 185 A.2d 557, 561 (Pa. 1962)); *Griesser* v. *National R.R. Passenger Corp.*, 761 A.2d 606, 613 (Pa. Super. Ct. 2000); *Young* v. *Washington Hosp.*, 761 A.2d 559, 565 (Pa. Super. Ct. 2000) (Todd, J.); *Trump* v. *Capek*, 406 A.2d 1079, 1081 (Pa. Super. Ct. 1979).

As the panel's opinion recognizes, perhaps defense counsel's most egregious violation of the prohibition on this sort of collateral source

evidence came during her closing argument to the jury. In defense counsel's closing arguments, she pleaded to the jury that all of the minor plaintiff's needs were already met, regardless of the outcome of the litigation:

> But here's what's critical, Ladies and Gentlemen, about Nurse Corrigan. Every item that she claims that Miss Deeds has, Miss Deeds already receives, except for a new house. She didn't tell you that Miss Deeds is lacking in a single care need; not one. She has morning care, day care, afternoon care, overnight care, that is already provided in an obviously caring house. She has medical care, specialists, top rate schools, communication boards. Everything Nurse Corrigan mentioned, Miss Deeds already receives.

R.2494a.

In its application for reconsideration/reargument, just as in its brief for appellee filed before the panel, HUP argues that plaintiff is not entitled to a new trial based on HUP's counsel's references to impermissible collateral source evidence during HUP's counsel's closing argument because plaintiff did not specifically object to that part of HUP's counsel's closing. But HUP's waiver argument misses the point. Plaintiff is not arguing on appeal that she is entitled to a new trial based on the objectionable passage from HUP's counsel's closing argument. Rather, plaintiff argues that she is entitled to a new trial because HUP

impermissibly placed before the jury collateral source evidence. HUP's counsel's improper references to the prohibited collateral source evidence during closing argument merely served to make unquestionably clear the purpose of this improper evidence for the jury's consideration — demonstrating that HUP's attorney specifically explained how the jury should use this improperly introduced evidence, by relying on it to deny plaintiff any recovery here.

In none of the collateral source cases on which plaintiff relied to establish the necessity of a new trial did this Court hold that an objection to defense counsel's closing argument was needed in order to obtain a new trial due to defense counsel's improper introduction of collateral source evidence. The panel majority thus ruled properly in rejecting HUP's waiver argument, which focuses solely on defense counsel's closing argument.

In its reconsideration/reargument application, HUP cites for the first time in this appeal the Pa. Supreme Court's ruling in *Boyle* v. *Independent Lift Truck, Inc.*, 6 A.3d 492 (Pa. 2010), for the proposition that an evidentiary error limited to the issue of damages will not necessitate a new trial where the jury never reached the issue of damages. *Boyle*, not surprisingly, is not a collateral source case. The *Boyle* opinion does not even once mention the

term "collateral source," nor did the *Boyle* opinion expressly or by implication overrule the Pa. Supreme Court's longstanding and well–settled earlier decision in *Lobalzo* v. *Varoli*, 185 A.2d 557, 561 (Pa. 1962), recognizing that a collateral source violation necessitates a new trial even if the jury never reached the issue of damages.

Thus, even if HUP is correct that the Pa. Supreme Court in *Boyle* held that an error solely affecting damages does not necessitate a new trial where the jury's verdict in favor of the defendant on liability survives unscathed, both the Supreme Court in *Lobalzo* and this Court in numerous decisions cited *supra* at 8 has recognized that a violation of the collateral source rule is an error that affects both liability and damages.

Before concluding on this point, plaintiff wishes to address that HUP's contention in its reargument petition that defense counsel's improper mention of the Affordable Care Act to suggest that plaintiff would not be incurring future damages did not violate the collateral source rule because the ACA's provisions apply only to the cost of future medical care. HUP's argument overlooks that in this case plaintiff pursued a claim for both past and future medical care. Thus, defense counsel's gratuitous mentions of the ACA with regard to the cost of medical care to be incurred

in the future surely violated the collateral source rule just as much as did defense counsel's intentional eliciting of the availability of Medicaid to pay for previously incurred medical expenses.

For these reasons, no grounds exist for granting either panel reconsideration or full–court reargument on the panel's collateral source ruling.

B. The Panel Correctly Ruled That The Trial Court Abused Its Discretion In Failing To Limit The Defense To Only One Attorney Per Witness And A Single Closing Argument

At the conclusion of the first day of trial in this case, all counsel had agreed that this case would go to the jury as one in which the plaintiff was asserting claims against a single defendant, HUP. The verdict slip that the jury received from the trial court at the start of deliberations confirmed this agreement.

Nevertheless, the trial court continued to allow defense counsel to question witnesses and present closing arguments to the jury as though multiple parties were being sued. By doing so in this closely contested case, plaintiff's right to a fair trial was prejudiced. Just as the lone plaintiff was

not allowed to question witnesses or present closing arguments through multiple counsel, the defense should not have been allowed to do so either.

The substantive and procedural unfairness that ensued prejudicially tilted the scales of justice in favor of the defense. The jury heard closing arguments from two attorneys who seemingly vouched for the propriety of the medical care that plaintiff's lawsuit was challenging. A second attorney was always available to the defense, but never to the plaintiff, to bat cleanup, driving home whatever points the first attorney had teed up and covering whatever omissions the first attorney had overlooked.

HUP argued to the panel in its brief for appellee that because plaintiff's suit had challenged the actions and inactions of Serdar Ural, M.D., while not naming Dr. Ural individually as a defendant, Dr. Ural nevertheless somehow retained the right to be represented at trial by a lawyer of his own choosing in opposing plaintiff's lawsuit against HUP.

HUP has never denied that it routinely refuses to identify until the last possible moment in litigation such as this whether the Trustees, the Hospital, or the Medical Center is the responsible party for paying damages should liability be established. Here, it was not until the first day of trial that plaintiff was able to ascertain from defendants that HUP was

the only defendant that plaintiff needed to sue to obtain full and complete relief.

Had plaintiff only sued HUP from the outset of this litigation, it seems clear — and HUP has never denied — that Dr. Ural would not have been entitled to be separately represented at trial by defense counsel of his own choosing in addition to the counsel representing the lone defendant, HUP. Why Dr. Ural was entitled to separate representation here, when all parties agreed at the end of the first day of trial that this case would go to the jury solely against HUP, defense counsel's submissions to this Court have failed to satisfactorily answer.

The jury's verdict in favor of the defendant in this closely contested trial demonstrates the prejudice that plaintiff suffered as a result of the trial court's initially denying plaintiff's motion for a voluntary nonsuit and in permitting multiple attorneys for the lone remaining defendant to present closing arguments to the jury and to examine and cross–examine the same witnesses.

This aspect of the panel's ruling is obviously and necessarily limited to the particular facts and circumstances of this case. That fact alone makes this issue unsuitable for full–court reargument. Moreover, because the

panel's decision on the collateral source rule necessitated a new trial, the panel's narrow holding on the issue of how many different defendants should be allowed to present closing arguments in a case that goes to the jury as a one–defendant case did not control the outcome here. Reargument en banc does not exist to reconsider an alternate rationale whose resolution one way or another will have no impact on the ultimate outcome of an appeal.*

Finally, because a new trial was necessary due to HUP's violation of the collateral source rule, before any such new trial occurs counsel for the Trustees will have the ability to enter his appearance as co–counsel for HUP should there in fact be some actual need for him to participate in the new trial. What will be avoided, however, is HUP's ability to use multiple lawyers to question the same witness or to give multiple opening and

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* HUP notes that the version of Pa. R. Civ. P. 230 in effect at the time of this trial did not entitle the plaintiff to dismiss a defendant from the suit without the trial judge's permission once trial began. Yet the panel majority's opinion correctly recognizes that the Trustees remained as a party even after all parties had agreed that the case should be submitted to the jury using a verdict slip that identified only one defendant. Thus, the panel majority's discussion of when a plaintiff may unilaterally dismiss a defendant was inconsequential to the outcome of this appeal.

closing arguments, causing the jury to wonder why the defendant gets two chances to influence it for every one afforded to the plaintiff.

IV. CONCLUSION

For the reasons set forth above, the application for reconsideration/reargument should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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