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DEAD OR ALIVE? THE CASE FOR RESURRECTING THE ERROR OF JUDGMENT INSTRUCTION

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In *Pringle v. Rapaport*, 980 A.2d 159 (Pa. Super. 2009) (*en banc*), *appeal denied*, 987 A.2d 162 (Pa. 2009), the Pennsylvania Superior Court addressed the propriety of the “error of judgment” jury instruction in medical malpractice cases, an instruction the Supreme Court of Pennsylvania has never directly addressed. The court found that the instruction does not inform jurors on the applicable standard of care, and tends only to confuse, rather than clarify, the issues the jury must decide. To resolve what the Superior Court found to be irreconcilable decisions by panels of that court, the court issued a broad ruling, holding that “‘error of judgment’ instructions should not be given in medical malpractice actions in this Commonwealth.”

Rather than eliminate the instruction, the Superior Court should have provided a clear instruction, one that does not cause confusion. Physicians play an important role in our society, making complex judgments while dealing with an inexact science. As such, it is important that jurors understand that physicians cannot be held liable, retrospectively, for mere errors of judgment and should not be condemned in hindsight. Thus, where the instruction is warranted by the evidence, it should be permitted.

Supreme Court Precedent Endorses Error of Judgment Principles

The principle that physicians should not be held liable for mere errors of judgment is a well established principle in this Commonwealth that has been repeatedly endorsed by the Supreme Court. *See: Williams v. Le Bar*, 141 Pa. 149, 158-59, 21 A. 525 (1891) (*per curiam*) (holding that the trial court properly held that the

defendants should not be held liable for a mistaken diagnosis absent a showing of negligence); *English v. Free*, 205 Pa. 624, 626, 55 A.2d 777, 777-78 (1903) (*per curiam*) (affirming the entry of a nonsuit in favor of the physician-defendant because although he failed to accurately diagnose a dislocated hip joint, the evidence showed that he acted with reasonable skill and diligence); *Duckworth v. Bennett*, 320 Pa. 47, 50, 181 A. 558, 559 (1935) (“Where the most that the case discloses is an error [sic] of judgment on the surgeon’s part, there is no liability. . . . At most, all that could be said is that defendant made a mistake in diagnosis where the symptoms were obscure, and for this there is no liability.”); *Ward v. Garvin*, 328 Pa. 395, 195 A. 885 (1938) (*per curiam*) (“. . . a physician is not responsible for an error of judgment or mistake in diagnosis in the treatment of a patient.”); *Hodgson v. Bigelow*, 335 Pa. 497, 504-05, 7 A.2d 338, 342 (1939) (discussing a plaintiff’s *prima facie* case of medical malpractice and stating: “Where a physician exercises ordinary care and skill, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment.”); *Smith v. Yohe*, 412 Pa. 94, 99, 194 A.2d 167, 170-71 (1963) (discussing “well-settled principles” related to medical malpractice, and indicating that a physician is not liable for an error of judgment); *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 573 Pa. 245, 264, 824 A.2d 1140, 1151 (2003) (plurality) (“Therefore, expert testimony is necessary to prevent a finding of liability for a simple mistake in judgment, failure of treatment, or an accidental occurrence.”); *Toogood*, 573 Pa. at 262, 824 A.2d at 1150 (“There is no requirement that [physicians] be

infallible, and making a mistake is not negligence as a matter of law.”).

The need to protect physicians from being held liable, in hindsight, for mere errors of judgment was highlighted by the Supreme Court in *Toogood*, where a plurality of the court recently stated:

Public policy reasons exist for protecting physicians. . . . First, doctors hold an important place in our society due to the role they play in the health and even survival of the peoples of this nation. For that reason, society should not allow a doctor’s actions to be second-guessed at trial without a clear understanding of the standards required. Second, medicine is not an exact science. Much discretion exists in a doctor’s practice of medicine that should not be condemned in hindsight. Third, the practice of medicine is a complex and experimental field. Therefore, expert testimony is necessary to prevent a finding of liability for a simple mistake in judgment, failure of treatment, or an accidental occurrence.

Consistent with these policy objectives, in order for jurors to have a “clear understanding of the standards required,” they should be instructed that physicians cannot be held liable for a simple error of judgment, failure of treatment, or an accidental occurrence.

Ensuring that jurors understand that physicians are not liable for mere mistakes in judgment or unfortunate results is consistent with the public policy expressed by the legislature in the Medical Care Availability and Reduction of Error Act, which states: “[i]n the absence of a special contract in writing, a health care provider is neither

a warrantor nor a guarantor of a cure.” The fact that the legislature felt the need to include this provision shows that jurors have a tendency to expect more from physicians than simply the exercise of reasonable skill and knowledge. As such, jury instructions need to do more than state the standard of care in terms of reasonable skill and knowledge. In addition to referencing reasonable skill and knowledge, jury instructions need to explicitly point out that where a physician exercises ordinary care and skill, the physician is not liable for a mere error of judgment, misdiagnosis, or unfortunate result.

Superior Court Decisions Overwhelmingly Embrace Error of Judgment Principles

The Superior Court in *Pringle* found that panel decisions of the Superior Court were irreconcilable and confusing, and concluded that the only way to resolve the confusion was to preclude the use of the “error of judgment” instruction. The court’s analysis overlooked the fact that most of the panel decisions at issue explicitly or implicitly approved of the use of the instruction.

As the *Pringle* court noted, the following Superior Court cases affirmed the trial court’s decision to instruct the jury that physicians are not liable for a mere error of judgment. See *Blich* v. *Jacks*, 864 A.2d 1214 (Pa. Super. 2004); *King* v. *Stefenelli*, 862 A.2d 666 (Pa. Super. 2004); *Fragale* v. *Brigham*, 741 A.2d 788 (Pa. Super. 1999), *appeal denied*, 563 Pa. 629, 758 A.2d 662 (2000); *Havasy* v. *Resnick*, 415 Pa. Super. 480, 609 A.2d 1326 (1992), *appeal granted*, 553 Pa. 625, 620 A.2d 491 (1993), *dismissed as improvidently granted*, 537 Pa. 114, 641 A.3d 580 (1994) (*per curiam*); *Schaaf* v. *Kaufman*, 850 A.2d 655 (Pa. Super. 2004), *appeal denied*, 582 Pa. 719, 872 A.2d 1200 (2005); *Soda* v. *Baird*, 411 Pa. Super. 80, 600 A.2d 1274 (1991), *appeal denied*, 532 Pa. 665, 616 A.2d 986 (1992). Additional Superior Court cases, not cited in *Pringle*, also approved of the use of an “error of judgment” instruction. Those cases are: *Carrozza* v. *Greenbaum*, 866 A.2d 369 (Pa. Super. 2004) (explaining the instruction in *dicta*), *appeal granted in part on other grds.*, 584 Pa. 154, 882 A.2d 1000 (2005), *appeal denied*, 584 Pa. 698, 882 A.2d 1004 (2005), *aff’d in part on other grds.*; *Carrozza* v. *Greenbaum*, 591 Pa. 196, 916 A.2d 553 (2007), and, most notably,

the en banc decision of the Superior Court in *McAvenue* v. *Bryn Mawr Hosp.*, 245 Pa. Super. 507, 369 A.2d 743 (Pa. Super. 1976). Each of these decisions endorses the principle that if a physician employs the skill, knowledge and care customarily exercised in his profession to make a judgment, he will not be liable for an error of judgment or mistake in diagnosis in treating a patient.

The *Pringle* court identified the following cases as panel decisions rejecting the use of the “error of judgment” instruction: *D’Orazio* v. *Parlee & Tatem Radiologic Assoc., Ltd.*, 850 A.2d 726 (Pa. Super. 2004), *appeal denied*, 582 Pa. 699, 871 A.2d 191 (2005); *Tindall* v. *Friedman*, 970 A.2d 1159 (Pa. Super. 2009); *Vallone* v. *Creech*, 820 A.2d 760 (Pa. Super. 2003), *appeal denied*, 574 Pa. 755, 830 A.2d 976 (2003); and *Gunn* v. *Grossman*, 748 A.2d 1235 (Pa. Super. 2000), *appeal denied*, 564 Pa. 711, 764 A.2d 1070 (2000). The Superior Court’s analysis read the import of these decisions too broadly.

Rather than reject the use of an error of judgment instruction as improper in all circumstances, the decisions in *Tindall* and *Vallone* held that the instruction was not warranted by the evidence in those cases and, thus, the trial court did not err when it either refused to give an “error of judgment” instruction or concluded, in response to a post trial motion, that the instruction should not have been given. Moreover, *Tindall* and *Vallone* acknowledged that physicians cannot be held liable for a mere error of judgment. The *Tindall* court acknowledged the principle when it found that the trial court’s decision not to give an “error of judgment” instruction was proper because the instructions given were “sufficient to cover the concepts that a doctor is not liable for a mere error in judgment, he is not a guarantor of treatment, and that a poor outcome does not establish malpractice.” The *Vallone* court acknowledged the principle when it indicated that it agreed with the trial judge’s post-trial decision, wherein the judge acknowledged that physicians may not be held liable for a mere error of judgment. While the *Gunn* court did not directly endorse the error of judgment principle, it held that the proposed error of judgment charge was sufficiently covered by the trial court’s instructions to the jury defining medical negligence and causation. Thus, the *Gunn* decision

implicitly acknowledges that error of judgment principles are properly considered in medical malpractice cases. It does not stand for the proposition that error of judgment instructions are improper in all instances.

Before *Pringle*, the lone Superior Court case unequivocally stating that “error of judgment” instructions are improper because they are more confusing than helpful was *D’Orazio*. In that case, the Superior Court affirmed the trial court’s decision not to give an “error of judgment” instruction, finding that although the standard charge on a physician’s duty of care could itself be simplified, that instruction “is far less confusing than first telling the jury that a doctor is not responsible for an error in judgment and then providing an exception if the judgment was below the standard of care.” The requested instruction in *D’Orazio* attempted to differentiate between making an error in judgment, and not having sufficient data on which to make a judgment in the first place. Even if the requested instruction in *D’Orazio* was confusing, that holding should not have been the springboard for the *Pringle* court’s total ban on the use of the instruction. *D’Orazio*, a panel decision, is inconsistent with the great weight of authority from both the Superior Court and the Supreme Court that approves of the principle that physicians cannot be held liable for a mere error of judgment.

Of particular importance to the analysis is the en banc Superior Court decision in *McAvenue*. In that case, the plaintiff challenged a jury instruction that instructed the jury to decide whether the defendant, a physical therapist, employed such reasonable skill and diligence as is ordinarily exercised. In addition, the trial court instructed the jury that: “Where a physician or hospital exercises ordinary care and skill, that hospital is not liable for the result of a mere mistake of judgment. There is no responsibility for error of judgment unless it is so gross as to be inconsistent with the degree of skill which it is the duty, in this case of a physical therapist, to possess.” The Superior Court held that the trial court’s charge to the jury, including the error of judgment charge taken from the Supreme Court’s decision in *Hodgson*, properly articulated the appropriate standard of care.

In light of *McAvenue* and the overwhelming case law supporting the error in judgment principle in both the Supreme Court and the Superior Court, the *D'Orazio* panel decision should have been limited to the facts of that case and the confusion associated with the instruction given in that case. The *D'Orazio* decision should not have been relied on by the Superior Court as the basis for a broad-based ban on "error of judgment" instructions. Moreover, the *Pringle* court should have acknowledged, and distinguished or overruled, the *McAvenue* decision when it issued its broad-based ban on "error of judgment" instructions. That the *Pringle* court should have addressed the *McAvenue* decision is highlighted by the fact that the instruction at issue in *McAvenue* was based on the Supreme Court's decision in *Hodgson*.

In *Hodgson*, the Supreme Court unambiguously stated: "Where a physician exercises ordinary care and skill, keeping within recognized and approved methods, he is not liable for the result of a mere mistake in judgment." Giving this simple instruction is neither confusing, nor an erroneous statement of the law. As a plurality of the Supreme Court noted in *Toogood*, physicians, who deal in an inexact, complex science, hold an important place in our society and, thus, should not be second-guessed at trial without a clear understanding of the standards required. Based on these policy considerations, the Supreme Court's unambiguous and long-standing support for error of judgment principles, and the conflict between the en banc decisions of the Superior Court in *McAvenue* and *Pringle*, the Supreme Court should, given the opportunity, review the propriety of the Superior

Court's holding in *Pringle*. Moreover, when the opportunity presents itself, the Supreme Court should reaffirm its prior holdings endorsing error of judgment principles and craft an instruction that eliminates any confusion created by prior decisions of the Superior Court. In particular, jurors should be expressly told that physicians who act with reasonable skill and knowledge cannot be held liable, retrospectively, for a mere error of judgment, mistake in diagnosis, or unfortunate result. Absent this instruction, jurors lack a *clear* understanding of the proper standard of care and may impose liability on physicians based solely on the outcome, rather than on whether the physician acted reasonably in making the decision at issue in the first instance.

