IN THE

Supreme Court of Pennsylvania
Western District

55 WAP 2017

LANETTE MITCHELL,

Appellee,

v.

EVAN SHIKORA, D.O., UNIVERSITY OF PITTSBURGH PHYSICIANS d/b/a WOMANCARE ASSOCIATES, MAGEE WOMENS HOSPITAL OF UPMC,

Appellants.

Appeal from the Order entered May 5, 2017, in the Superior Court of Pennsylvania – Western District, at Case No. 384 WDA 2016, Reversing the Order entered February 22, 2016, in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. GD 13-023436

APPLICATION FOR LEAVE TO FILE POST-SUBMISSION COMMUNICATION PURSUANT TO PA. R.A.P. 2501(a)

RUDOLPH L. MASSA, ESQ.
ID. No. 84788
MASSA BUTLER GIGLIONE
Three Gateway Center, Suite 1540
401 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 338-1800
rmassa@mbp-law.com

STEPHEN TRZCINSKI, ESQ.
ID. No. 86963
421 Westminster Avenue
Haddonfield, New Jersey 08033
(215) 586-1339
strzcinski06@comcast.net

Attorneys for Appellee, Lanette Mitchell

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APPLICATION FOR LEAVE TO FILE POST-SUBMISSION COMMUNICATION PURSUANT TO PA. R.A.P. 2501(a)

For the following reasons, Stephen Trzcinski and Rudolph L. Massa, counsel for Plaintiff/Appellee ("Plaintiff"), request leave to file a post-submission communication with this Court—namely, an Application to Dismiss Appeal as Improvidently Granted or, Alternatively, to Clarify the Question(s) Presented (hereinafter "Application to Dismiss").

1. By way of background, this appeal arises from the order and opinion of the Pennsylvania Superior Court dated May 5, 2017, reversing the order and decision of the Court of Common Pleas of Allegheny County, entered on February 22, 2016.

2. This case stems from a surgery that Defendants/Appellants ("Defendants") performed on Plaintiff in 2012. Midway through a laparoscopic procedure, the surgeons (Drs. Shikora and Hansen) severed Plaintiff's bowel nearly in half and then aborted the operation.

3. Plaintiff sued Defendants, alleging negligence, and later sought to exclude evidence about whether bowel injury was a known risk or complication of the surgery.

4. Importantly, Plaintiff did not make any claims for lack of informed consent.

5. Although the trial court did not allow Defendants to present evidence relating to informed consent, including conversations between Dr. Shikora and Plaintiff or evidence of Plaintiff's consent despite the risks, the jury was allowed to hear about the general risks and complications associated with surgery.

6. The jury rendered a defense verdict, and Plaintiff subsequently appealed, arguing that the court should not have admitted any information about the general risks and complications.

7. Plaintiff raised one question in her appeal to the Superior Court:

> Whether the trial court erred by allowing [D]efendants to admit evidence of the 'known risks and complications' of a surgical procedure[,] in a medical malpractice case that did not involve informed consent-related claims, and such evidence was, therefore, irrelevant, unfairly prejudicial, and misled jurors on an issue that directly controlled the outcome of the case, thereby warranting a new trial?

Mitchell v. Shikora, 161 A.3d 970, 971-72 (Pa. Super. 2017)

8. After considering Brady v. Urbas, 11 A.3d 1155 (Pa. 2015) and other authorities, the Superior Court reversed and ordered a new trial. Mitchell, 161 A.3d at 976. In so ruling, the Court found that the risk/complications evidence was (1) "irrelevant in determining whether Defendants, specifically Dr. Shikora, acted within the applicable standard of care"; and (2) likely "to mislead and/or confuse the jury by leading it to believe that [Plaintiff's] injuries were simply the result of the risks and complications of the surgery." Id. at 975.

9. Thereafter, Defendants filed a Petition for Allowance of Appeal ("Petition") and presented three questions for this Court's review:

> (1) Whether the Superior Court has departed from judicial practices and/or abused its discretion in usurping the trial court's sound discretion and considering de novo the admission of expert testimony and evidence and, as such, the exercise of this Court's authority is warranted?
>
> (2) Whether the Superior Court's holding directly conflicts with this Honorable Court's holdings in [Brady], which permits evidence of general risks and complications in a medical negligence claim?
>
> (3) Whether the Superior Court's imposition of a strict liability standard against health care providers has drastic policy implications and presents a question of substantial public importance that requires prompt and definitive resolution by this Court?

Petition at 3.

10. While the Petition was pending, Defendants filed an Application for Leave to File Supplement to Petition, seeking to expand upon the third question presented ("question three").

11. In that supplemental filing, Defendants argued that because of the Superior Court's decision in Mitchell, courts are now "bar[ring] any evidence of risks and complications in medical negligence cases, thus effectively imposing an all but impossible to overcome strict liability standard on physician-defendants." Defs.' Proposed Supplement to Petition at 1.

12. This Court granted Defendants' Petition, but limited its review to the second question presented ("question two"):

> Whether the Superior Court's holding ***directly conflicts*** with this Honorable Court's holdings in [Brady], which permits evidence of general risks and complications in a medical malpractice claim?"

Mitchell v. Shikora, 174 A.3d 573 (Pa. 2017) (emphasis added).

13. Notably, Defendants' Petition was "DENIED as to all remaining issues," and Defendants' Application to File Supplement to Petition was denied, as well. Id.

14. Despite these rulings, Defendants briefed all of the issues raised in their Petition, including question three. See e.g., Defs.' Opening Br. at 16, 45-46, 48 (strict-liability argument).

15. When Plaintiff submitted her brief, she did not address question three on the merits, as that was beyond the scope of this Court's limited grant of allocatur.[1]

16. Plaintiff also objected to Defendants' attempt to enlarge the scope of this appeal, stating:

> Notwithstanding this Court's clear and unambiguous Order, Defendants and their *amici* ***deliberately violated the Order*** and briefed and argued the very issues rejected

[1] Indeed, Plaintiff did not believe that she would need to brief questions that this Court specifically declined to review.

> by this Court. Repeatedly, Defendants' and their *amici* inappropriately argue that the Mitchell holding creates a strict liability standard for medical malpractice cases where a patient suffers an injury. The Defendants and their *amici* also inappropriately address the Superior Court's alleged usurpation of the trial court's discretion.

Pl.'s Br. at 35 (original emphasis; internal footnotes omitted).

17. Given the foregoing, Plaintiff requested that the "rejected issues in Defendants' and *amici*'s briefs . . . be stricken from the record and oral argument . . . be limited to only the single issue accepted by this Court for review." Id. at 36.

18. Undaunted, Defendants and their *amici* supporter continued focusing on issues that this Court specifically rejected, including question three. Defs.' Reply Br. at 1, 12, 19 (strict-liability argument); see also 10/10/18 Application for Leave to Present Oral Argument on behalf of Amicus Curiae, The Pennsylvania Orthopaedic Society ("POS"), ¶ 7 ("the decision below effectively creates a strict liability standard for surgeons operating in this Commonwealth.").[2]

19. This Court heard oral argument on this matter on October 23, 2018.

20. During that argument, Defendants' counsel did not directly address question two. Instead, John C. Conti spent most of his time discussing issues relating to question three, including strict liability. See Max Mitchell, Pa. Justices

[2] This Court denied POS's Application on October 19, 2018.

Eye Exclusion of Risk, Complication Evidence in Med Mal Cases, The Legal Intelligencer, Oct. 25, 2018.[3]

21. Mr. Conti "further argued that barring the evidence would mostly affect complex high-risk procedures, which, he said, would have a chilling effect on the most skilled surgeons." Id.

22. In response, one of the Justices said: "We are perilously close to strict liability," or words to that effect.

23. When it was Plaintiff's turn to present, her counsel (Stephen Trzcinski) addressed whether the Superior Court's holding conflicts with Brady, and he concluded it does not.

24. As Mr. Trzcinski explained, the trial court was faced with two issues: (1) how to treat the doctor/patient communication regarding potential risks and complications, and (2) how to treat the risk/complication evidence, when viewed in isolation. Only the second is implicated in this appeal.

25. At the time, both parties relied on Brady to resolve these two issues, as everyone agreed that it was "controlling precedent."[4]

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[3] The lead to this article reads: "Exclusion of defense evidence about the risks and complications of a procedure during a medical negligence trial would effectively impose ***strict liability*** on doctors, a defense attorney argued before the Pennsylvania Supreme Court on Tuesday." Id. (emphasis added).

[4] See Defs.' Response, ¶ 6 ("Defendants agree that the Pennsylvania Supreme Court's recent decision in [Brady] is controlling precedent . . . .") (R. 194a).

26. But as it turns out, neither party was correct. As Mr. Trzcinski explained: Brady controls the first issue, but it has little bearing on the second.

27. This Court seemed to agree with that assessment. For example, the Honorable Max Baer noted that to the extent Brady touches upon the second issue, it is merely "dicta" and has no precedential value.[5] Mr. Trzcinski wholeheartedly agreed.

28. In the context of this appeal, Brady is dicta, so there is no conflict for this Court to resolve.

29. Again, the sole question here is whether the Superior Court's holding "directly conflicts" with this Court's holding in Brady. Because that question must be answered in the negative, this Court should consider dismissing the appeal as improvidently granted.[6]

30. Simply put, there is no need for this Court to go beyond the limited grant of allocator by deciding questions that (1) "the parties did not fully brief;"[7]

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[5] See also Castellani v. Scranton Times, L.P., 124 A.3d 1229, 1243 n.11 (Pa. 2015) ("Dicta has no precedential value.") (internal quotation omitted).

[6] See e.g., Curry v. State, 682 So. 2d 1091, 1092 (Fla. 1996) ("Because no conflict exists between Curry and Navarre, we accordingly dismiss the petition" as improvidently granted).

[7] McMullen v. Kutz, 985 A.2d 769, 782-83 (Pa. 2009) (Castille, C.J., dissenting) (criticizing the Majority for "reach[ing] out to 'decide' an issue arguably not encompassed in our grant of review and one that the parties did not fully brief . . . .").

(2) are outside the scope of the grant of allowance of appeal;[8] and (3) were "expressly rejected" at the allocator stage.[9]

31. Moreover, there are other legal grounds for affirmance that demonstrate that the Superior Court's decision is correct, regardless of how this Court resolves the question(s) currently under consideration.

32. Defendants never connected the general risks of surgery to the specific facts of this case. Even if this Court accepts their version of events, Defendants failed to establish the necessary predicate facts—the existence of

[8] Dubose v. Quinlan, 173 A.3d 634, 641 n.6 (Pa. 2017) ("We decline to address this claim because it is outside the scope of the grant of allowance of appeal, which was limited . . . ."); Wilson Area Sch. Dist. v. Skepton, 895 A.2d 1250, 1255 n.3 (Pa. 2006) ("Because such issues are outside the scope of this Court's limited grant of allowance of appeal, we will not consider them."); McMullen, 985 A.2d 769 at 777-78 (Pa. 2009) (Saylor, J., concurring and dissenting) (taking issue with the Majority's broad approach, while noting that the appeal was accepted "on a limited basis, solely to address a purported conflict between the Superior Court's decision in this case and its prior" decisions).

[9] Commonwealth v. Maconeghy, 171 A.3d 707, 711 n.3 (Pa. 2017) (the "approach of addressing an issue which was expressly rejected at the allocatur stage is inconsistent with the many decisions in which this Court has disciplined itself to adhere to the questions selected for discretionary review."); McWilliams v. Dunn, 137 S. Ct. 1790, 1807-08 (2017) (Alito, J., dissenting) (describing as "acutely unfair" the Court's disposition of an issue/question on which review was not granted, while lamenting: "It will come as a nasty surprise to Alabama that the Court has ruled against it on the very question we declined to review—and without giving the State a fair chance to respond.").

adhesions and/or abnormal anatomy—to argue that the injury could not be avoided.

33. Since Defendants could not establish these predicate facts, they had no basis for making the arguments in question. Thus, the trial court erred by "allow[ing] defense counsel to argue alternate theories . . . for which there was no evidence." Winschel v. Jain, 925 A.2d 782, 796 (Pa. Super. 2007).

34. Because there are alternative grounds for affirming the Superior Court's decision, this Court should leave the broader questions for a more suitable case. See e.g., The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959) (dismissing certiorari as improvidently granted because of alternative grounds for affirming the court of appeals); John M. Golden, The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law, 56 UCLA L. Rev. 657, 710 n.320 (2009) (discussing, as potential grounds for denying certiorari, the existence of an alternative ground to reach the same decision, the irrelevance of the question presented "to the ultimate outcome of the case," and a case's failure to "fairly present the legal question over which there is a conflict") (quotation omitted).

35. For all of these reasons, Defendants' appeal should be dismissed.

36. Alternatively, if this Court is inclined to go beyond question two, then it should (1) clarify what other question(s) are being considered, and (2) allow for additional briefing and argument.

37. Such relief is necessary to ensure that this Court receives adequate adversarial briefing, which in turn will help this Court reach a sound decision. See e.g., Pridgen v. Parker Hannifin Corp., 916 A.2d 619, 621 (Pa. 2007) ("it is best for the parties to an appeal to be afforded the opportunity to make a direct presentation to an appellate court concerning issues that will be addressed in the appeal proceedings"); Coady v. Vaughn, 770 A.2d 287, 294 (Pa. 2001) (Castille, J., concurring) (we should "not indulge the conceit that, without adversarial presentations, it is possible to discern any and all arguments that may be made" on a given issue).

CONCLUSION

38. For all the reasons set forth above, counsel for Plaintiff desires to file a post-submission communication—namely, an Application to Dismiss.

39. If this application for leave to file a post-submission communication is granted, Plaintiff will file and serve her Application to Dismiss within 7 days of this Court's Order.

WHEREFORE, counsel for Plaintiff/Appellee requests leave to file a post-submission communication with this Court, pursuant to Pa. R.A.P. 2501(a).

Respectfully Submitted,

/S/ STEPHEN TRZCINSKI
STEPHEN TRZCINSKI, ESQUIRE
Attorney ID. No. 86963
421 Westminster Avenue
Haddonfield, New Jersey 08033
Phone: (215) 586-1339
strzcinski06@comcast.net

RUDOLPH L. MASSA, ESQUIRE
Attorney ID. No. 84788
MASSA BUTLER GIGLIONE
Three Gateway Center, Suite 1543
401 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Phone: (412) 338-1800
rmassa@mbp-law.com

Counsel for Plaintiff/Appellee,
Lanette Mitchell

AFFIDAVIT OF SERVICE

DOCKET NO 55 WAP 2017

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I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on October 30, 2018

I served the Application for Leave to File Post Submission Communication Pursuant to PA. R.A. P. 2501(a) within in the above captioned matter upon:

See Service List attached

via electronic service, or Express Mail for any party NOT registered with the PacFile system by depositing 2 copies of same, enclosed in a postal-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Upon acceptance by the Court of the PacFiled document, copies will be filed with the Court within the time provided in the Court's rules.

Sworn to before me on October 30, 2018

/s/ Robyn Cocho

_____ /s/ Elissa Diaz

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2022 Job # 284507

Service List:

Justin Mark Gottwald
Megan Justine Block
John C. Conti
Dickie McCamey & Chilcote PC
2 PPG Pl Ste 400
Pittsburgh, PA 15222-5491
(412) 281-7272
Attorneys for Appellant

Michael Keith Feeney
Matthew Brian O'Connor
Matis Baum O'Connor
912 Fort Duquesne Blvd
Pittsburgh, PA 15222
(412) 338-4733
Attorney for The Pennsylvania Orthopaedic Society, Amicus Curiae

Joseph Regis Froetschel
Gismondi & Associates
310 Grant St., Suite 700
Pittsburgh, PA 15219
(412) 281-2200
Attorney for American Association for Justice, Amicus Curiae
and Pennsylvania Association for Justice, Amicus Curiae

Seth A. Goldberg
Philip H. Lebowitz
Duane Morris, L.L.P.
30 S 17th St
Philadelphia, PA 19103-4196
(215) 979-1175
Attorney for The Hospital and Healthsystem Association of Pennsylvania, Amicus Curiae

Kim Kocher
White and Williams LLP
1650 Market Street, Suite 1800
1800 One Liberty Place
Philadelphia, PA 19103-7395
(215) 864-6332
Attorney for Philadelphia Association of Defense Counsel and Pennsylvania Defense Institute, Amicus Curiae

Maureen Murphy McBride
Lamb Mcerlane PC
PO Box 565
West Chester, PA 19381-0565
(610) 430-8000
Attorney for The American Medical Association, Amicus Curiae

Joseph H. Blum
Shook Hardy & Bacon, L.L.P.
Two Commerce Square
2001 Market Street, Suite 3000
Philadelphia, PA 19103
(215) 575-3115
Attorney for The Pennsylvania Orthopaedic Society, Amicus Curiae

James C. Sargent, Jr.
Lamb McErlane, PC
24 E Market St
PO Box 565
West Chester, PA 19381-0565
(610) 430-8000
Attorney for The American Medical Association, Amicus Curiae