

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

| | | |
|--|---|---------------------|
| ANNA DIEFFENBACH and DONALD DIEFFENBACH, : | : | DOCKET NO: 10-00016 |
| Plaintiffs : | : | CIVIL ACTION – LAW |
| vs. : | : | |
| PETER B. TREVOULEDES, M.D., : | : | JURY TRIAL DEMANDED |
| Defendant : | : | |

O P I N I O N A N D O R D E R

AND NOW, this 12th day of January, 2012, following oral argument on Plaintiffs’ Motion in Limine to Prohibit Defense Testimony and Argument Regarding Defendant Dr. Trevouledes’ Subjective State of Mind and Character, it is hereby ORDERED and DIRECTED that Plaintiffs’ motion is DENIED. Plaintiffs argued that, pursuant to our Superior Court’s decisions in *Pringle v. Rapaport*, 980 A.2d 159 (Pa. Super. Ct. 2009) (*en banc*) and *Passarello v. Grumbine*, 29 A.3d 1158 (Pa. Super. Ct. 2011), this Court should prohibit defense counsel from “arguing or presenting evidence which is based upon or related to the erroneous error of judgment rule/instruction” during opening and closing statements and during the trial. Motion, 4. Particularly, Plaintiffs requested that defense counsel be prohibited from making “mention of Defendant Dr. Trevouledes’ good intentions, good character, commitment, whether Dr. Trevouledes did his best, and other evidence related to Dr. Trevouledes’ subjective state of mind.” *Id.* This Court does not believe that the *Pringle* and *Passarello* cases mandate limiting Defendant Dr. Trevouledes’ own testimony and oral argument his defense counsel. However, this Court will not give the “error of judgment” instruction during the final jury charges.

In *Pringle*, our Superior Court held that “the ‘error of judgment’ instruction should not be given in medical malpractice actions, as it does not inform jurors on the applicable standard of care and instead tends only to confuse, rather than clarify, the issues that the jury must decide.”

980 A.2d at 160. In that case, the Pringles brought a medical malpractice action against Dr. Rapaport after their son sustained a brachial plexus injury during his birth; Dr. Rapaport delivered Ms. Pringle's son. *Id.* at 161. The Pringles alleged that Dr. Rapaport "was negligent by using excessive force on Austin's [their son's] head during delivery and that the excessive force caused the brachial plexus injury and resultant paralysis." *Id.* at 161.

During jury instructions, the trial judge gave the jury an "error of judgment" charge. *Id.* at 164. "An error of judgment charge provides generally that physicians are not responsible for 'mere errors in judgment' or the use of 'best judgment' unless the resulting error constitutes, or was the result of, negligence." *Id.* The jury returned a defense verdict. *Id.* at 164. When the Pringles appealed this verdict, one of the issues that they raised was "[d]id the trial court err when it instructed the jury ... to decide the issue of negligence by considering the physician's subjective judgment?" *Id.* at 165.¹

Sitting *en banc*, the Superior Court used the Pringles' appeal as an opportunity to review the history of the physicians' standard of care within the Commonwealth and the role that the physicians' judgment plays when determining whether a violation of this standard has occurred. *Id.* at 165. After a thorough review of applicable case law, that Court held that the "error of judgment" instruction should not be given during medical malpractice trials because the "instruction neither defines nor clarifies the applicable standard of care, and may likely mislead the jury during its deliberations." *Id.* at 174. In particular, that Court reasoned that the charge "wrongfully suggests to the jury that a physician is not culpable for one type of negligence, namely the negligent exercise of his or her judgment" and that the charge "wrongly injects the

¹ In its *Pringle* decision, the Superior Court stated that "[t]he issue presented here is whether or not an 'error of judgment' instruction should have been included in the jury charge." 980 A.2d at 173.

subjective element into the jury's deliberations." *Id.* at 173-74. Therefore, that Court held that the Pringles were entitled to a new trial. *Id.* at 175.

In *Passarello*, our Superior Court applied its *Pringle* decision retroactively in another medical malpractice action. 29 A.3d at 1166. In *Passarello*, the trial court gave the "error in judgment" instruction to its jury at the conclusion of a medical malpractice trial. *Id.* at 1161. The *Passarello* trial court gave this instruction approximately 4 months prior to the filing of the Superior Court's decision in *Pringle*. *Id.* at 1163. The jury returned a defense verdict, and the Passarellos appealed on the basis of the "error in judgment" instruction. *Id.* at 1162.

In *Passarello*, the Superior Court held that "the holding in *Pringle* can, and must, be applied retroactively." *Id.* at 1166. Applying its *Pringle* decision to the facts in the *Passarello* case, the Superior Court held that the Passarellos should be given a new trial because "the court's charge nevertheless introduced Dr. Grumbine's [defendant doctor's] state of mind as an element for the jury's consideration" and "[i]n so doing, the charge attenuated the objective standard of care imposed by Pennsylvania law and obfuscated the manner in which the jury might properly weigh the evidence." *Id.* at 1167.

In the instant case, Plaintiffs argued that this Court should interpret the *Passarello* decision as requiring trial courts to prohibit evidence, testimony, and argument regarding the subjective state of mind of defendant doctors in medical malpractice actions. However, this Court does not read the *Passarello* decision as requiring such a prohibition on defense testimony, evidence, and argument. In *Passarello*, the Superior Court noted defense counsel's oral arguments regarding Dr. Grumbine's state of mind. In particular, the Superior Court quoted a portion of defense counsel's argument and stated:

[w]hat counsel's argument skillfully suggests is that regardless of the objective standard of care, Dr. Grumbine, in an exercise of continued self-sacrifice, acted with the best of

intentions and made judgments for which she could not be faulted, in part because they were judgments and a physician cannot warrant care. *Although we might otherwise recognize such commentary as a manifestation of the broad license counsel enjoys to argue the evidence, in this case, where that argument exploits an erroneous instruction, we cannot minimize the underlying error.* Although, as we noted, the language the court used here is not as extensive as that employed by the court in *Pringle*, counsel's argument effectively magnified the error, rendering the resulting verdict as likely the result of the incorrect charge as any we can conceive.

Id. at 1168 (emphasis added). Therefore, in *Passarello*, this Court believes that the Superior Court granted a new trial to the Passarellos on the underlying basis of the “error in judgment” instruction and not, solely, on defense counsel’s comments during oral argument.

In short, this Court does not believe that our Superior Court’s decisions in *Pringle* and *Passarello* require it to prohibit defense testimony, evidence, and oral argument regarding Defendant Dr. Trevouledes’ state of mind. This Court will follow our Superior Court’s rulings in *Pringle* and *Passarello* and will not give the “error of judgment” instruction during its jury charges.

This Court will entertain Plaintiffs’ individual objections during Defendant Dr. Trevouledes’ testimony and the oral arguments of defense counsel.

BY THE COURT,

Date

Richard A. Gray, J.

RAG/abn

cc: Clifford A. Rieders, Esquire
C. Edward S. Mitchell, Esquire
Gary L. Weber, Esquire, Lycoming County Reporter