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.

REPLY 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

As to the first and most critical issue presented on appeal — involving the defendant's improper presentation to the jury of impermissible collateral source evidence — the Hospital of the University of Pennsylvania (HUP) in its Brief for Appellee can muster only the insincere plea that because defendant's counsel finally succeeded in his relentless effort to extract this improper evidence from the mouth of one of the plaintiff's witnesses, the defense supposedly bears no responsibility for bringing this impermissible evidence mandating a new trial to the jury's attention in this case.

The above description of HUP's response to the central issue presented in this appeal reveals the absurdity of HUP's position. Although HUP may be correct that a plaintiff is not precluded from introducing into evidence otherwise prohibited collateral source information, HUP is flat wrong that a defendant such as HUP may therefore present a jury with otherwise improper collateral source evidence so long as counsel for the defendant succeeds in a relentless effort to extract such impermissible information from the mouth of one of the plaintiff's witnesses on cross–examination.

On the second issue presented on appeal, HUP's Brief for Appellee correctly notes an absence of on–point precedent on this question of first impression concerning whether a trial court may continue to allow counsel for multiple defendants to separately question witnesses and separately deliver closing arguments after the parties and the trial court have agreed that the case is going to the jury only against a single defendant. In an especially revealing omission, HUP's appellate brief fails to mention that two separate defense counsel presented consecutive closing arguments to the jury before the jury received a verdict slip listing only one potentially liable defendant, as though one defense attorney was appearing in an amicus role as friend of the court. This improper defense double–teaming of plaintiff likewise necessitates a new trial.

Finally, as to plaintiff's third and final issue challenging the improper scope of Dr. Parry's expert testimony at trial, HUP's brief misses the point. Dr. Parry provided medical care to the plaintiff's birth mother on the date of plaintiff's emergency c–section delivery, but Dr. Parry did not treat the birth mother two days earlier when the birth mother was examined but negligently discharged from HUP. To allow Dr. Parry to give expert testimony concerning whether the birth mother had preeclampsia or

exhibited signs thereof necessitating further evaluation two days before Dr. Parry treated the birth mother improperly exceeded Dr. Parry's role as a fact witness and transformed him into an expert witness who had not been properly identified as such pretrial and as to whom no expert report was provided to plaintiffs. Allowing Dr. Parry to testify at trial as an expert witness that he agreed with the nurses who examined and discharged plaintiff's birth mother without the involvement of any physician two days before plaintiff's birth on the central medical question critical to this case — whether the birth mother then had preeclampsia or was exhibiting signs thereof — was improper and necessitates a new trial.

II. ARGUMENT IN REPLY

A. Plaintiff Bears No Responsibility For HUP's Counsel's Repeated Improper References At Trial To The Availability Of Insurance Or Other Money Or Benefits To Compensate The Plaintiff, And Thus A New Trial Is Necessary

As HUP's brief for appellee at pages 20 through 23 reveals, 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.

Yet HUP's brief for appellee only serves to confirm that it was defense counsel who improperly introduced inadmissible collateral source evidence into the trial of this case. Counsel for plaintiff was not the advocate who initially put that evidence before the jury.

In a misplaced reliance on *Simmons* v. *Cobb*, 906 A.2d 582, 585 (Pa. Super. Ct. 2006), HUP then proceeds to reason that because it was one of plaintiff's witnesses who provided the objectionable collateral source testimony, this case is identical to *Simmons*, in which the plaintiff through counsel purposefully and intentionally introduced collateral source evidence as part of plaintiff's own proof.

The difference between this case and the *Simmons* case could not be more obvious. Here, 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 choice but to provide the jury with the particular improper evidence that defense counsel's relentless questioning had been aimed at uncovering. HUP's brief for appellee cites to absolutely no authority treating plaintiff as the proponent of evidence that defense counsel elicits for the first time at trial from the mouth of a witness for plaintiff during cross–examination, presumably because no such authority exists.

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 makes no difference at all.

Consequently, the cases on which plaintiff relied in her opening brief to demonstrate that a new trial is required remain fully applicable, notwithstanding HUP's unpersuasive attempts at falsely distinguishing them. *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).

Notably, HUP's brief for appellee does not discuss or even cite to the lone authority on which the trial court relied — *Gallagher* v. *Hildebrand*, 132 A.174 (Pa. 1926) — in rejecting plaintiff's argument in her motion for post–trial relief that defendant's improper placement of prohibited collateral source before the jury necessitates a new trial here.

As plaintiff noted in her opening brief for appellant, 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.

Moreover, 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.

HUP in its brief for appellee asserts that plaintiff is not entitled to a new trial based on HUP's counsel's references to impermissible collateral source evidence in 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 serves to establish that HUP's attorney made unmistakably clear to the jury the use to which the jury should put the improperly introduced evidence — using it to deny plaintiff any recovery here.

In none of the collateral source cases on which plaintiff relies to establish the necessity of a new trial, *see supra* and plaintiff's opening brief for appellant at pages 26–30, 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. This Court should not use this case to create such an additional preservation requirement not recognized in any of this Court's previous on–point holdings.

The bulk of HUP's appellate response on the first issue presented on appeal consists of an effort to establish that sufficient evidence exists to support the jury's finding of no negligence. Of course, the fact that this case went to trial demonstrates the trial court's recognition that the facts would have permitted a jury to find in favor of either side on liability. Plaintiff's appeal does not challenge whether sufficient evidence exists in the record to support the jury's finding of no negligence; rather, plaintiff focuses her

challenge on the inability, resulting from defense counsel's misconduct in introducing prohibited collateral source evidence, to determine whether the jury's finding of no negligence rested on a proper or improper basis, thus necessitating a new trial.

HUP's other arguments on the first issue raised on appeal are even less weighty. The assertion that because the Chief Justice of the United States was able to uphold Obamacare against Commerce Clause challenge by treating the statute's penalties as a tax, *see National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566, 2593-96 (2012), does not establish that the health insurance provided under that federal law constitutes something other than a form of insurance to which the collateral source rule prohibits reference. Moreover, HUP's assertion that Obamacare represents settled law is as questionable today as it was at the time of trial.

Lastly on this subject, HUP's brief for appellee offers no persuasive response to plaintiff's argument that at any retrial of this case the jury should be informed that neither plaintiff's birth mother nor 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.

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 court's refusal to allow the jury to be so informed in this case unfairly prejudiced plaintiff. Consequently, when this Court grants a new trial due to the collateral source issue, this Court on remand should instruct the trial court that the plaintiff is entitled to have the jury properly charged 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. None Of HUP's Arguments For Upholding The Trial Court's Refusal To Limit The Defense To Only One Attorney Per Witness Or A Single Attorney's Closing Argument Has Merit

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 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.

In addressing this question of first impression in its brief for appellee, HUP focuses on irrelevant issues. Plaintiff's complaint is not that more than one law firm or lawyer was representing the defense; rather, plaintiff's request for reversal is based on the fact that multiple defense attorneys were allowed to examine the same witnesses and to deliver closing arguments, as though serving as friend of the court instead of representing a party with an actual stake in the litigation.

Plaintiff would not object if the defense brought forth a different defense attorney to question every single witness, so that no defense attorney had questioned more than one witness at trial. The problem here was that multiple defense counsel were permitted to question the same witnesses and to present closing arguments, even though the verdict slip showed that plaintiff's claims were against only a single defendant.

Likewise misplaced is HUP's reliance on the 2002 explanatory comment to Pa. R. Civ. P. 230. *See* Brief for Appellee at 44. That comment observes that the requirement for judicial approval of a voluntary nonsuit during the course of a trial was intended to avoid providing the plaintiff

with the absolute right to declare a do–over in the midst of any trial that seems to have taken an unfavorable turn from the plaintiff's perspective.

Had the trial court properly limited HUP to but a single attorney for questioning each witness and for delivering a closing argument to the jury in this case, a jury verdict in favor of HUP would not have permitted plaintiff to pursue a separate action against the other two defendants whom plaintiff had originally sued. Rather, based on the agreement of counsel reached at the close of the first day of trial, it was clear that the parties had agreed that the jury's verdict as to HUP would encompass all of the claims that plaintiff has asserted in this litigation against all the parties.

Most inexplicable is HUP's argument 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's brief does not deny that HUP 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's brief for appellee does not deny — 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, the brief for appellee fails 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. 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. HUP's Justification For The Trial Court's Decision Allowing 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 Lacks Merit

Dr. Parry treated Niajah Deeds on January 20, 2001, delivering her by c–section, and thus Dr. Parry was qualified to opine concerning whether Niajah's mother had preeclampsia on January 20th. Plaintiff's third and final ground for a new trial concerns a different issue — whether the trial court committed reversible error in allowing Dr. Parry to opine that the birth mother neither had, nor show signs of, preeclampsia two days earlier on January 18th, based on the records of treatment provided to the birth mother on January 18th by other medical professionals. It is undisputed that Dr. Parry played no role in the birth mother's treatment or evaluation when the birth mother visited HUP two days earlier on January 18th.

It is further undisputed that the nurses who saw Niajah's birth mother at HUP on January 18, 2001 did not conclude that the birth mother

had preeclampsia, nor did they determine that the birth mother should remain in the hospital at that time to undergo additional testing to see whether she had preeclampsia. If a diagnosis of preeclampsia had been reached on January 18th, then Niajah would have been delivered immediately, thereby avoiding any and all of the devastating injuries that will continue to plague Niajah for the remainder of her life.

It was plaintiff's principal argument at trial that HUP either should have concluded that the birth mother had preeclampsia on January 18th or, at a minimum, should have conducted sufficient additional testing to determine whether the birth mother then had preeclampsia, which would have resulted in that diagnosis far sooner than after 6 p.m. on January 20th, when Niajah was actually delivered via c–section.

Whether the medical records of Niajah's birth mother from January 18th that Dr. Parry may have referred on January 20th indicated that the birth mother had preeclampsia or at a minimum indicated that further preeclampsia testing should have been ordered (which then would have resulted in a preeclampsia diagnosis and Niajah's immediate delivery two days sooner) was not relevant to Dr. Parry's treatment of the birth mother on January 20th. It was clear on January 20th, when Dr. Parry treated the

birth mother, that an immediate c–section had to be performed. Whether Niajah should have been delivered two days earlier played no role in Dr. Parry's treatment of the birth mother on January 20th.

As the foregoing discussion makes clear, when Judge Di Vito allowed Dr. Parry to testify as an expert witness, in the absence of any pretrial disclosure or expert report, regarding the adequacy or inadequacy of the care the birth mother received or did not receive two days earlier on January 18, 2001, Dr. Parry was allowed to offer his expert opinion on the central issue in the case, without any of the advance disclosure of that opinion to which an opposing party would unquestionably be entitled under the Pennsylvania Rules of Civil Procedure.

Because, as explained above, whether Niajah's birth mother should have been diagnosed with preeclampsia on January 18, 2001 played no role in Dr. Parry's treatment of the birth mother two days later on January 20th, Dr. Parry should not have been allowed to furnish the jury with his previously undisclosed expert opinion that the birth mother in fact did not have preeclampsia on January 18, 2001.

This Court has recognized the line between opinions of physicians developed in the course of treatment versus opinions of physicians

developed in anticipation of litigation. *See Polett* v. *Public Communications, Inc.*, 83 A.3d 205, 218-22 (Pa. Super. Ct. 2013) (en banc), *allowance of appeal granted*, 91 A.3d 1237 (Pa. 2014); *Kurian ex rel. Kurian* v. *Anisman*, 851 A.2d 152, 155-56 (Pa. Super. Ct. 2004). Stated plainly, whether Niajah's birth mother received proper treatment at HUP on January 18, 2001 was not an opinion that Dr. Parry formed or had any reason to form in order to treat the emergency with which the birth mother presented at HUP on the evening of January 20, 2001.

HUP's insistence that Dr. Parry's opinion was not developed in anticipation of litigation is especially difficult to accept once the meaning of "PIH" and preeclampsia, as the terms were used in 2000, is clarified. In 2000, the medical literature separated pregnancy hypertension in two categories: (1) chronic hypertension or (2) pregnancy-induced hypertension "PIH." The primary differences between PIH and chronic hypertension is that PIH starts after 20 weeks of gestation; and chronic hypertension, unlike PIH, is not a risk factor for placental abruption. In 2000, the term or acronym "PIH" was used interchangeably in the medical literature with preeclampsia. An article authored by Dr. Parry himself stated that PIH had only four clinical subsets: (1) mild preeclampsia; (2) severe preeclampsia;

(3) eclampsia; and (4) HELLP syndrome (Parry, S. (2000). Hypertensive Disorders. In A. Evans and K. Niswander (Eds.), Manuel of Obstretrics 6th ed., (pp.287- 97) Lippincott Williams & Wilkins). When Dr. Parry wrote in the patient's chart that the differential diagnosis for her elevated blood pressure was "PIH, cocaine, or pain," he was not ruling out preeclampsia but identifying it as first of three possible causes. Subsequently, after Dr. Parry was no longer involved in the patient's care, her blood testing was found to be negative for even trace amounts of cocaine. At trial, thirteen years later, Dr. Parry testified with certainty that Tamika did not suffer from preeclampsia on the 18th and on the 20th, but in 2000 when he was involved in Tamika's care that is not what he wrote in her medical record.

At trial, Dr. Parry offered no independent recollection of these now decade–old events. His chart note, by contrast, suggests he thought she did have preeclampsia or at best is silent as to his diagnosis and the cause of the abruption. The diagnosis and opinion he articulated at trial that Tamika did not have preeclampsia (on the 18th or the 20th) could only have been developed after he was no longer involved in her care. The question then becomes under what circumstances would he have any reason to develop

an opinion, once his role in her care was over, other than in anticipation of litigation.

Because whether Niajah's birth mother was properly treated and evaluated on January 18th was not an opinion that Dr. Parry formed in the course of treatment, it necessarily was an opinion that he formed exclusively in anticipation of litigation. The trial court thereby committed reversible error in allowing Dr. Parry to provide the jury with his expert opinion on that issue central to this case, in the absence of HUP's having identified Dr. Parry as an expert before trial and in the absence of any expert report from Dr. Parry providing his opinion in that regard and describing the bases for it.

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 third and final 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.

III. CONCLUSION

For all of the reasons set forth above and in the opening brief for appellant, this Court should vacate the trial court's judgment in favor of HUP 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 4,184 words excluding the parts of the brief exempted by Pa. R. App. P. 2135(b).

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Dated: November 14, 2014

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John Mirabella

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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