[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.	:
	: ARGUED: November 28, 2012 : RESUBMITTED: December 27, 2013
ROWENA T. GRUMBINE, M.D. AND BLAIR MEDICAL ASSOCIATES, INC.	:
APPEAL OF: BLAIR MEDICAL ASSOCIATES, INC.	:

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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DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: FEBRUARY 7, 2014**

As I would find appellees' argument contending the "error in judgment" instruction is inherently confusing was waived by their failure to object on this ground at trial and further take issue with the majority's adoption of Pringle v. Rapaport, 980 A.2d 159 (Pa. Super. 2009) (en banc), I respectfully dissent. While the majority's recitation of the facts surrounding appellees' "error in judgment" instruction challenge is vague, I find the particulars salient to the waiver analysis. During the charging conference, appellees' counsel noted the following regarding Dr. Grumbine's proposed "error in judgment" instruction:

> I have law...I have law on the judgment at my hotel room.
>
> * * *
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> I just don't have the law with me that this is…that this case did not develop and is not appropriate for an error of judgment charge.
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> * * *
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> There is specific law in medical malpractice cases dealing [with] when the error of judgment charge needs to be given and when it isn't. It's at my hotel. I just don't have it here.

N.T. Charge Conference, 4/24/09, at 85-86. Disregarding other potential arguments regarding whether these statements amounted to a proper objection and whether such objection preserved appellees' challenge to the "error in judgment" instruction actually given at trial from Blair Medical's proposed instructions, these comments clearly state a challenge to the applicability of the "error in judgment" instruction to the facts of this case, not an assertion the charge should not be given because it is inherently confusing.[1]

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[1] While it appears further discussion regarding the "error in judgment" instruction took place when the charge conference was reconvened, there is no transcription of the same and nothing in the record suggests, and appellees have not argued, they asserted any further basis for their objection at that time. When called to side-bar following the jury charge, appellees' counsel simply renewed his objections from the charging conference. N.T. Jury Charge, 4/27/09, at 37.

In their motion for post-trial relief, appellees challenged the "error in judgment" instruction on two bases, neither of which even hinted at it being inherently misleading:

> 11. Plaintiffs[] objected to the "Error in Judgment" charge as this case involved a failure to test [or] diagnose.
>
> 12. Plaintiffs[] also objected to the "Error in Judgment" charge on the basis that this charge was adequately covered by the Pennsylvania Suggested Standard Jury Instructions and that no further charge was necessary.

Plaintiff's Motion for Post-Trial Relief, 5/5/09, at 2-3 (internal citations omitted). In fact, appellees' assertion the "error in judgment" instruction is inherently misleading does not appear until their brief in support of their post-trial motion, wherein appellees completely abandon their initial challenges and rely solely on Pringle.[2]

While the majority correctly notes litigants are entitled to the benefit of changes in the law that occur during the pendency of their case, such is true only where they have properly preserved a challenge concerning the basis on which the law has been altered. See, e.g., Blackwell v. Commonwealth State Ethics Commission, 589 A.2d 1094, 1099 (Pa. 1991) (holding our prior decision declaring statute unconstitutional was to be applied retroactively "to all cases pending at the time of that decision in which the issue of the constitutionality of [the statute] was timely raised and preserved"). Where, as here, the objection was on a wholly different basis, appellees should not be permitted to challenge pursuant to Pringle under the guise that a challenge to the "error in judgment" charge on any basis gives them the blanket benefit of any new law regarding any facet of that instruction.

I also find the majority's adoption of Pringle's wholesale ban on the "error in judgment" instruction in medical malpractice cases troubling, particularly given the

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[2] Appellees' abandonment of their prior bases further supports that such were inapplicable to their argument under Pringle.

majority's failure to quote, in full, the "error in judgment" instruction from that case, and its attendant failure to analyze the additional language contained therein. Further, the majority's characterization of the "error in judgment" instruction in this case as "very similar" to that given in Pringle is misleading, especially in light of the majority quoting only a portion of the Pringle instruction in support of this determination. See Majority Slip Op., at 6. The omitted portion of the instruction reads as follows:

> 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, at 164 (citation and additional emphasis omitted). As the majority notes, in determining the "error in judgment" charge "has no place in medical malpractice cases[,]" the Superior Court reasoned:

> [T]he "error [in] judgment" charge wrongly 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] … wrongly injects a subjective element into the jury's deliberations [by] … improperly refocus[ing] the jury's attention on the physician's state of mind at the time of treatment, even though the physician's mental state is irrelevant in determining whether he or she deviated from the standard of care. Furthermore, by directing the jury's attention to what the physician may have been thinking while treating the patient, the jury may also be led to conclude that only judgments made in bad faith are culpable — even though a doctor's subjective intentions while rendering treatment are likewise irrelevant to the issues placed before a jury in a medical malpractice case.

Id., at 173-74. Where, as in this case, the jury is properly instructed on the standard of care and the additional language concerning the physician's state of mind is omitted, the Pringle court's concerns — and with them the basis for its "error in judgment" charge ban — are, in my opinion, obviated. To the extent a reasoned analysis could come to an alternative conclusion, the majority fails to engage in the same; instead, it focuses its analysis on the terms "error" and "judgment," to the exclusion of the remainder of the jury charge given, and on its determination "that the essential principles that underlie error in

judgment instructions are capable of being stated in a straightforward manner without incorporating phrases such as 'error in judgment.'"[3] Majority Slip Op., at 26.

For these reasons, I respectfully dissent.

Mr. Chief Justice Castille joins this dissenting opinion.

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[3] Importantly, such analysis appears at odds with our applicable standard of review:

> In examining jury instructions, our scope of review is limited to determining whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case. Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. … In reviewing a trial court's charge to the jury[,] we must look to the charge in its entirety.

Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1069-70 (Pa. 2006) (internal citations omitted).