

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

KIRK RETTGER AND ERIK RETTGER, CO-
ADMINISTRATORS OF THE ESTATE OF
MICHAEL RETTGER, DECEASED

Appellee

v.

UPMC SHADYSIDE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 614 WDA 2012

Appeal from the Judgment Entered March 19, 2012
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD No. 05-25300

BEFORE: BOWES, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J.

FILED NOVEMBER 04, 2013

UPMC Shadyside (the Hospital) appeals from the judgment entered in favor of Kirk Rettger and Erik Rettger, co-administrators of the Estate of Michael Rettger, Deceased (the Estate). We affirm.

In an earlier proceeding, a jury awarded \$2.5 million to the Estate on a claim of wrongful death but rendered no award on the Estate's survival action.¹ The trial court granted a new trial limited to damages on the

* Retired Senior Judge assigned to the Superior Court.

¹ In a survival action, the decedent's estate sues on behalf of the decedent for claims the decedent could have pursued but for his or her death. **Frey v. Pennsylvania Electric Co.**, 607 A.2d 796 (Pa. Super. 1992).

survival action. On appeal, this Court affirmed. ***Rettger v. UPMC Shadyside***, 991 A.2d 915 (Pa. Super. 2010) (***Rettger I***).

Trial on the survival action was held between October 26 and November 2, 2011, and the jury returned a \$10 million verdict in favor of the Estate. The Hospital filed post-trial motions on November 14, 2011, and on March 19, 2012, upon praecipe of the Estate, judgment was entered in the amount of \$12,951,884.74 (jury verdict, delay damages and post-judgment interest). The Hospital filed a notice of appeal on April 5, 2012, and by opinion and order dated May 22, 2012, the court denied the Hospital's post-trial motions.

This Court previously set forth the facts of this case as follows:

The Estate commenced this action following the death of Michael Rettger at UPMC Shadyside Hospital while under the care of Eugene Bonaroti, M.D., and Oakland Neurological Associates. Mr. Rettger, then twenty-four years old, initially sought treatment at Cabell Huntington Hospital (CHH) in Huntington, West Virginia after suffering sustained, severe headaches while on work assignment in the Huntington area. Diagnostic imaging at CHH revealed a mass in the left side of Rettger's brain, which doctors there diagnosed as glioblastoma multiforme, an aggressive type of brain tumor, with a differential diagnosis of brain abscess. Thereafter, Rettger was transferred to UPMC Shadyside on November 15, 2003, and commenced treatment with Dr. Bonaroti on November 17, 2003. Dr. Bonaroti concurred in the earlier diagnosis of glioblastoma and retained the differential diagnosis of brain abscess. After a consult with a neuro-oncologist, who determined that Rettger's condition was not amenable to his treatment protocol, Dr. Bonaroti scheduled Rettger for a surgical procedure to take place at 7:30 a.m., Wednesday, November 19, 2003.

Pending surgery, Mr. Rettger was placed in a neurosurgical unit at the Hospital and assigned as a patient to nurse Kirsten

Stalder. Stalder was a relatively new employee who had completed nurse's training in May 2003 and commenced employment at UPMC Shadyside in June. After hire, Nurse Stalder attended a one-week new nurse orientation and, thereafter, received on-the-job training for twelve weeks. Following completion of her orientation and training experiences, Nurse Stalder provided nursing care unsupervised, subject to the laws of Pennsylvania governing nursing practice, the policies of UPMC Shadyside, and the direction of the attending physician. The policies at issue included the imperative that a nurse invoke the nursing chain of command to obtain proper care for a patient if the attending physician failed to render such care or to call a "Condition C" to obtain immediate critical care for a patient whose condition appeared emergent.

On November 18, the day prior to the scheduled surgery, Rettger displayed uneven pupil size and experienced substantial pain, for which he received narcotic pain medications and an anti-seizure medication. On November 19, shortly after 1 a.m., Nurse Stalder documented on Rettger's chart that the pupil of his left eye was fixed and dilated, indicating escalating pressure on the brain which, if not treated on an emergency basis, could lead to brain herniation and, ultimately, death. Nurse Stalder's notes also indicate that she telephoned Dr. Bonaroti at home to report Rettger's condition. Nurse Stalder's account of the conversation, however, differs sharply from Dr. Bonaroti's. While Stalder asserted that she told Dr. Bonaroti that Rettger's pupil was fixed and dilated, Bonaroti contends that she told him only that Rettger's pupils were uneven, essentially indicating that his condition was unchanged. Dr. Bonaroti did not report to the hospital or order emergency treatment and Nurse Stalder did not invoke the nursing chain of command or call a Condition C. Thereafter, Rettger's condition continued to deteriorate until, at 6:00 a.m., both pupils were fixed and dilated. When Nurse Stalder telephoned Dr. Bonaroti on that occasion he indicated that he was on his way to the Hospital. Prior to surgery, Rettger lost consciousness and hospital personnel placed him on life support. Although Dr. Bonaroti conducted two emergency surgical procedures that day to relieve the pressure on his brain, Rettger never recovered consciousness and died within twenty four hours. Evaluation during surgery established that Rettger did not suffer from a glioblastoma but rather from a fast growing brain abscess and that as a result of inattention to his worsening condition, he had suffered brain herniation.

The Estate commenced this action within the applicable limitations periods, asserting causes of action for wrongful death and survival and alleging professional negligence by Dr. Bonaroti and hospital staff, among them Nurse Stalder. The Estate also alleged corporate negligence by UPMC in failing to provide adequate training and supervision of its personnel and failing to formulate policies adequate to avoid the breakdown of care that had resulted in Rettger's death.¹ In response, UPMC denied all allegations of negligence but did not join Dr. Bonaroti as an additional defendant pursuant to former Civil Rule 2252(d), and did not seek to file a cross-claim against him pursuant to current Rule 1031.1 until after trial had commenced.² After trial commenced, UPMC argued to the jury that all defendants were blameless in Michael Rettger's care and that neither Nurse Stalder nor Dr. Bonaroti were negligent. However, after a stipulation by counsel for the Estate that no negligence had occurred prior to the 1 a.m. call by Nurse Stalder to Dr. Bonaroti, additional evidentiary rulings by the trial court focused the jury's inquiry on the two witnesses' competing versions of the call and on the alleged failure of Nurse Stalder to take appropriate action afterward. Thereafter, counsel for the Hospital sought to introduce allegedly inculpatory statements made by Dr. Bonaroti to the decedent's family members as "admissions of a party opponent," in an effort to establish that Dr. Bonaroti, rather than Nurse Stalder, bore primary responsibility for Rettger's death. The trial court, the Honorable Timothy Patrick O'Reilly, refused the tendered evidence, however, on the grounds that Dr. Bonaroti was not a party opponent of UPMC, prompting the Hospital to request, for the first time, that it be allowed to file a cross-claim against Dr. Bonaroti pursuant to Pa.R.C.P. 1031.1. Judge O'Reilly denied the motion as untimely and unduly prejudicial to Dr. Bonaroti, thus eliminating the Hospital's ability to seek contribution from him on any claim for which the defendants were not found jointly liable.

¹ No party contests that had medical personnel adequately intervened following Rettger's development of a fixed and dilated left pupil, he would not have died but would merely have suffered a vision deficit in his left eye.

² Rule 1031.1 replaced and superseded Rule 2252(d) by amendment of the Rules of Court effective June 1, 2007. See Pa.R.C.P. 1031.1 Explanatory Comment—2007.

In preparation for the deliberations of the jury, Judge O'Reilly instructed the jurors on, among other things, the legal duty of a hospital and its nurses to monitor the treatment provided by physicians and take appropriate action to protect patients from omissions in physician care. Consistent with that charge, the court read a portion of the Pennsylvania Code prescribing the duties of nurses and allowed the jury to take a copy of the relevant Code section to the jury room. Following deliberations, the jury returned a verdict for the plaintiff but awarded damages only on the wrongful death claims of the decedent's family members. The jury awarded no damages on the Estate's survival claim despite uncontroverted testimony that Michael Rettger was a talented and ambitious young accountant who would have achieved the rank of partner at a national accounting firm or, in private industry, would become controller or chief financial officer.

Rettger I, 991 A.2d at 920-22.

As previously noted, following trial on the survival action, the jury returned a \$10 million verdict. On appeal from the order entering judgment in favor of the Estate on the survival action, the Hospital raises the following issues for our review:

1. Whether the trial court erred as a matter of law in concluding that the decedent's preexisting condition, which was not caused by the Hospital's negligence, was irrelevant to the determination of survival damages, which legal error, in turn, resulted in multiple erroneous rulings that unfairly prejudiced [the Hospital] by relieving [the Estate] of [its] burden of proving causation of damages and preventing [the Hospital] from defending itself; exclusion of the testimony of [the Hospital's] medical expert, exclusion of most of the testimony of [the Hospital's] economic expert, and an instruction telling the jury that the decedent would have returned to work as an accountant.
2. Whether the trial court erred as a matter of law in concluding that the deduction from projected future income for personal maintenance expenses may include only bare-minimum costs and need not take into account decedent's station in life or the reasonable costs associated with earning a salary.

3. Whether the trial court erred as a matter of law in denying [the Hospital's] motion for a mistrial or a curative instruction after [the Estate's] counsel delivered a closing argument that exhorted the jury to punish [the Hospital] by sending a message with its verdict, even though survival damages are purely compensatory.
4. Whether the trial court's instructions to the jury were erroneous as a matter of law and probably misled the jury because they: failed to inform the jury of the first trial and its outcome, failed to inform the jury that loss of life and loss of enjoyment of life are not elements of survival damages, and incited the jury's sympathy and prejudice by informing it that decedent's mother would receive the damages.

Brief of Appellant, at 4.

The central issue raised by the Hospital is whether the trial court erred by determining that this Court's decision in ***Rettger I*** constituted the law of the case, thereby precluding the parties from relitigating the issue of the cause of Rettger's lost earnings.

As previously noted, in ***Rettger I***, this Court stated: "No party contests that had medical personnel adequately intervened following Rettger's development of a fixed and dilated left pupil, he would not have died but would merely have suffered a vision defect in his left eye." ***Id.*** at 922 n.1. Furthermore, this Court stated:

[T]he evidence also established that Michael Rettger . . . had achieved his educational objectives and had embarked on a very successful path in his chosen profession. Moreover, UPMC *failed to contravert*, through cross-examination or otherwise, that had Michael Rettger been properly treated, he would have survived and been able to continue in the profession for which all the evidence indicated he had shown extraordinary aptitude. Although the evidence indicated that Mr. Rettger would have suffered diminished peripheral vision in his left eye, it also

established that such a deficit would not have compromised his professional aptitude.

Id. at 934-35 (emphasis in original).

In the second trial, the court held that pursuant to the law of the case doctrine, **Rettger I** was dispositive of the issue of causation of damages. Because the first trial established that the Hospital's negligence after 1:00 a.m. on November 19, 2003, caused Rettger's death, the trial court precluded the Hospital from presenting the expert testimony of Dr. Peter Le Roux, who opined that, "had Mr. Rettger survived, he had a very high likelihood of having important neurological and neurobehavioral deficits that would have limited his ability to return to his work." Report of Dr. Le Roux, 9/25/11, at 2.

With respect to the law of the case, our Supreme Court held in **Commonwealth v. Starr**, 664 A.2d 1326 (Pa. 1995):

This doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. Among the related but distinct rules which make up the law of the case doctrine are that: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor court.

The various rules which make up the law of the case doctrine serve not only to promote the goal of judicial economy . . . but also operate (1) to protect the settled expectations of the

parties; (2) to insure uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamline administration of justice; and to bring litigation to an end.

Id. at 1331 (citations omitted).

With respect to the effect of an appellate court's decision on remand to the trial court, we have stated:

Under the law of the case doctrine, a trial court cannot overrule the holding of this Court upon remand proceedings. A trial court is without power to modify, alter, set aside or in any manner disturb or depart from the judgment of the reviewing court as to any matter decided on appeal.

Commonwealth v. McCandless, 880 A.2d 1262, 1267 (Pa. Super. 2005) (citations omitted).

Our Supreme Court has recognized the soundness of this policy:

If a jury can reconsider a determination of a trial court that is crucial to its ultimate legal conclusion in a later phase of the same litigation, the possibility exists that an adverse determination can undermine that initial legal conclusion and emasculate the principles underlying the "law of the case" doctrine.

In re De Facto Condemnation and Taking of Lands of WBF Associates, 903 A.2d 1192, 1210 n.4 (Pa. 2006).

This Court determined in **Rettger I** that the uncontroverted evidence established that if Rettger had been properly treated, he would have survived and been able to return to work as an accountant. This determination was the basis for affirming the trial court's grant of a new trial as to damages. Allowing the jury in the second trial to reconsider whether,

or not, Rettger would have recovered and returned to his career would give rise to the possibility of an adverse determination on that issue, undermining this Court's conclusion that the Estate was entitled to a new trial on damages. ***See In re De Facto Condemnation, supra.*** On remand, the trial court was without power to depart from this Court's determination in the first appeal that Rettger would have survived and would have been able to return to work.

The Hospital argues that the first trial and appeal did not establish that Rettger would have recovered and been able to return to work as an accountant. Nevertheless, this Court clearly held that the Hospital "*failed to contravert . . . that had . . . Rettger been properly treated, he would have survived and been able to continue in the profession for which all the evidence indicated he had shown extraordinary aptitude.*" ***Rettger I***, supra at 934-35 (emphasis in original). The Hospital filed a petition for allowance of appeal, which the Supreme Court denied. ***Rettger v. UPMC Shadyside***, 15 A.2d 491 (Pa. 2011). Therefore, for purposes of the second trial, this Court's determination that if Rettger had been properly treated he would have been able to resume his career, became the law of the case.

The grant of a new trial was strictly to determine the amount of survival damages, not to allow the Hospital to claim that Rettger would not have recovered or been able to work as an accountant. ***See Rettger I, supra.*** Therefore, relying on the law of the case doctrine, the trial court properly precluded the Hospital from presenting the testimony of Dr. Le

Roux that had Rettger survived, he would not have been able to return to the accounting profession.

The Hospital next challenges the trial court's rulings with respect to the proposed testimony of its economic damages expert. Prior to trial, the Hospital obtained an expert report from Douglas S. King, CPA, who calculated four possible earning scenarios for Rettger had he survived. The first three were based on Dr. Le Roux's opinion that if Rettger had survived, his vocational prospects would have been limited. The fourth scenario, which did not rely on Dr. Le Roux's opinion, assumed that Rettger would not have experienced any cognitive loss following his recovery.

The trial court precluded Mr. King from testifying about the first three scenarios because they were based on Dr. Le Roux's opinion, which it previously rejected. We agree with the trial court that our decision in ***Rettger I*** established the law of the case, namely that the evidence established that if Rettger had been properly treated, he would have been able to resume his career. Accordingly, the trial court properly precluded Mr. King from presenting the first three scenarios to the jury.

With respect to the fourth scenario in Mr. King's report, that Rettger would have continued to work in his chosen field, it is well settled that an appropriate deduction from Rettger's earnings must be made for the amount he would have spent on himself had he lived. ***See Incollingo v. Ewing***, 282 A.2d 206 (Pa. 1971); ***Murray v. Philadelphia Trans. Co.***, 58 A.2d 323 (Pa. 1948).

When taking into account Rettger's personal maintenance costs, Mr. King assumed they included "food, housing, clothing, transportation, healthcare, personal care products and services, reading, education and some entertainment." Report of Mr. King, 9/30/11, at 10 n.28. However, the trial court held that this assumption was inconsistent with the description of maintenance expenses approved of by our Supreme Court in **McClinton v. White**, 444 A.2d 85, 88 (Pa. 1982):

[Personal maintenance] is that necessary and economical sum which a decedent would be expected to spend, based upon his station in life, for food, clothing, shelter, medical attention and some recreation.

Id. citing Bernstein, "Damages in Personal Injury and Death Cases in Pennsylvania (A Supplement)," 26 Pa.Bar. Ass'n Q. 26 (1954). Accordingly, the trial court directed that Mr. King recalculate his projections consistent with the holding of **McClinton**. Based on this decision, the Hospital elected not to present an economic expert, but simply to cross-examine the Estate's expert witness.

"The admissibility of expert testimony is soundly committed to the discretion of the trial court, and the trial court's decision will not be overruled absent a clear abuse of discretion." **Hatwood v. Hosp. of the Univ. of Pennsylvania**, 55 A.3d 1229, 1239 (Pa. Super. 2012) (citation omitted). Because Mr. King's report included a calculation for personal maintenance that was contrary to applicable law, the trial court did not

abuse its discretion in prohibiting him from testifying consistently with his report.

The court instructed the jury by reading the above-quoted definition of personal maintenance set forth in **McClinton** and concluded by stating, “[t]hat’s what maintenance is. It is not every conceivable thing that somebody might spend money on.” N.T. Trial, 11/2/11, at 538-39. “A trial court has wide discretion in phrasing jury instructions, and absent an abuse of discretion or an inaccurate statement of law, there is no reversible error.” **Harman ex rel. Harman v. Borah**, 756 A.2d 1116, 1127 (Pa. 2000). Because the jury instruction on personal maintenance was an accurate statement of the law, it does not provide the basis for the grant of a new trial, as the Hospital suggests.

The Hospital next argues that the trial court erred by denying its request for a mistrial or a curative instruction after counsel for the Estate concluded its closing argument with the following remarks:

UPMC was negligent and caused Mike’s death, as I told you, and what they’re here doing today, I would submit, is they want you to give them a discount. They want the discount rate, and I don’t mean the discount rate to reduce present value.

They want you to give a discount on what Mike’s future earnings would be, and that’s because by asking for that discount – [counsel for the Hospital] said, “Oh, we want to be responsible.”

They don’t want to be responsible. By asking for the discount, they don’t want to take responsibility for causing his death and taking away what was going to be a very successful accounting career.

They want you to ignore the evidence and give [the Hospital] a discount so it can save as much of its money as possible. That is not taking responsibility for causing Mike Rettger to die.

The Rettger family doesn't need you to award money commensurate with a successful accountant within that range of \$14 million and \$18 million to know that Mike was going to be a successful accountant and that he was going to have that type of career. They know that [the Hospital] took away what was going to be a successful career for Mike.

But you know who needs that award? [The Hospital] needs that award. They need your award, that the minimum of \$4.3 million or a maximum of \$18.3 million,² they need to know that when they are negligent and they cause a young man to die at the age of 24, they're going to be held responsible.

They need to know, [the Hospital] needs to know with your award that it is not going to get a discount when its conduct results in the death of a young man who had a successful and prosperous career in front of him.

I trust that your award will hold [the Hospital] fully responsible for taking away Mike's career as an accountant at Ernst & Young. Thank you.

N.T. Trial, 11/2/11, at 525-27.

At sidebar, counsel for the Hospital moved for a mistrial or a curative instruction, arguing that opposing counsel had impermissibly asked the jury for a verdict that would send a message to the Hospital. Counsel for the Hospital suggested that the argument injected elements that were punitive and retributive in nature as opposed to compensatory. *Id.* at 547-48. The trial court denied the requests for a curative instruction or a mistrial, noting

² The Estate's economic expert, Thomas Claassen, testified that Rettger's lost wages minus personal expenditures would fall within this range depending on the exact nature of his employment as an accountant. N.T. Trial, 11/1/11, at 326-38.

that the message not to give the Hospital a discount was not the same as asking the jury to send a message. *Id.* at 548.

“It is well settled that the presentation of closing arguments and the decision to declare a mistrial with respect thereto is within the discretion of the trial court.” *Mansour v. Linganna*, 787 A.2d 443, 449 (Pa. Super. 2001). “When reviewing objectionable remarks made by trial counsel in closing argument, they must not be viewed in isolation, but, rather in the context of opposing counsel’s closing argument.” *Alexander v. Carlisle Corp.*, 674 A.2d 268, 271 (Pa. Super. 1996) (citation omitted).

During cross-examination, Mr. Claassen reiterated that he had calculated that Rettger would have spent 25.6 per cent of his income on personal maintenance. N.T. Trial, 11/1/11, at 387. The following exchange then took place between counsel for the Hospital and Mr. Claassen:

Q: Let’s talk about the notion of reduction to present value. The way net earnings are typically, you first calculate gross earnings, which means salary over a number of years and fringe benefits, correct?

A: That’s correct.

Q: And then just to use round numbers, if you started with just a million dollars in gross earnings and you reduced it by a percentage, you said 25 percent, somebody might say 50 percent, let’s use 50 percent personal maintenance, you would get down to \$500,000, correct, if you assume 50 percent personal maintenance, correct?

A: Yes.

Q: If you used 25 percent, your number, you would get \$750,000, correct?

A: That’s correct.

Id. at 388-89. Returning to this theme in closing argument, counsel for the Hospital stated:

[I]f you came out here and this number were \$3 million and you found that personal maintenance were 50 percent, the bottom line number would be \$1.5 [million].

If you accepted Mr. Claassen's 25 percent, then you would reduce the \$3 million [by] just 25 percent.

If you felt it was lower, you could reduce it by a smaller percentage, and that would give you your bottom line. That would give you your verdict.

N.T. Trial, 11/2/11, at 493.

The trial court determined that characterizing this "not-so-subtle plea for a 50% maintenance reduction" as a discount was appropriate. Trial Court Opinion, 5/22/12, at 9. "So long as no liberties are taken with the evidence, a lawyer is free to draw such inferences as he wishes from the testimony and to present his case in the light most suited to advance his cause and win a verdict in the jury box." **Hycza v. West Penn Allegheny Health System, Inc.**, 978 A.2d 961, 977 (Pa. Super. 2009) (citation omitted). Accordingly, the trial court did not abuse its discretion in determining that the reference to a discount did not require a mistrial or a curative instruction.

Furthermore, the trial court's instruction ensured that the jury would not use the verdict to punish the Hospital. The court stated:

Now, the amount you award today must compensate the plaintiff, the Estate of Michael Rettger, compensate the plaintiff completely for the net lost earnings sustained in the past, as well as net lost earnings that would be sustained in the future.

N.T. Trial, 11/2/11, at 537.

The court also instructed the jury:

You should not allow sympathy, or prejudice to influence your deliberations. You should not be influenced by anything other than the law and the evidence in this case.

All the parties stand equally before the Court. Each is entitled to the same fair and impartial treatment at your hands and that is what I expect you to do.

Id. at 553.

The Hospital has not established that it suffered prejudice as the result of the trial court's refusal to grant a mistrial because of the Estate's closing argument. Accordingly, it is not entitled to relief. **See Boyle v. Independent Lift Truck, Inc.**, 6 A.3d 492, 496 (Pa. 2010) (moving party must demonstrate prejudice by alleged error of trial court to be awarded new trial).

The Hospital next argues that it is entitled to a new trial based on the court's instructions to the jury. "In examining jury instructions, our scope of review is limited to determining whether the trial court committed a clear abuse of discretion or err of law controlling the outcome of the case." **Quimby v. Plumsteadville Family Practice**, 907 A.2d 1061, 1069 (Pa. 2006) (citation omitted).

At the beginning of trial, the court informed the jury that "[i]t has already been determined that the defendant UPMC Shadyside's negligent conduct caused the death of Michael Rettger." N.T. Trial, 11/1/11, at 105.

The court rejected the following proposed opening remarks prepared by the Hospital:

[A]nother jury has previously determined that UPMC Shadyside is legally responsible for the death of Michael Rettger, who was a patient at the hospital being treated for a presumed brain tumor. This jury awarded damages on other legal claims that were presented on behalf of Mr. Rettger and his family, and those claims are not part of this case.

The jury award on those other claims was \$2.5 Million which, with interest, resulted in a payment to plaintiffs in the amount of \$3.2 Million.

Appellant's Proposed Opening Remarks, 10/27/11, at 1. The court also directed the parties not to refer to the existence of the first trial. N.T. Trial, 11/1/11, at 95.

The Hospital asserts that it was prejudiced by the trial court's rulings, which prevented "the second jury from learning the necessary background [inviting] it to impermissibly build into its award compensation related to the wrongful death, which unbeknownst to the jury, already had been provided in the first trial." Appellant's Brief, at 55.

"A reviewing court will not grant a new trial on the ground of inadequacy of the charge unless there is a prejudicial omission of something basic or fundamental." ***Ferrer v. Trustees of the University of Pennsylvania***, 825 A.2d 591, 612 (Pa. 2002). At a trial on survival damages, there was nothing basic or fundamental that the jury had to know regarding the amount the first jury awarded for wrongful death. The only evidence at trial involved lost earnings and the only jury instructions

involved calculation of damages under the Survival Act. At a trial where the jury's duty was to determine a decedent's net lost earnings, the court's decision not to inform the jury regarding damages for a separate cause of action was an appropriate exercise of discretion, and accordingly, no relief is due. ***See Quimby, supra.***

In ***Willinger v. Mercy Catholic Medical Center of Southeastern Pa.***, 393 A.2d 188 (Pa. 1978), our Supreme Court held that a court may not instruct a jury that survival action damages include loss of life's pleasures or loss of life. Relying on ***Willinger***, the Hospital sought the following instruction: "Compensation for loss of 'life's pleasures' or loss of 'life itself' are not elements of damage under the Pennsylvania Survival Act, and are not to be awarded in this case." Appellant's Proposed Points for Charge, at 12. The trial court refused to give this instruction, and on appeal the Hospital asserts this was erroneous and prejudicial, thus warranting a new trial. We disagree.

Willinger does not stand for the proposition that a court must charge the jury that loss of life's pleasures or loss of life are *not* elements of survival damages. It merely holds that it is error for the trial court to charge that they *are* elements of survival damages. Here, the trial court charged the jury on the only issue properly before it, which was Rettger's net lost

earnings.³ The trial court's charge contained no prejudicial omission of a basic element of survival damages, and therefore, is not a basis for granting a new trial.

The Hospital's final challenge is to the following portion of the jury instructions:

You should understand this so it is clear, under the law, because Michael Rettger died without a will, all damages awarded under the Survival Act will go to his mother

N.T. Trial, 11/2/11, at 539. The Hospital does not dispute the accuracy of this statement. However, it argues that invoking Rettger's mother created "unfair sympathy or prejudice on the part of the jury." Appellant's Brief, at 56. The jury was aware that this matter is captioned "Kirk Rettger and Erik Rettger, Co-Administrators of the Estate of Michael Rettger, Deceased v. UPMC Shadyside". The court's decision to inform the jury that Rettger's mother was the actual party who would receive the damages awarded was a proper exercise of its discretion. Furthermore, as noted above, the court instructed the jury as follows:

You should not allow sympathy, or prejudice to influence your deliberations. You should not be influenced by anything other than the law and the evidence in this case.

³ Although pain and suffering may also be included as an element of damages in a survival action, the Estate withdrew its claim for pain and suffering prior to trial. N.T. Pre-Trial Motions, 10/26/11, at 6-7.

All parties stand equally before the Court. Each is entitled to the same fair and impartial treatment at your hands and that is what I expect you to do.

Id. at 553. It is well settled that absent evidence to the contrary, the jury is presumed to have followed the trial court's instructions. **Commonwealth v. Spatz**, 896 A.2d 1191, 1124 (Pa. 2006). As the Hospital has presented no evidence in support of its argument that the jury failed to follow the court's instructions, we must presume that the jury reached its decision uninfluenced by sympathy or prejudice.

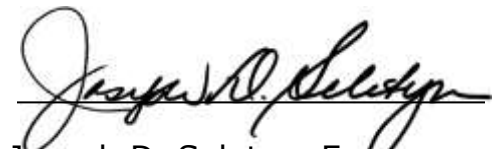
For these reasons, we conclude that the trial court did not abuse its discretion or err as a matter of law, and accordingly, the Hospital is not entitled to relief.

Judgment affirmed.

BOWES, J., files a Concurring Memorandum in which COLVILLE, J., concurs in the result.

COLVILLE, J., concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/4/2013