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.

BRIEF FOR APPELLANT

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

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.

For as long as she lives, Niajah Deeds will require assistance with all activities of daily living and full–time custodial care. She has significant visual impairment, cannot communicate normally, and receives 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. Niajah's mother, Tamika Peterson, was 24 years old when she became pregnant with Niajah. She had already given birth to other children. She was unmarried. And she was not an especially complaint birth mother, only seeking medical care when she had reason to be concerned about her own health or the health of her fetus. Ms. Peterson occasionally smoked cigarettes while pregnant, and she even once reported that she had unintentionally ingested cocaine. She reportedly also experienced traumas to her abdominal area once or twice while pregnant.

The defense strategy at trial was to blame Niajah's birth mother for Niajah's severe, permanent injuries. The defense blamed Ms. Peterson for not returning sooner to the hospital on January 20, 2001, the date of

Niajah's birth, as though that would have changed the severity of Niajah's injuries.

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.

For this reason — which the trial court treated far too dismissively in its Rule 1925(a) opinion (*see* Exhibit A hereto at 5–6) — and the other reasons set forth below, the trial court abused its discretion in failing to grant plaintiff a new trial in this case.

II. STATEMENT OF JURISDICTION

On January 28, 2014, the trial court issued orders denying plaintiff's motions for post–trial relief and entering judgment in favor of the defendants. *See* Exhibits B through D hereto. Plaintiff filed a timely notice of appeal from that order on February 18, 2014. R.4882a.

This Court possesses appellate jurisdiction over this final order appeal pursuant to Pa. R. App. P. 341(a).

III. STATEMENT OF THE SCOPE AND STANDARDS OF REVIEW

As this Court has recognized, when reviewing a trial court's denial of a motion for a new trial, the 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." *V–Tech Services, Inc.* v. *Street*, 72 A.3d 270, 280 (Pa. Super. Ct. 2013).

IV. TEXT OF THE ORDER IN QUESTION

On January 28, 2014, the trial court issued an order that stated, in full:

> AND NOW, this 28th day of January, 2014, upon consideration of Plaintiff's Motion for Post–Trial Relief, and the Response thereto filed by Defendants, University of Pennsylvania Medical Center and the Trustees of the University of Pennsylvania, it is hereby ORDERED that said Motion is DENIED.

Exhibit B hereto.

V. STATEMENT OF THE QUESTIONS PRESENTED

1. In accordance with this Court's recognition of a *per se* rule entitling the plaintiff to a new trial following a defense verdict where counsel for defendant has improperly informed the jury that the plaintiff's injuries are being adequately cared for due to the availability of government benefits, should not the plaintiff receive a new trial here because defense counsel committed this very transgression, to the likely prejudice of plaintiff?

2. Did the trial court err or otherwise abuse its discretion in not granting plaintiff a new trial because the trial court improperly allowed two separate attorneys representing two separate defendants to question

witnesses and present closing arguments even after the parties stipulated that this case would proceed only against a single defendant?

3. Did the trial court err or otherwise abuse its discretion in permitting defendant Dr. Samuel Parry to testify as an expert witness beyond the scope of his actual treatment of the birth mother, even though defense counsel failed in violation of applicable procedures to identify him as an expert witness and disclose his expert opinions during discovery?

VI. STATEMENT OF THE CASE

A. Relevant Factual History

On July 19, 2000, Tamika Peterson was 24 years old when her pregnancy with Niajah was discovered at the Hospital of the University of Pennsylvania. R.195a, 696a. Ms. Peterson was unmarried, had two older children, and lacked a stable support system. R.195a. She was seen in the emergency department at HUP on July 19, 2000 with complaints of abdominal pain. *Id.* She was evaluated and tested for pregnancy, which was confirmed at that time. *Id.* She was assured that everything was well with her child then in utero, who now is the plaintiff in this suit. *Id.* Ms. Peterson was discharged that same day. *Id.* She was also quoted in the

record during that hospital visit: "I wish I could stay here for nine months." *Id.*

Over the following months, Tamika received prenatal care at HUP's Perinatal Evaluation Center (PEC) on July 19th, August 10th, September 27th, October 2nd, October 26th, November 3rd, November 27th, December 9th, December 16th, and finally the visit that is the subject of this suit, January 18, 2001. R.967a–91a. Although not the traditional outpatient care for expectant mothers, the PEC nevertheless offered regular prenatal care provided by obstetricians and obstetrical nurses including laboratory testing, ultrasounds, and physical examinations. R.195a.

The PEC records of those visits chronicle a pregnant woman with no existing support system, no family structure, and an unstable home life. Despite these disadvantages, Tamika Peterson always made certain that any problems that could impact her pregnancy with Niajah were reported and addressed at HUP's PEC during her visits. During each of those visits she was triaged in the ER but then seen in the PEC. Tamika's pregnancy progressed without complications through her first nine PEC visits, including the visit of December 16, 2000. R.967a–91a.

During visit number ten, on January 18, 2001, Tamika was at approximately 33 weeks gestation when she presented for the first time with complaints of headache, blurred vision, and an elevated blood pressure (165/102). R.867a, 871a. By now there was a well–documented history of regular assessments in the PEC including a baseline of normal blood pressure readings and the progression of a healthy pregnancy. The new symptoms were classic symptoms of a potentially fatal condition called preeclampsia. R.869a. Preeclampsia is pregnancy–induced hypertension. It is a known risk factor for maternal and perinatal mortality and morbidity, including placental abruption. R.913a. Placental abruption is the premature separation of the placenta from the uterus, and if not timely treated it can result in the death of the baby and the mother. *Id.* In 2001, according to the American College of Obstetrics and Gynecology, delivery was the only definitive treatment for pregnancy induced hypertension.

If the diagnosis of preeclampsia had been made on the January 18th, as it should have been, the only therapy would have been hospitalization and delivery. R.894a–914a. Instead, after being evaluated only by nurses (R.899a–900a), Tamika was discharged home, without physician

consultation or authorization, given "strict preeclamptic instructions," and told to return to the PEC on January 20, 2001 (R.910a–11a). Tragically, when she returned two days later, it was already too late.

On January 20, 2001 at 6:18 p.m., Ms. Peterson returned and was admitted to HUP with the chief complaint of abdominal pain and bleeding. R.1019a–20a. She was admitted, and an emergency c–section occurred twenty minutes after her arrival. Niajah Deeds was delivered at 6:45 p.m., three minutes after Ms. Peterson received general anesthesia. R.1275a. The surgical attending (Samuel Parry, M.D.) noted that an emergency cesarean section was performed secondary to placental abruption (75% of placenta surface covered with clot) and elevated blood pressure. R.837a–38a, 1020a–22a. Toxicology screens performed that same day on both mother and child were negative for cocaine, metabolites, and illicit drugs. R.857a, 1066a. Although Ms. Peterson was never given any diagnosis on the 20th, the urine collected on admission revealed elevated protein and continued elevated blood pressure, both of which are indications of preeclampsia. R.873a–78a.

Niajah Deeds was born on the verge of death. Her initial apgars were 0, 1, and 6 at 1, 5, and 10 minutes. R.1022a–23a, 1212a–13a, 2022a–23a. She

was immediately transferred to the HUP NICU where she was resuscitated and given sodium bicarbonate in an effort to reverse the acidosis in her blood resulting from the asphyxiation that occurred after her mother's placenta separated from the uterus. R.197a, 855a–57a. An MRI of Niajah's brain performed on January 29, 2001 showed pathology in the posterior frontal cortex in a gyriform distribution consistent with diffuse hypoxic injury secondary to hypoxic–ischemic encephalopathy. R.1228a–29a. Niajah has been diagnosed with cerebral palsy, choreiform. R.1331a. She has frequent spastic movements. R.197a. She suffers from seizures. *Id.* She has profound developmental delay. R.197a–98a. She is microcephalic, has retinopathy prematurity, and significant visual impairment. R.198a. She cannot perform on her own any activities of daily living. R.1307a–08a. She receives all of her nutrition through a tube in her stomach. *Id.* She will require assistance with all activities of daily living and custodial care for the remainder of her life. *Id.*

Although Tamika Peterson did not receive traditional prenatal care, she did receive consistent and regular prenatal care in the Perinatal Evaluation Center. Unfortunately, the care she received on January 18, 2001 was provided only by nurses when the complexity of her situation

required direct physician involvement. R.899a–900a. Tamika was discharged on January 18th without the authorization of any physician at HUP, including the attending physician, Serdar Ural, M.D. R.899a–900a. The undisputed mistakes made in her care on January 18th include:

- Despite a complaint of blurred vision, no funduscopic examination was performed of her eyes. R.863a, 867a.

- Only a urine dipstick protein test was performed despite the fact that the ACOG standard for the assessment of preeclampsia requires a twelve or twenty–four hour urine screen. R.876a–77a.

- Despite the fact her blood pressure had been recorded in the PEC for every visit (always within the normal range), the nurses reported that there was no baseline blood pressure readings for comparison to the elevated reading obtained on January 18, 2001. R.871a–73a.

- Her blood pressure readings were not timed, were not signed, and she was discharged with her blood pressure still elevated six hours after admission. R.900a–01a.

- Despite a triage report of a ruptured membrane, she was discharged without speculum exam. R.828a–29a.

- Records from HUP's PEC reveal no involvement of a physician in her assessment, treatment, or discharge. R.899a–900a.

Plaintiff's expert, Yvonne S. Thornton, M.D., a specialist in obstetrics and maternal fetal medicine, testified that Ms. Peterson should have been

admitted on the 18th and the diagnosis of preeclampsia would have been made. R.910a–14a. The indicated therapy of early delivery would have prevented the avoidable devastating injuries suffered by Niajah Deeds. *Id.* In addition, Dr. Thornton and Debra Sperling, RN testified as to the deviations in nursing care that contributed to the failure to reach a diagnosis of preeclampsia on January 18, 2001 and tragic injuries that befell Niajah before birth, which have destined her for a life utterly dependent on others for her most basic needs. R.899a–900a, 1154a–55a.

B. Relevant Procedural History

Tamika Peterson, Niajah Deeds' birth mother, is not and never was a party to this case. Niajah was removed from Tamika's home and placed into the foster care system in the beginning of 2008. In October of 2008, Julia Renzulli became Niajah Deeds' foster parent, and in late 2009 Ms. Renzulli became Niajah Deeds' legal guardian. R.1573a–75a.

On May 23, 2011, Ms. Renzulli brought this action on Niajah's behalf against the Hospital of the University of Pennsylvania, the Trustees of the University of Pennsylvania, and the University of Pennsylvania Medical Center. R.5a.

On August 1, 2011, Thomas Savon, Esquire of the Naulty firm entered his appearance on behalf of the Trustees, the Hospital of the University of Pennsylvania, and the University of Pennsylvania Medical Center. R.7a. Extensive pretrial discovery followed. Tamika Peterson was never deposed. Numerous orders, including orders imposing sanctions, were entered against the defendants as a result of their failure to comply with the discovery rules contained in the Pennsylvania Rules of Civil Procedure. R.14a–28a.

On March 13, 2012, Kathleen Kramer, Esquire of the Marshall Dennehey firm entered her appearance and attorney Savon withdrew his appearance as counsel for the Hospital of the University of Pennsylvania only. R.14a. From that point forward, Savon remained as defense counsel for the Trustees and the Medical Center, while attorney Kramer represented the Hospital. The Trustees and UPMC filed an answer denying they were responsible for the Hospital but admitting the Hospital was its unincorporated operating division and that the Trustees employed Serdar Ural, M.D. R.93a–103a. The Hospital filed an answer denying all allegations of agency and negligence and also described itself as the unincorporated division of the Trustees. R.106a–12a.

On October 22, 2013, this case was assigned to the Honorable Gary F. Di Vito for trial. Jury selection was completed on October 25, 2013. Trial commenced on October 29, 2013 (R.625a) and ended on November 12, 2013 with a jury verdict in favor of the lone defendant shown on the verdict slip (R.2526a–29a).

As explained below, during trial counsel for defendants repeatedly informed the jury, over the objections of plaintiff's counsel, that Niajah was already receiving all necessary care as the result of government–provided assistance consisting of school programs and federal medical assistance. *See infra* at 20–24.

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 very 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. *See infra* at 35–40.

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. Thereafter, plaintiff filed timely post–trial motions seeking the same relief that plaintiff is now seeking on appeal. R.4678a–93a.

On January 28, 2014, Judge Di Vito issued an order denying plaintiff's post–trial motions in their entirety and entering judgment in favor of the defendant in accordance with the jury's verdict. Plaintiff thereafter filed a timely notice of appeal to this Court. R.4882a.

VII. SUMMARY OF THE ARGUMENT

The guarantee of a fair trial is important in all cases, but in a case of utmost significance such as this — where a jury must determine whether a permanently and most severely injured child will have any recourse for recovery against the medical professionals whose negligence is alleged to have caused those injuries — this Court should take special care to ensure that the trial court required both sides to abide by the rules requiring the fair submission of a dispute for a jury's resolution.

In this case, unfortunately, the trial court repeatedly allowed defense counsel to transgress several critical requirements adopted to ensure the fair resolution of disputes on their merits. Most significantly, the trial court improperly allowed defense counsel to repeatedly inform the jury that the minor plaintiff's substantial medical needs were all being attended to at

little to no cost to the plaintiff's legal guardian due to the existence of state and federal education and medical benefits programs.

This prohibited collateral source evidence, which defense counsel improperly placed before the jury and then reemphasized in the defense's closing argument to the jury, necessarily entitles plaintiff to a new trial under this Court's longstanding and directly applicable precedent. The trial court, perhaps unable to distinguish away applicable law, instead relied on a completely irrelevant decision in erroneously rejecting a new trial on this ground.

The defense strategy on the merits was to blame the plaintiff's injuries on the conduct of her birth mother while the child remained in utero. At the time of trial, however, the birth mother had no legal responsibility for the plaintiff. Counsel for plaintiff thus wanted to inform the jury that any award in plaintiff's favor would be held in trust for the benefit of the minor plaintiff, and would not be available for the use either of the plaintiff's birth mother nor for the personal benefit of the plaintiff's legal guardian. The trial court committed further prejudicial error when it prohibited plaintiff's counsel from placing this information before the jury.

A new trial is also required because the trial court both committed an error of law and abused its discretion when it allowed counsel for two separate defendants to continue to participate in the defense of this case, by separately examining or cross–examining witnesses and by presenting separate closing arguments, even after plaintiff dismissed all defendants except for the one defendant whom defense counsel had stipulated would be financially responsible to answer for any verdict. For this reason as well, a new trial is required here.

Lastly, a new trial is also required because the trial court improperly permitted the attending surgeon who delivered the minor plaintiff to offer expert testimony that the hospital and its medical staff were not negligent when they discharged the plaintiff two days earlier — an opinion on the dispositive issue that was the central focus of this case. Defendants had not identified this physician as an expert witness, nor had they provided plaintiff with any report containing his expert opinions in advance of trial as required under the rules of court applicable to this case.

There may be no such thing as a perfect trial, but at an absolute minimum the parties to a case are entitled to a fair trial. In this case, the plaintiff's injuries could not be any more severe, nor could the plaintiff's

need to recover compensation to provide for her needs after she reaches the age of majority be any more urgent. Unfortunately, for the reasons described herein, the defense verdict was impermissibly tainted by the trial court's admission of improper evidence that under Pennsylvania law unquestionably entitles the plaintiff to a new, fair trial. As a result, this Court should overturn the trial court's denial of a new trial and remand this matter for a new trial at which the validity of plaintiff's unquestionably significant claims can be fairly adjudicated.

VIII. ARGUMENT

A. Under Pennsylvania Law, A Defendant's Reference At Trial To The Availability Of Insurance Or Other Money Or Benefits To Compensate The Plaintiff For Her Injuries Is *Per Se* Improper, Entitling The Plaintiff To A New Trial

If the jury in this case had ruled against the plaintiff following a fair trial at which both sides played by the rules, the result would be no less dismaying, but plaintiff and her counsel would have no choice but to accept that tremendously disappointing result. That is not what happened here, however. Rather, in this case, defense counsel refused to play by the rules. No doubt concerned that their strategy of blaming this completely

innocent plaintiff's injuries on her birth mother might not succeed, defense counsel were unable to refrain from repeatedly informing the jury that the plaintiff's unquestionably urgent and severe medical needs were already adequately being cared for due to the availability of various forms of governmental benefits.

As explained below, notwithstanding the trial court's dismissive approach to this argument based on an utterly irrelevant 90–year–old decision, defense counsel's placing this information before the jury was *per se* improper under Pennsylvania law, entitling plaintiff to a new trial at which such inadmissible evidence and arguments would not be before the jury for its consideration.

Defense counsel's most egregious violation of the prohibition on this sort of 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.

Defense counsel began improperly laying the foundation for this impermissible argument during the testimony of plaintiff's life care expert, Nurse Corrigan. Throughout trial, the defense made continual references to collateral sources of compensation, in addition to improper questioning from defendant's counsel communicating to the jury that plaintiff was seeking to obtain a double if not triple recovery.

Defendant's entire cross-examination of plaintiff's life care expert, Nurse Corrigan, suggested to the jury that the minor plaintiff did not have any future needs since the minor plaintiff was already taken care of by Medicaid, eliciting prejudicial testimony concerning collateral benefits:

> Q. … It's not your opinion that Miss Renzulli is paying that out-of-pocket cost? You don't have that opinion, do you?
>
> A. That she is paying for the medication?
>
> Q. That they're being charged the out-of-pocket cost?
>
> A. I believe Medicaid is paying for the medication.

> Q. Okay. And they don't pay that walk up pay out of their pocket price either, do they?
>
> MR. DUFFY: Objection, Your Honor. That's not the legal standard of what the plaintiff is entitled to recover, and it's a total collateral source rule and we have a stipulation of what the past medical costs are.
>
> THE COURT: I'll sustain in part, but it's certainly okay to ask how she determined what the costs are.

R.1349–50a.

By eliciting this testimony from Nurse Corrigan, the defendant created a substantial likelihood of prejudicial impact in the minds of the jurors that Niajah's medical bills were being paid by another source, such as Medicaid. In sustaining plaintiff's objection "in part" without an immediate curative instruction, the evidence was also misleading.

In the jury's presence, defense counsel also made improper references to the collateral source coverage of the Affordable Care Act (hereafter "ACA"). As explained below, this too was *per se* improper under Pennsylvania law, necessitating a new trial.

> Q. I just want to ask you just one other area. Can you tell us how the guarantee issue and the individual mandate portions of President Obama's Affordable Care Act will actually affect the future care costs in this case?
>
> MR. DUFFY: Objection.

THE COURT: Sustained.

MR. SAVON: Your Honor, may I approach, please, sidebar?

R.1366a.

Although the trial court sustained the objection, it gave the jury no immediate curative instructions. At the time of trial, as at present, issues surrounding the ACA saturated the U.S. media. As the trial court pointed out in the discussion at sidebar, the ACA and its effects are unclear and may have no relevance:

> THE COURT: Let me hear the objection first.
>
> MR. DUFFY: Your Honor, what is that other than a collateral source?
>
> MR. SAVON: It actually does not fall under collateral source, Your Honor. Collateral source is not to penalize the people who have insurance and have that work against them. With the Affordable Care Act everybody is in the same situation. This is very different, Your Honor, and these are areas that if it's outside of the collateral source, the logical conclusion is that collateral source doesn't hold here and I should be allowed to ask this. Because the fact of the matter is, under the Affordable Care Act, there's an area — for instance, long-term facilities have to participate in evaluating the person. Areas like that, out-of-pocket costs, are strictly limited, and that will apply to everyone, and has already, including Miss Renzulli. Your Honor, I think I should be —
>
> MR. DUFFY: Here's the situation. The people who wrote the Affordable Care Act aren't sure what it covers. This is a case

> that happened and the law it applies doesn't apply — and if you have an expert that can come in here and say I can guarantee you these health care cost will be covered. We have a lawyer standing with a piece of paper saying isn't this going to happen, that's going to happen, and all she did was ask her did you take that into consideration.
>
> THE COURT: I wish you would have taken the opportunity to give me a letter of memorandum or something to that —
>
> * * *
>
> THE COURT: I might have been a little more prepared to go into this in some depth, but at the 16th hour — well, obviously it could have been raised even last year, I have not had this issue raised. I don't know that it's relevant.

R.1366a–69a.

The likely harm to plaintiff stemming from defense counsel's repeated efforts to place before the jury this sort of *per se* inadmissible evidence was further compounded by the trial court's refusal to allow plaintiff's counsel to inform the jury that defendants should be held liable to plaintiff regardless of the availability of any other sources of compensation to pay for plaintiff's medical care. For example, during plaintiff's counsel's closing argument, the trial court sustained defendant's objection to plaintiff's counsel's attempt to explain to the jury that, if found

negligent, defendants are liable to plaintiff for the amount of future medical expenses:

> MR. DUFFY: And you saw Julia. Julia shouldn't - - she's her mother now. She took her in her family, and John took her in, and she made her a part of her family. She shouldn't have to provide that care. That should be provided by the people —
>
> MS. KRAMER: Objection.
>
> THE COURT: Sustained.
>
> MS. KRAMER: Really?
>
> * * *
>
> MR. DUFFY: This is pursuant to the law to the Medicare [sic] (M-Care) — to the medical care availability and reduction of her — these are numbers of what it's going to take to take care of Niajah. Now, let me explain something to you, folks, so that you understand. Nobody gets - -
>
> MS. KRAMER: Objection.
>
> THE COURT: Sustained.
>
> MR. DUFFY: What?
>
> MS. KRAMER: I know exactly what he's going to say and so does the Judge.
>
> MR. DUFFY: I didn't say anything yet.
>
> MS. KRAMER: I know what you're going —
>
> THE COURT: Sustained.

R.2402a, 2404a–05a.

This Court has repeatedly recognized and enforced a *per se* rule entitling the plaintiff to a new trial, following a defense verdict as to liability, in personal injury cases where the defendant has improperly placed before the jury evidence and argument that the plaintiff's injuries are already being adequately cared for due to the availability of insurance or government benefits.

In *Nigra* v. *Walsh*, 797 A.2d 353 (Pa. Super. Ct. 2002), this Court held:

> In the instant case, pursuant to *Lobalzo* [v. *Varoli*, 185 A.2d 557, 561 (Pa. 1962)], we hold that Appellee violated the collateral source rule and that it is impossible to conjecture what influence this violation had in the bringing the jury to the conclusion that Appellee's negligence was not the proximate cause of Appellant's injuries.

Id. at 360.

According to this Court's ruling in *Nigra*:

> Based on the above excerpts and our review of the record, we conclude that the questions by Appellee's counsel when combined with his opening statements did indeed suggest to the jury that Appellee was receiving social security disability benefits, and that his wife, Kathleen was, or had been receiving social security disability benefits. The cumulative effect of counsel's questions and comments is that the jury was informed that Appellant was receiving social security disability benefits for the same injury which is the subject of the litigation.

Id. at 358. Accordingly, even though, as here, the jury's verdict in *Nigra* 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.

The Supreme Court of Pennsylvania's decision in *Lobalzo* v. *Varoli*, 185 A.2d 557 (Pa. 1962), which this Court quoted in *Nigra*, describes the highly prejudicial impact from improperly introduced evidence of collateral compensation in visual terms:

> [I]t is impossible to conjecture what influence the erroneously admitted evidence on workmen's compensation and unemployment compensation, as well as the misleading charge, had in bringing the jury to the conclusion it reached. When an error in a trial is of such consequence that, like a dash of ink in a can of milk, it cannot be strained out, the only remedy, so that justice may not ingest a tainted fare, is a new trial.

Lobalzo, 185 A.2d at 561.

This Court applied a *per se* rule entitling the plaintiff to a new trial in numerous other cases involving the same circumstances that are presented in this appeal. For example, in *Griesser* v. *National R.R. Passenger Corp.*, 761 A.2d 606 (Pa. Super. Ct. 2000), this Court's opinion granting plaintiff a new trial concluded:

> In conclusion, we hold that the trial court committed an error of law when it permitted Amtrak to present evidence of collateral early retirement benefits. Given the likelihood that the jury may have used this evidence to mitigate Appellant's damages or reduce Amtrak's liability, we are constrained to remand for a new trial on liability and damages.

Id. at 613.

Similarly, in *Young* v. *Washington Hosp.*, 761 A.2d 559 (Pa. Super. Ct. 2000), then–Judge (now–Justice) Todd's opinion for the Court explained:

> [W]e are not persuaded by the trial court's conclusion that because the jury concluded that the defendants were not negligent, and therefore did not deliberate on damages, the argument and evidence which ostensibly concerned Appellants' failure to mitigate damages was not prejudicial. This ignores the possibility that a jury's conclusions regarding damages may be entangled with its conclusions on negligence. *See*, *e.g.*, *Trump* v. *Capek*, 406 A.2d 1079, 1081 (1979) (noting that jury may have "felt comfortable in resolving the question of negligence against" plaintiff where fact that plaintiff's damages may have been partially compensated for by a government pension plan was erroneously introduced into evidence).

Id. at 565 (citations omitted).

This Court's decision in *Trump* v. *Capek*, 406 A.2d 1079 (Pa. Super. Ct. 1979), which Judge Todd cited in her opinion quoted immediately above, is one of this Court's leading precedents in recognizing the *per se* requirement of a new trial when improper evidence or argument pertaining to the plaintiff's collateral recoveries is before the jury.

In *Trump*, this Court explained:

> [T]he inadmissible evidence here pertained to a substantial part of the appellee's case, for appellee began receiving benefits as soon as he was disabled and was still receiving them at time of trial. Furthermore, the jury found that appellant was not negligent. Under these circumstances we recognize the risk that the jury was undecided on the issue of negligence but, realizing that appellee had been compensated for a substantial portion of his damages, felt comfortable in resolving the question of negligence against him. It is exactly this risk that in an analogous situation bars a plaintiff from mentioning that the defendant carries insurance.

Id. at 1081 (citation omitted); *see also Palandro* v. *Bollinger*, 186 A.2d 11, 12 (Pa. 1962) (holding that plaintiff is entitled to a new trial due to defendant's violation of the prohibition on collateral compensation evidence in the form of government–provided disability benefits).

The substantial body of controlling authority discussed above, which directly supports plaintiff's request for a new trial, demonstrates that the trial court in this case committed clear error and unquestionably abused its discretion in denying plaintiff's requested new trial in an opinion that can only be viewed as curtly dismissive on this point. The lone authority on which the trial court relied, *Gallagher* v. *Hildebrand*, 132 A.174 (Pa. 1926), did not even involve a defendant's alleged violation of the collateral source rule. Indeed, to the extent that 90–year–old decisions should be considered,

plaintiff respectfully refers this Court to the Supreme Court of Pennsylvania's ruling in *Lengle* v. *North Lebanon Twp.*, 117 A. 403 (Pa. 1922), in which Pennsylvania's highest Court more than 92 years ago ordered a new trial due to the defendant's violation of the collateral source rule.

Given that a new trial must be ordered in plaintiff's favor under the circumstances presented here, plaintiff wishes to touch on a related evidentiary issue that is bound to recur at any such new trial. Because the jury may have legitimately also been concerned either that plaintiff's birth mother or that plaintiff's legal guardian would financially benefit from any award in favor of the plaintiff, when in fact under Pennsylvania Rule of Civil Procedure 2039 any recovery would be held in trust exclusively for the benefit of the minor plaintiff, counsel for plaintiff sought to inform the jury that any award would be held in trust as that the law requires.

During his opening statement, plaintiff's counsel attempted to explain to the jury who the parties were. Knowing that defendants intended to blame the minor plaintiff's mother for her devastating injuries, plaintiff's counsel wanted to ensure that the jury understood that neither the minor plaintiff's mother nor the minor plaintiff's guardian stood to make any financial gain as a result of a judgment in favor of the minor

plaintiff. As plaintiff's counsel attempted to explain during his opening statement to the jury:

> I want to present a life care specialist, Miss Kate Corrigan. She'll explain to you all the needs, all the care that Niajah is going to need over her life. And because of that care we're going to ask you to make an award that pays for that care. And so you understand, that award that you make will be put in a trust. It will be controlled by a trustee appointed by the Court. And it won't be awarded in any way to Tamika [the birth mother] —
>
> MS. KRAMER: Objection.
>
> THE COURT: Sustained.

R.694a.

Following plaintiff's counsel's opening statement, defendant moved for a mistrial, contending the plaintiff's attempt to identify the parties and who was entitled to recovery was inappropriate:

> BY MR. SAVON: Your Honor, on a different issue.
>
> With regard to counsel's opening, the comments about what was going to be done, money being put into a trust is just completely wrong to say in front of a jury. Your Honor, we request a mistrial at this point. I think that that was just flat out wrong. He should not have said that he was going to put it into a trust, and that's the only way and that's all that's going to happen with any award that they give —
>
> MR. DUFFY: That is what's going to be done. The jury hasn't —

MR. SAVON: No, no. There's going to be a counsel fee with that and that's not —

MR. DUFFY: You can say that too.

THE COURT: Don't talk over each other than [sic]. I understand your point. I sustained the objection.

As I told the jury at the very beginning, it's argument of counsel. It isn't evidence.

And I will tell them at the conclusion that whatever law they take, it comes from me, not from counsel.

So, I'm not going to grant a mistrial on that.

MR. SAVON: Thank you, Judge.

MS. KRAMER: And I totally understand what you're saying. The only thing is, is that this isn't, you know — this is him telling them information that's never coming in. It's not, you know — I'm representing things and it's going to come in later, and maybe I'm right, maybe I'm wrong, and so, it's argument. This is him giving information that shouldn't be in.

And I understand the Court's ruling. I just think he should be advised that he's not permitted to talk about what's happening to the money or that Tamika Peterson is or is not getting the money, and reality is nobody knows what's going to happen here.

THE COURT: Well, Mr. Duffy knows that.

MS. KRAMER: Okay.

MR. DUFFY: I don't think there is anything wrong with telling the jury that Miss Peterson is clearly not a party

> here and not going to benefit by this. They're trying the whole case empty chair against Miss Peterson.
>
> THE COURT: I understand.
>
> MR. DUFFY: That's their defense. So I have a right to emphasize that Miss Peterson is not here. We talked about it yesterday. What Miss Peterson did, they want to use as a causation defense. They didn't join her, and the jury has a right to know. She is not here and I'm going to benefit by this because they're going to keep implying that this mother's bad conduct is what caused everything.

R.710a–13a.

In *Young* v. *Washington Hosp.*, *supra*, Judge Todd's opinion for this Court recognized that "Rule 2039 of the Pennsylvania Rules of Civil Procedure requires that any award to a minor be held in trust until the child attains majority and, therefore, is not readily accessible to the parents." 761 A.2d at 562. The opinion continued, "That the jury was never instructed as to the requirements of Rule 2039 only served to highlight a picture of parents motivated first by financial considerations." *Id.* Thus, this Court's opinion in *Young* recognizes that it is permissible, and in some cases necessary, for the jury to be informed that "any award to a minor be held in trust until the child attains majority."

The trial judge's apparent belief that permitting the jury to be informed that any award in favor of the plaintiff would be maintained exclusively for the minor plaintiff's benefit would somehow be unfairly prejudicial to the defendants is entirely without merit. Indeed, across the Delaware River from Philadelphia, in the New Jersey state courts, the law requires that a jury be informed about the ultimate outcome of any verdict in a negligence case. *See Roman* v. *Mitchell*, 413 A.2d 322, 326–27 (N.J. 1980) (holding that a fully informed jury "is better able to fulfill its fact finding function").

The trial court's refusal to allow the jury to be so informed in this case unfairly prejudiced plaintiff. When this Court grants a new trial due to the collateral source issue, this Court should further specify that on remand the plaintiff is entitled to have the jury properly instructed on the provisions of Pennsylvania Rule of Civil Procedure 2039, requiring that any recovery be held in trust exclusively for the benefit of the minor plaintiff.

B. The Trial Court Abused Its Discretion In Allowing The Lone Defendant On The Verdict Slip To Present Two Separate Closing Arguments And To Examine Witnesses As Though The Case Involved Two Separately Represented Defendants

Before the trial's first day had concluded, counsel informed the trial court on the record after the jury had been excused for the day that the opposing parties had reached a stipulation that all of the medical professionals who had provided or failed to provide the medical treatment to the birth mother at issue in this case were agents of the Hospital of the University of Pennsylvania. R.752a. As a result of that stipulation, plaintiff's counsel asked the trial court to dismiss the other defendants — University of Pennsylvania Medical Center and Trustees of the University of Pennsylvania — given that plaintiff was no longer seeking to maintain any independent claims against those defendants because complete relief could be obtained against the remaining defendant, the Hospital of the University of Pennsylvania. R.918a–22a.

Counsel for defendants University of Pennsylvania Medical Center and Trustees of the University of Pennsylvania objected to plaintiff's request that those defendants be dismissed, stating that because Dr. Ural's negligence was at issue in the case, and because Dr. Ural was an employee

of the Trustees of the University of Pennsylvania, Dr. Ural should be allowed to be defended by his own personal attorney retained by Dr. Ural's employer even though Dr. Ural had never been sued in this case in his personal capacity. R.935a–36a. The trial court agreed with the argument advanced by the attorney representing defendants University of Pennsylvania Medical Center and Trustees of the University of Pennsylvania and denied plaintiff's request to dismiss those defendants. R.925a, 946a–47a.

As a result, even though defendant Hospital of the University of Pennsylvania was the only defendant listed on the jury verdict slip (R.2526a), and even though plaintiff had sought to dismiss her claims against defendants University of Pennsylvania Medical Center and Trustees of the University of Pennsylvania, two separate defense attorneys in this case were allowed to present consecutive closing arguments to the jury at trial and were permitted to separately examine or cross-examine witnesses during this two-week trial. R.2410a–97a.

Affording defendants two closing arguments and twice as many opportunities to examine each witness, in what was otherwise correctly presented to the jury for decision as a one defendant case, prejudiced the

plaintiff and represented an abuse of the trial court's discretion, entitling plaintiff to a new trial.

Plaintiff recognizes that under Pennsylvania Rule of Civil Procedure 230(b), "leave of court upon good cause shown" is required for a plaintiff to dismiss a defendant during a trial. Although there is a paucity of authority construing Pa. R. Civ. P. 230 (titled "Voluntary Nonsuit"), it appears that the main goal of the rule is to prevent the plaintiff from dismissing a defendant where other defendants have asserted cross–claims against the very defendant that the plaintiff seeks to dismiss. *See*, *e.g.*, *Ross* v. *Tomlin*, 696 A.2d 230, 232 (Pa. Super. Ct. 1997).

Here, however, no doubt in recognition of the fact that the defendants here were essentially the same party, none of the defendants in this case had asserted any cross–claims against one another. Consequently, the main concern requiring leave of court under Rule 230(b) was absent here. Moreover, the closely related defendants in this case had retained the same expert witnesses (R.940a), and therefore dismissing defendants University of Pennsylvania Medical Center and Trustees of the University of Pennsylvania would not have prejudiced the remaining defendant, the Hospital of the University of Pennsylvania, in any way.

In opposing the dismissal that plaintiff requested, counsel for defendants University of Pennsylvania Medical Center and Trustees of the University of Pennsylvania argued that he was Dr. Ural's attorney and that Dr. Ural was entitled to be represented in the case because plaintiff was alleging that Dr. Ural's negligence was among the reasons why the Hospital of the University of Pennsylvania should be held liable to plaintiff. R.935a–36a. Yet Dr. Ural had never been personally sued in this case, and if plaintiff had only sued the Hospital of the University of Pennsylvania from the outset of this case, it is clear that Dr. Ural would not be entitled to his own separate defense counsel at trial. Here, it was only because the various University of Pennsylvania entities were able to engage in a shell game until the first day of trial concerning their respective responsibility for plaintiff's injuries that plaintiff was forced to keep all of these defendants in this lawsuit until the start of trial.

Under Pennsylvania Rule of Civil Procedure 223(2), a trial court is empowered to "[l]imit[] the number of attorneys representing the same party or the same group of parties, who may actively participate in the trial of the case or may examine or cross-examine a witness or witnesses." Pa. R. Civ. P. 223(2). Likewise, under Pennsylvania Rule of Civil Procedure

223(3), a trial court is empowered to "[r]egulat[e] the number and length of addresses to the jury . . . ." Pa. R. Civ. P. 223(3). Here, the trial court abused its discretion in failing to recognize that the stipulation between the parties entered into on the first day of trial had the consequences of turning this into a one plaintiff versus one defendant case. *See Burish* v. *Digon*, 206 A.2d 497, 499 (Pa. 1965) (recognizing that even a party represented by two separate attorneys, because that party was both suing and being sued, was properly limited to a single closing argument given by only one of those attorneys).

If there were any doubt about how many defendants remained in this case, the jury verdict slip provides the conclusive answer. The jury was simply asked to find whether "the conduct of the defendant, the Hospital of the University of Pennsylvania, fell below the applicable standard of medical care?" R.2526a. By the close of trial, as evidenced by the jury verdict slip, the trial court had in essence granted the voluntary nonsuit that plaintiff had requested at the outset of trial, but only after having allowed the defendant to present multiple closing arguments to the jury using separate attorneys and to use multiple attorneys to examine and cross-examine the same witnesses.

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. Because of the unfairness to plaintiff that resulted from the trial court's abuses of discretion in this regard, this Court should grant plaintiff a new trial at which the defendant will be limited to presenting its closing argument and questioning of witnesses through a single attorney, in the same manner as plaintiff.

C. The Trial Court Erred And Abused Its Discretion When It Permitted Dr. Samuel Parry, The Attending Physician For Niajah's C–Section Delivery, To Offer Expert Opinion Testimony About The Care The Birth Mother Received From Others Two Days Earlier On The Mother's Previous Visit To HUP's PEC

The rules of discovery require that in response to interrogatories, a party that expects to introduce expert testimony at trial must identify the expert, must state the subject matter in which the expert is expected to testify, must state the facts and opinions to which the expert is expected to

testify, and must state a summary of the grounds for each opinion. *See* Pa. R. Civ. P. 4003.5. In accordance with that procedure, plaintiff served interrogatories on the defendants asking them to identify any and all treating physicians who would be providing opinion testimony at trial. In addition, the trial court's final Pretrial Order mandated that all parties produce their expert reports in advance of trial.

Dr. Samuel Parry was called by the defendants during their case–in–chief. He served as surgical attending physician during the emergency c–section delivery that resulted in Niajah Deeds' birth. Defendants did not identify Dr. Parry as an expert witness, nor was he identified in defendants' answers to interrogatories as a treating physician who would be providing opinion testimony. In fact, it was stipulated on the record that Dr. Parry was not involved in minor plaintiff's mother care on January 18, 2001, the day on which Ms. Peterson was negligently evaluated for preeclampsia and discharged. Thus, in accordance with the trial court's ruling, Dr. Parry's testimony should have been limited to what he observed and did on January 20th during the child's delivery and would not have been allowed to offer his expert opinion testimony concerning the

treatment that Ms. Peterson received on January 18, 2001, a date on which Dr. Parry was not involved in treating her. R.2089a–101a.

After counsel for defendants acknowledged that they had not identified Dr. Parry as an expert, the defendants went on to qualify him and treat him as an expert witness and asked his opinion concerning whether minor plaintiff's mother had preeclampsia on January 18th, the equivalent of asking him as to whether or not the defendants violated the standard of care by not diagnosing minor plaintiff's mother with preeclampsia on January 18th. R.2148a–53a.

Prior to Dr. Parry's taking the stand, the trial court ruled that his testimony would be limited to what he personally did. R.2108a. The trial court further ruled that if he relied on other notes in the record on January 20th, while he was involved in Ms. Peterson's care in making his diagnosis, he may refer to them but only if it was established that he utilized them in reaching his own diagnosis. R.2108a–11a.

Before Dr. Parry took the stand, plaintiff objected to his expected testimony and sought to limit his testimony, which the trial court initially agreed to do but then abandoned its ruling after the doctor began

testifying. The trial court thereafter continued to overrule plaintiff's objections to Dr. Parry's testimony. For example:

> Q. Doctor, if a patient truly has blurred vision and headaches from pre-eclampsia, would you expect to that be a common ailment?
>
> MR. DUFFY: Objection.
>
> BY MR. SAVON:
>
> Q. You can answer.
>
> A. No. The whole point — headaches are common in pregnancy. The whole point of a pre-eclampsia headache is that there is sustained and the only cure for pre-eclampsia is delivery.
>
> Q. So until that happens, you would expect the symptoms to continue?
>
> A. That's the point, yes.

R.2144a.

In addition, Dr. Parry was permitted to give opinion testimony about diagnosing preeclampsia and the "diagnostic criteria for preeclampsia" over plaintiff's counsel's objection:

> Q. Now, Doctor, in terms of diagnosing pre-eclampsia, perhaps if we can start out with this, what is the diagnostic criteria?

A. The diagnostic criteria for pre-eclampsia — actually, we heard a lot of things. They are very straightforward. A woman who has high blood pressure early in the pregnancy has chronic hypertension. A woman who has high blood pressure after 20 weeks has what we call gestational hypertension or pregnancy-induced hypertension. They're the same term, PIH or gestational hypertension, same term. Elevated blood pressure. Nothing else wrong. That's the dichotomy caught after 20 weeks between chronic hypertension and PIH or gestational hypertension. Among those women who have a sustained elevated blood pressure after 20 weeks, meaning greater than 140, greater than 90 for — on two occasions, at least six hours apart, among those women who also have either two plus — I'm sorry, one plus per —

MR. DUFFY: Objection, Your Honor. We're now into an expert opinion about this which is not covered on what he did on the 20th. There is no mention of that in the record. He didn't write the records. His notes don't say that. So I think we're trying to limit this to what we had discussed with the Judge, with you, Your Honor, outside the presence of the jury.

MR. SAVON: Your Honor, the entire questioning and the entire area that we discussed is whether or not there was a diagnosis of pre-eclampsia on January 20 made by this doctor.

MR. DUFFY: I have to see Your Honor at sidebar.

THE COURT: Okay.

(Whereupon the following took place at sidebar in the jury's presence:

MR. DUFFY: Your Honor, here's the total notes that are involved with this thing. He is asking him to read this staff note from the 20th. He read the admission note. There is nothing in here that says this is what pre-eclampsia is, what you look for,

the same blood pressures, anything like that. They're all opinions about how you diagnose this which we had countless testimony from all the witnesses on. In his operative report, he mentions nothing about that. And in the note that he wrote, there is no mention of that. They getting into it what this is, what pre-eclampsia is, why you diagnose it, how you diagnose it, is what expert testimony is needed for. In discovery, we asked who was going to testify, what were their opinions going to be and none of this was ever produced. Had we been told in discovery, which believe it or not, Your Honor, there was like ten discovery motions in this case filed by plaintiff, I think 11, we would have taken his deposition. We could have explored this and maybe counsel could — but we haven't even established that he has a memory of what happened on the 20 — 27. We haven't —

THE COURT: The 20th.

MR. DUFFY: No, on the 27th. He just testified —

THE COURT: In November?

MR. MIRABELLA: There is no documented diagnosis made by this physician in his handwritten note.

MR. SAVON: Your Honor, it's completely wrong. What is actually indicated in the note is they talk about PIH. They talk about labs being normal, blood pressure stabilized. Patient admits to the cocaine use. This is what I mentioned before. Positive proteinuria in there and then the check to pre-eclampsia labs and begin medication if seizures start. There has to be a consideration as to whether or not there is pre-eclampsia because you just don't start that medication unless it's proven at that point. This is the doctor who ruled it out.

THE COURT: I agree.

MR. MIRABELLA: Go on in the record a little further.

MR. DUFFY: There is no ruling out of anything.

MR. MIRABELLA: There is no diagnosis made. In fact, what he writes is PIH, cocaine or pain may be cause of high blood pressure she previously described. PIH [includes] pre-eclampsia. After that, her blood pressure remains elevated the entire time. She has proteinuria. He is no longer involved in her care. The fact that she doesn't have a seizure doesn't mean she doesn't have pre-eclampsia.

MR. DUFFY: He can testify about what he saw, but now counsel is asking him if you must have sustained blood pressure. He's going to get into his expert opinions again through this witness. There is no diagnosis given in this document.

MR. SAVON: There's no diagnosis for pre-eclampsia.

MS. KRAMER: The thing is that this is no surprise. Both experts — Dr. Thornton said, basically, I acknowledge that pre-eclampsia was not diagnosed and I think that they didn't diagnose it on purpose. Dr. Fox testified the pre–eclampsia was not diagnosed when she returned on the 20th. Here's the person that saw her and didn't make the diagnosis. It's been in the case.

THE COURT: If he made the diagnosis, then I will allow it.

MR. DUFFY: He didn't make the diagnosis.

MS. KRAMER: Exactly. He said it wasn't there.

MR. DUFFY: He doesn't rule it out either.

> MR. MIRABELLA: He didn't rule it out. He didn't make any diagnosis either.
>
> THE COURT: That's for cross-examination.

R.2148a–53a.

It is well settled under Pennsylvania law that if a treating physician is testifying as a fact witness, the ordinary discovery rules apply. *See Kurian* v. *Anisman*, 851 A.2d 152, 155 (Pa. Super. Ct. 2004). The Supreme Court of Pennsylvania has recognized, however, that if expert testimony is elicited that was not developed in anticipation of litigation, the disclosure requirements of Rule 4003.5 do not apply. *See Miller* v. *Brass Rail Tavern*, 664 A.2d 525, 531–32 (Pa. 1995). Thus, if a treating physician is testifying as an expert to opinions developed in anticipation of litigation, then the ordinary discovery rules applicable to all other expert witnesses govern.

In this case, it is undisputed that Dr. Parry was not identified as an expert witness. He was never identified in discovery and was only first identified on defendants' pretrial memo after discovery was completed. He was not identified as an expert witness but only as a treating physician. Furthermore, in response to interrogatories from the plaintiff requesting

the identification of any and all treating physicians who will provide opinion testimony, Dr. Parry was never disclosed.

As discussed above, prior to Dr. Parry's taking the witness stand, plaintiff moved to preclude or limit his testimony to the issues of his observations and/or notes (since the treatment occurred over ten years earlier) limited to the day he was involved in minor plaintiff's mother's care — the day of Niajah's delivery. The trial court agreed and so limited his testimony. However, as the testimony unfolded at trial, counsel for the defendant repeatedly moved into the area of Dr. Parry's opinion concerning what happened two days earlier when Dr. Parry was not involved in minor plaintiff's mother's care, because it was the conduct of defendant's medical professionals on that earlier date that was the subject of the lawsuit:

> Q. Doctor, let's break that down. PIH is what?
>
> A. That's elevated blood pressure beginning after 20 weeks of pregnancy in the absence of proteinuria. I would have written it this way because she didn't have proteinuria so she didn't have pre–eclampsia on the 18th when she was evaluated. But she was being evaluated for elevated blood pressures. Patient came in was being evaluated for elevated blood pressures so I wrote that she was evaluated for possible PIH.
>
> Q. Doctor, did she have PIH?

A. No. Not on the 18th or the 20th.

MR. DUFFY: Objection. Move to strike.

THE COURT: Overruled.

MR. SAVON: He is reviewing the information from two days ago. It states it right in the note.

THE COURT: Overruled. Continue.

R.2162a–63a.

Q. Doctor, you had said possible PIH and labs were normal. Are those the labs from the 18th?

A. Yes.

Q. Doctor, we have heard a lot about hematocrit in this case. Doctor, in the face of normal labs, what is the significance of elevated hematocrit?

A. Very little. Patients come into an emergency room pregnant, not pregnant, I don't care, for a variety of different reasons, frequently in a stressful situation, frequently a little bit dehydrated, and it's just a concentration. So that if you're a little bit dehydrated, your hematocrit is a little bit elevated. In Ms. Peterson's case, her white blood cell count was a little elevated because of a little bit of dehydration. She had been in a stressful situation. Frequently when you're rushing to an emergency room —

MR. DUFFY: Objection.

THE COURT: Overruled.

MR. SAVON: He is explaining his answer.

THE COURT: Overruled.

THE WITNESS: You don't drink a lot of water. And pain, a kid coming in with a knee injury or needs stitches, a woman coming in pregnant for a headache, you will get a hematocrit that is a little bit high because they're just a little bit dehydrated and that's — we see that all the time. In this case the hematocrit wasn't even high. It was still in a normal range. And in the face of every other lab being normal, I was confident to write on the 20th that the labs were normal, referring back to January 18.

R.2163a–64a.

Defense counsel went back to the very same issue and again moved into the area of the doctor's opinion concerning what happened on the 18th and whether in fact the birth mother had preeclampsia (which goes to the issue of the standard of care on the 18th) when he questioned Dr. Parry as follows:

Q. Doctor, there has been some question in this case whether or not she — strike that.

There is a distinction between — there is a mild pre–eclampsia and a severe pre–eclampsia, right, Doctor? Did she have either mild pre–eclampsia or severe pre–eclampsia on January 20?

A. No.

Q. Did she have either mild pre–eclampsia or severe pre–eclampsia on January 18?

A. No.

MR. DUFFY: Objection.

MR. SAVON: We went through the notes that he reviewed from the two days before.

THE COURT: Overruled.

R.2177a–78a.

Dr. Parry, after sitting through the entire trial, was undeniably testifying to opinions developed in anticipation of litigation, and his testimony clearly was not limited to issues of care and treatment and opinions, if any, expressed in connection with his treatment rendered on January 20th. Not only did plaintiff receive no prior notice that Dr. Parry would be providing expert opinion testimony about Ms. Peterson's condition on the 18th, which was the central issue in this litigation, but plaintiff was repeatedly told the opposite — that Dr. Parry would not provide testimony as an expert.

The trial court ruled prior to Dr. Parry's taking the witness stand that his testimony would be limited to what he did on the January 20th. The expert testimony that defense counsel elicited from Dr. Parry under the pretense that he was called as a treating physician was highly prejudicial, a

patent violation of Rule 4003.5, and represented a clear abuse of the trial court's discretion.

Ironically, Dr. Parry himself charted in the medical record that preeclampsia may have caused the abruption at around the time of Niajah's delivery. Now, over ten years later, he came to court, unidentified as an expert witness, and was permitted to take the stand over plaintiff's objection to opine that Ms. Peterson did not have preeclampsia on the 18th, thereby refuting plaintiff's claims that the treating physicians on the 18th deviated from the standard of care by making the diagnosis and/or properly investigating the diagnosis.

The scope of expert testimony that the trial court permitted Dr. Parry to provide to the jury at trial was clearly improper and unfairly prejudicial to plaintiff. As a result, this ground independently entitles plaintiff to a new trial at which Dr. Parry's testimony is properly limited in accordance with the applicable rules of court.

IX. CONCLUSION

For all of the reasons set forth above, this Court should vacate the trial court's judgment in favor of defendants and remand this case for a new trial at which the validity of plaintiff's unquestionably significant claims can be fairly adjudicated.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Pa. R. App. P. 2135(a)(1) because this brief contains 10,696 words excluding the parts of the brief exempted by Pa. R. App. P. 2135(b).

This brief complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) and 2135(c) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Book Antiqua font.

Dated: August 13, 2014

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Howard J. Bashman

Exhibits Attached to Brief for Appellants in Accordance with the Pa. Rules of Appellate Procedure

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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