[J-101A & B-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

STEVEN P. PASSARELLO, ADMINISTRATOR OF THE ESTATE OF ANTHONY J. PASSARELLO, DECEASED, AND STEVEN P. PASSARELLO AND NICOLE M. PASSARELLO, HUSBAND AND WIFE	:	No. 15 WAP 2012
	:	Appeal from the Order of the Superior Court entered September 9, 2011 at No. 1399 WDA 2010, vacating the Judgment of the Court of Common Pleas of Blair County entered September 7, 2010 at No. 2003 GN 3088, and remanding.
v.	:	
ROWENA T. GRUMBINE, M.D. AND BLAIR MEDICAL ASSOCIATES, INC.,	:	29 A.3d 1158 (Pa. Super. 2011)
APPEAL OF: BLAIR MEDICAL ASSOCIATES, INC.	:	ARGUED: November 28, 2012 RESUBMITTED: December 27, 2013
STEVEN P. PASSARELLO, ADMINISTRATOR OF THE ESTATE OF ANTHONY J. PASSARELLO, DECEASED, AND STEVEN P. PASSARELLO AND NICOLE M. PASSARELLO, HUSBAND AND WIFE	:	No. 16 WAP 2012
	:	Appeal from the Order of the Superior Court entered September 9, 2011 at No. 1399 WDA 2010, vacating the Judgment of the Court of Common Pleas of Blair County entered September 7, 2010 at No. 2003 GN 3088, and remanding.
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ROWENA T. GRUMBINE, M.D. AND BLAIR MEDICAL ASSOCIATES, INC.,	:	29 A.3d 1158 (Pa. Super. 2011)
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DISSENTING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: FEBRUARY 7, 2014**

I respectfully dissent, and I join Mr. Justice Eakin's Dissenting Opinion. The Majority affirms the award of a new trial premised upon an alleged "error" never raised at trial: specifically, appellees did not object to the "error in judgment" charge on the basis that it was substantively misleading, confusing, and prejudicial.[1] Rather, as Justice Eakin details, appellees' objections at trial and in post-trial motions focused on the distinct ground that such a charge was inappropriate under the facts of this case and that the charge was redundant because its essence was adequately covered by the standard jury instructions, which rendered an additional, specific charge unnecessary. Because the substance of the trial and post-trial objections made does not encompass the discursion forming the basis for the Superior Court's decision, which is approved by the Majority's affirmance here, the Court's decision is an exercise is *obiter dictum*.

I write further to address two points: retroactivity and prejudice. Concerning retroactivity, I have difficulty with the Majority's discussion of the Superior Court's decision in Pringle v. Rapaport, 980 A.2d 159 (Pa. Super. 2009) (*en banc*), holding that an error in judgment jury charge is always inappropriate in medical malpractice actions. This Court has noted that a judicial decision that announces a new rule of law or "overrule[s], modif[ies] or limit[s] any previous case **from this Court**" is generally not applied retroactively due to the effect on litigants who relied on the previous decisional rule made by this Court. Kendrick v. District Attorney of Philadelphia County, 916 A.2d 529, 538 (Pa. 2007) (quoting Commonwealth v. Eller, 807 A.2d 838, 844 (Pa. 2002) (emphasis in original)). However, "[n]ot every opinion creates a new rule of law. Generally, where we have yet to rule explicitly on an unresolved legal issue, the first decision providing a definitive answer announces a new rule of law. When **this Court** issues a ruling that overrules prior law, expresses a fundamental break from precedent,

[1] Only appellant Rowena T. Grumbine raised and argued waiver before this Court.

upon which litigants may have relied, or decides an issue of first impression not clearly foreshadowed by precedent, **this Court** announces a new rule of law." Fiore v. White, 757 A.2d 842, 847 (Pa. 2000) (emphasis supplied).

The Majority states that "Pringle did announce a new rule of law" and approves application of that new rule to retroactively find that the trial here was unfair. Maj. Slip Op. at 38. As a threshold matter, the Superior Court's proper institutional role does not encompass formulating or announcing new rules of law. When it comes to these sorts of decisional "rules" involving matters of Pennsylvania law, the formal purpose of the Superior Court is to implement the decisional law of this Court. See Commonwealth v. Dugger, 486 A.2d 382, 386 (Pa. 1985).[2] As this Court indicated through the emphasis on the "from this Court" language in Eller, Kendrick and Fiore, "new" rules are generally the province of this Court. See also In re L.J., 79 A.3d 1073 (Pa. 2013) (emphasis on this Court announcing new rules); Commonwealth v. Pitts, 981 A.2d 875 (Pa. 2009) (Castille, C.J., concurring) ("putting aside the question of whether the Superior Court should purport to promulgate new 'rules' or refine old ones in procedural matters"). Trial courts and intermediate appellate court panels properly can, and often do, opine regarding what those jurists believe to be the proper decision in a case based upon the application of principles deriving from constitutional provisions, statutes, formal procedural rules, and decisional law. And, of course, the lower courts are frequently

[2] I have discussed elsewhere the difficulty in ascertaining whether an intermediate appellate court has overstepped its bounds in crafting a "new rule," noting that the alleged overstepping oftentimes involves the lower court's mere good faith, if ultimately mistaken, effort to implement governing principles from this Court in new scenarios. See Commonwealth v. Liston, 977 A.2d 1089, 1095-1100 (Pa. 2009) (Castille, C.J., concurring, joined by Saylor and Eakin, JJ.).

faced with novel issues, whether it be a novel issue of law or settled law invoked in a novel scenario, a clash of competing principles, etc.

"New rules" and concomitant questions of retroactivity are not always of one kind. In speaking of such "new rules" and concerns of retroactivity, we can only be talking of procedural rules promulgated by this Court (whether through our Rules Committees process, or in the context of a specific case requiring broader supervisory guidance, see, e.g., Commonwealth v. Holmes, 79 A.3d 562 (Pa. 2013) (decided Oct. 30, 2013); or decisional "rules" arising from this Court's controlling interpretations of substantive law, whether the rule ultimately derives from constitutional provisions, see, e.g., Commonwealth v. Henderson, 47 A.3d 797 (Pa. 2012), statutes, see, e.g., Commonwealth v. Dickson, 918 A.2d 95 (Pa. 2007), or formal procedural rules. See, e.g., Commonwealth v. Brock, 61 A.3d 1015 (Pa. 2013).

Strictly speaking, the Superior Court does not establish new rules. To be sure, it may do its best to apply existing law to new scenarios, and those applications create a body of governing law within that court, including law on points this Court has yet to consider. Once we accept a case for review, however, the question is not whether some prior decisional "rule" of the Superior Court should apply retroactively; the question is the retroactive or prospective effect of the rule this Court announces or approves in our decision.

There can be no doubt that the Court today has established a new substantive rule. This Court has never approved (or disapproved) an "error in judgment" jury instruction in a medical malpractice case before today – much less have we ever remotely held that the issuance of such a charge is reversible error. As Justice Eakin points out, appellees are not entitled to application of this new rule. A litigant can only benefit from changes in the law occurring during the pendency of a case where the

litigant properly preserved a challenge bottomed on the same theory leading to the new rule. Dissenting Op. at 3 (citing Blackwell v. Commonwealth State Ethics Commission, 589 A.2d 1094, 1099 (Pa. 1991)). Appellees did not properly preserve, as a basis for their challenge to the error in judgment charge, the basis for the holding in Pringle, which the Majority adopts as our new rule.

Even assuming that appellees raised the objection that the Superior Court and the Majority believe they raised, and further assuming that appellees are entitled to the Court's new substantive rule, I fail to see how appellees were prejudiced by the charge at issue here.

Examining the trial court's jury charge in its entirety, rather than focusing on discrete passages, it is clear that the court's charge was not problematic. The charge on negligence principles began with a basic definition of the concept of negligence as the absence of the ordinary care that a reasonably prudent person would exercise in the circumstances presented and that negligence can result from an act or a failure to act. N.T. Jury Charge, 4/27/09 at 12-13. The court then provided a comprehensive description of professional negligence:

> Professional negligence consists of a [ ] negligent, careless or unskilled performance by a physician of the duties imposed upon her by the professional relationship with a patient. It is also negligence when a physician shows a lack of proper care and skill in the performance of a professional act. A physician MUST have the same knowledge and skill and use the same care normally used in the medical profession. A physician who's [sic] conduct falls below the standard of care is negligent. A physician who professes to be a specialist in a particular field of medicine must have the same knowledge and skill and use the same care as others in that same medical specialty. In this case Dr. Grumbine is a pediatrician. A specialist who's [sic] conduct does not meet this professional standard of care is negligent. Under this standard of care a physician must also keep informed of the contemporary developments in the medical profession or her specialty and must use current skills and knowledge. In other words a physician must have up to the date medical

> skills and knowledge and if she fails to keep it current or fails to use current knowledge in the medical treatment of the patient the physician is negligent.

Id. at 13-14.

Later in the charge, following a discussion of factual cause, burden of proof and damages, the court read selected points for charge submitted by the parties and identified them as such. As to Dr. Grumbine, the court reiterated the standard of care charge:

> Judging the care and treatment of Defendant you must not use hindsight but you must judge the Defendant on the conditions and circumstances and facts known to her at the time she was rendering treatment to Anthony --- Anthony Passarello. You must judge a physician by the skill and knowledge that she possess [sic] and by the reasonableness of her treatment. In order to recover against the Defendant the Plaintiffs must prove the Defendant did not possess or employ the skill and knowledge required to treat Anthony Passarello, that she did not exercise the care and judgment of a reasonable person under the circumstances and that the conduct caused the harm being claimed. If the Plaintiffs do not meet this burden of proof then your verdict must be in favor of the Defendant and against the Plaintiffs.
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> In determining whether a physician was negligent you may not rely on hindsight to find that the doctor's treatment produced a bad outcome since unexpected, [ ] unfortunate or even [ ] disastrous results is [sic] not a proof of negligence. Rather you must determine whether that physician failed to have and exercise ordinary skill, care, and knowledge of a specialist in this case a pediatrician in the circumstances which were present at the time.

Id. at 33, 35.

As to Blair Medical's requested points for charge, the court charged the jury regarding errors in judgment:

> In medical negligence cases there is no presumption of or inference of negligence merely because of an unfortunate result which might have occurred despite the exercise of reasonable care. Under the law physicians are permitted a broad range of judgment in their professional duties and physicians are not liable for errors of judgment unless it's proven that an error of judgment was the result of negligence.

Id. at 35-36.

There is, in my view, nothing erroneous or confusing in these jury instructions. Physicians, like lawyers and judges, do use judgment. The charge here fairly and accurately described general negligence concepts and then related those concepts to professional negligence. The trial judge repeatedly informed the jury that the guiding principles at issue were the standard of care of a professional in Dr. Grumbine's position and the reasonableness of her conduct as a professional. The court's brief error in judgment charge related back to the negligence charge by directly stating that a physician is liable for an error of judgment resulting from negligence. The twin notions that a physician is liable for negligence and that she does not escape liability for negligence by claiming an error in judgment were made crystal clear in the trial judge's charge to the jury.

The plaintiff in a medical malpractice case, of course, is free to stress that an exercise of professional judgment that represents a deviation from the standard of care should result in liability. But, there is no reason for courts to work backwards and reformulate charges so that they better square with the slanted arguments, and "spin," preferred by one side or the other.

Notably, as Justice Eakin points out, the error in judgment charge disapproved by the Superior Court in Pringle went a significant step farther than the charge in this case by stating:

> Folks, if a physician has used his best judgment and he has exercised reasonable care and he has the requisite knowledge or ability, even though complications resulted, then the physician is not responsible, or not negligent. The rule requiring a physician to use his best judgment does not make a physician liable for a mere error in judgment provided he does what he thinks best after careful examination.

Pringle, 890 A.2d at 164. This distinct directive potentially confused and misled the jury regarding the concepts of reasonable care and negligence, perhaps leading the Pringle jury to believe that an error in judgment relieves a physician of liability in all instances. It may be that the Pringle panel correctly decided that case in light of the distinctive charge given. The fact of the distinction, however, should serve as a warning before upsetting jury verdicts following upon very different jury charges, in the rush to establish some preferred prescriptive "rule."

Obviously, there are some instances in which an error in judgment instruction is inappropriate. Specifically, medical malpractice actions involving straight negligence claims that the physician's conduct fell below the standard of care, such as, for example, where a surgeon leaves implements or surgical equipment inside a patient's body, would not be amenable to an error in judgment instruction. It is not difficult to envision, however, a scenario where a physician has two or more different potential paths to follow in treating a patient, including judgment calls such as whether to order certain diagnostic tests or to prescribe certain medications given the potential complications of the tests or drugs, and then used judgment in a manner that arguably comported with the standard of care, but where the ultimate result for the patient was not good. In that instance, it would be appropriate to charge the jury that it can find that a physician whose actions fall within the standard of care is not liable for an error in judgment. The jury would then determine whether the physician's exercise of judgment was reasonable and within the standard of care. Of course, trial courts should

emphasize that a physician's conduct must always meet the applicable standard of care. It is only when a physician acts within the standard of care that a mere error in judgment can excuse liability.

This matter is just such a case, and the trial court's charge in this instance allowed the jury to determine if Dr. Grumbine's exercise of judgment was within the standard of care. It apprised the jurors that Dr. Grumbine's conduct must have been reasonable and within the standard of care applicable to Dr. Grumbine's specialty of pediatrics for her to be found not liable. In its brief error in judgment charge, the court again introduced the concepts of reasonable care and the standard of care. I do not believe that the charge in this case could possibly have prejudiced appellees.

I respectfully dissent.