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55 WAP 2017

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 55 W.A.P. 2017

LANETTE MITCHELL,
Appellant,

v.

EVAN SHIKORA, D.O., UNIVERSITY OF PITTSBURGH PHYSICIANS d/b/a WOMANCARE ASSOCIATES and MAGEE WOMEN'S HOSPITAL OF UPMC,

Appellees

BRIEF *AMICUS CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION, THE PENNSYLVANIA MEDICAL SOCIETY, THE PENNSYLVANIA ACADEMY OF OPHTHALMOLOGY, THE PENNSYLVANIA ACADEMY OF OTOLARYNGOLOGY—HEAD AND NECK SURGERY, THE PENNSYLVANIA ACADEMY OF DERMATOLOGY AND DERMATOLOGIC SURGERY, THE PENNSYLVANIA COLLEGE OF EMERGENCY PHYSICIANS, THE PENNSYLVANIA NEUROSURGICAL SOCIETY, AND THE ROBERT H. IVY PENNSYLVANIA PLASTIC SURGERY SOCIETY

Appeal from the Order of the Superior Court, entered March 29, 2017, at No. 384 W.D.A. 2016, reversing the Order of the Court of Common Pleas of Allegheny County, entered February 18, 2016, at No. 13-23436

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Pa.R.A.P. 531(a), *Amicus Curiae*, the American Medical Association, the Pennsylvania Medical Society, the Pennsylvania Academy of Dermatology and Dermatologic Surgery, the Pennsylvania Academy of Ophthalmology, the Pennsylvania Academy of Otolaryngology—Head and Neck Surgery, the Pennsylvania College of Emergency Physicians, the Pennsylvania Neurosurgical Society, and the Robert H. Ivy Pennsylvania Plastic Surgery Society file this Brief in Support of Appellants.

Amicus Curiae, the American Medical Association (the "AMA"), is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Pennsylvania.

Amicus Curiae, the Pennsylvania Medical Society (the "Medical Society") is a Pennsylvania non-profit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. The Medical Society regularly participates as an *amicus curiae* before this Court in cases raising important

health care issues, including issues that have the potential to adversely affect the quality of medical care.

The AMA and the Medical Society are appearing on their own behalves and as representatives of the Litigation Center.

Amicus Curiae, the Pennsylvania Academy of Ophthalmology (PAO) is a Pennsylvania non-profit corporation that represents ophthalmologists in the Commonwealth. The objectives of PAO include advancing quality medical and surgical care for individuals with ophthalmic conditions, as well as participating in the development and implementation of laws and regulations affecting the practice of ophthalmology and the delivery of quality medical eye care to the public.

Amicus Curiae, the Pennsylvania Academy of Otolaryngology – Head and Neck Surgery (PAO-HNS) is a Pennsylvania non-profit corporation that represents otolaryngologists (ear, nose and throat specialists) in the Commonwealth. The mission of PAO-HNS is to serve the common professional interests of otolaryngologists and their patients in Pennsylvania and the Pennsylvania region. It is the objective of PAO-HNS is to promote the highest professional and ethical standards of the practice of Otolaryngology/Head and Neck Surgery.

Amicus Curiae, the Pennsylvania Academy of Dermatology and Dermatologic Surgery (PAD) is a Pennsylvania non-profit corporation that represents dermatologists in the Commonwealth. The mission of PAD is to promote

the highest standards of dermatologic care and service in the Commonwealth of Pennsylvania through the strategic objectives of advocating for freely chosen, unhampered relationships between patients and physicians guided by the highest scientific, ethical and professional standards; advocating for patient safety by participating in the development and implementation of laws and regulations affecting the practice of dermatology; promoting professional education and research in dermatology and allied health fields; recognizing trends in the health care delivery system and influencing them so that patients will obtain the finest quality dermatologic care from those most qualified to deliver it; fostering cooperation among all who are concerned with medical, psychological, social and legal aspects of dermatology; and, representing the membership in the Academy before state and national medical organizations.

Amicus Curiae, the Pennsylvania Academy College of Emergency Physicians (PACEP) is a state chapter of the American College of Physicians and represents more than 1,700 emergency physicians across the state. PACEP is committed to advancing emergency care through continuing education, research, and public education. Its mission is to advocate and support the primary role of the emergency physician in the delivery of emergency medical care; serve as an aggressive advocate for patient care and public health; provide leadership in continuing medical education, graduate medical education and research; provide medical leadership in

the advancement of the state emergency medical services system; and advance emergency medicine in all forums as an essential service of the evolving health care system.

Amicus Curiae, the Pennsylvania Neurosurgical Society (PNS) is a Pennsylvania non-profit corporation that represents the professional interests of neurosurgeons in the Commonwealth. The Society strives to enhance the professional well-being of Pennsylvania's neurosurgeons as well as to promote the art and science of Neurosurgery within the Commonwealth by providing a forum for continuing education, scientific discussion, political advocacy and professional interaction.

Amicus Curiae, the Robert H. Ivy Pennsylvania Plastic Surgery Society (RHIS) is a Pennsylvania non-profit corporation that is a forum for plastic surgeons that promotes research and education, encourages high standards of ethical practice and advocates exchange of information, ideas and knowledge between members, for RHIS members' patients and Pennsylvanian policy makers.

The above organizations have a unique and substantial interest in the resolution of the instant case. They are keenly aware of recent efforts to significantly reduce or eliminate defenses traditionally available to defendants in medical malpractice cases and are extremely concerned that the Superior Court's ruling, which stands to deprive juries of fair and balanced explanations of surgery,

is simply the latest manifestation of these efforts. The above organizations are also concerned that preclusion of important medical evidence regarding risks and complications will transform medical malpractice actions into strict liability cases rendering physicians the unwitting guarantors of patient safety. Finally, and perhaps most importantly, these organizations are concerned about the likely increase in plaintiff's verdicts, and the significant adverse effect this will have on healthcare providers' ability to obtain cost-effective malpractice insurance.

The AMA, the Medical Society, PAO, PAO-HNS, PAD, PACEP, PNS, and RHIS submit that they are appropriate *amici* under Rule 531 of the Pennsylvania Rules of Appellate Procedure. Amici urge this Honorable Court to take into account the legal and policy considerations advanced in this Brief *Amicus Curiae*, which compels the conclusion that the Superior Court's decision be vacated and the trial court's decision affirmed.

II. INTRODUCTION

Claims against medical providers generally fall into two categories – informed consent claims, grounded in battery, and medical malpractice claims, based on negligence. Obtaining a patient's informed consent of course requires full disclosure of the known risks of a medical procedure or treatment. Performing non-negligent medical services requires the provider to comply with the standard of care. In *Brady v. Urbas*, 111 A.3d 1155 (Pa. 2015), this Court concluded *on the facts of that case* that where the patient had not sued for battery, evidence that the physician obtained the patient's informed consent was not relevant to whether the physician had complied with the standard of care.

But this Court did not hold in *Brady,* as Plaintiff argues and the Superior Court found, that evidence of the *known complications* of a procedure (rather than evidence of the informed consent) must be excluded in every medical malpractice case. The fact that physicians may be required to disclose known complications to obtain a patient's informed consent *does not mean* that the complications themselves are *irrelevant* to the standard of care. Indeed, in many cases, such as the case before this Court, the fact that a particular complication occurred is not evidence that the physician violated the standard of care – because, in certain instances, a complication may occur even where utmost care was exercised.

Where, as here, a defendant in a medical malpractice case establishes that a complication can occur even without negligence and, argues that the mere occurrence of that complication is not sufficient to prove a breach of the standard of care, it is entirely appropriate for the jury to hear that fact; *i.e.,* that the occurrence of the complication alone does not establish negligence. Stated differently, simply because risk of complications is *relevant* to informed consent does not make it *irrelevant* to the standard of care. For these reasons the Superior Court's contrary holding must be reversed.

III. FACTS

As more fully set forth in the Statement of the Case in the Appellants' Brief to this Court, the Superior Court granted a new trial in a medical malpractice negligence action simply because a trial court permitted Defendants to reference "risks and complications" of surgery at trial. The Superior Court held that evidence and testimony of "risks and complications" was irrelevant, violated this Court's decision in *Brady v. Urbas,* 111 A.3d 1155 (Pa. 2015), and was prejudicial to Plaintiff.

Appellants, Evan Shikora, D.O., University of Pittsburgh Physicians, d/b/a Womancare Associates and Magee Womens Hospital of UPMC, Defendants below, asked this Court to accept this appeal and to vacate the Superior Court's decision and reinstate the jury's verdict. This Court granted Defendants' Petition for

Allowance of Appeal to decide the issue of: "[w]hether the Superior Court's holding directly conflicts with this Honorable Court's holdings in *Brady v. Urbas*, 111 A.3d 1155 (Pa. 2015), which permits evidence of general risks and complications in a medical negligence claim?"

IV. SUMMARY OF ARGUMENT

Over the last two hundred years, courts in Pennsylvania have developed a body of law to define the duties and liability of physicians. The principles are basic. Physicians are only responsible for breaches of the standard of care. Physicians are not responsible for risks or complications that are out of their control. Concepts of strict liability have no place in medical malpractice negligence actions. Society has an interest in the provision of health care, even when surgery or other care involves inherent risks. Physicians who perform inherently risky but necessary surgeries in a non-negligent fashion should be rewarded, not punished.

In this case, the Superior Court turned all those principles on their heads. By essentially concluding that evidence of inherent risks and complications is *per se* irrelevant in a medical malpractice action, the Superior Court fundamentally changed the law as it relates to a physician's liability. Moreover, by eliminating a physician's ability to present evidence of risks and complications and thus to provide crucial context for the presentation of the relevant standard of care, the Superior Court created a brand new theory of liability that allows a physician to be held liable

for *any injury* to a patient resulting from surgery, *no matter how* unrelated to the physician's conduct. The upshot will be that: (i) any patient can sue a surgeon or physician for any complication or unavoidable risk; and (ii) a patient will be able to recover against a physician in the absence of negligence where the complication that occurred could not be avoided even with utmost care. Because this would constitute a radical result that is out of step with both common sense and the law, *amici* ask this Court to vacate the Superior Court's decision in its entirety.

V. ARGUMENT

A. The Superior Court Misapplied *Brady v. Urbas*.

The Superior Court's decision marks a fundamental departure from Pennsylvania law. *Brady v. Urbas*, the primary decision upon with the Superior Court relied, involved the admissibility of *informed consent forms* and is completely distinguishable from this case. The Superior Court's application of this Court's reasoning with regard to the admissibility of informed consent forms in a medical malpractice case has no bearing on whether evidence regarding *risks and complications* should be admitted.

In *Brady*, a physician performed four operations on the second toe of Maria Brady's right foot. The first surgery was successful but the three follow-up procedures left Brady's toe significantly shorter. Brady filed a complaint asserting that Dr. Urbas negligently treated her toe by failing to determine the cause of her

deformity and performing improper procedures. Brady did not sue for battery or for lack of informed consent.

At trial, Brady sought to exclude any consent-related evidence but the trial court allowed the evidence. The jury returned a defense verdict finding that Dr. Urbas was not negligent. On appeal, the Superior Court vacated and remanded for a new trial. In doing so, the Superior Court adopted a *per se* rule that evidence of informed consent should be excluded in a medical malpractice action. The Superior Court explained that in a case where lack of informed consent is not an issue, evidence of consent can sometimes confuse the jury.

On appeal, this Court took a less stringent approach and concluded that, while evidence could be relevant to the question of negligence if, for example, the standard of care requires the doctor to discuss certain risks with the patient, in most cases, including *Brady,* where the malpractice complaint only asserts negligence and not lack of informed consent, evidence that a patient agreed to proceed with an operation in spite of the risks of which she was informed is irrelevant and should be excluded. Accordingly, the Supreme Court affirmed the Superior Court's order vacating the judgment and remanding for a new trial.

This case is a far cry from *Brady.* By finding a nexus between the alleged informed consent form and the theory of negligence, the Superior Court went well beyond what *Brady* required; *i.e.,* it defined the scope of relevant evidence to exclude

not only the consent form itself but also any complications known to be a risk even of non-negligent medical treatment. Nothing in *Brady* compels such a result.

Here, unlike in *Brady*, the evidence in question is largely related to issues regarding the standard of care to be employed when performing risky surgery. The experts who testified made clear that consideration of the risks and complications of the surgery are *inextricably intertwined* with a determination of the standard of care.

The experts' testimony must be considered against the complicated backdrop of the practice of medicine generally. Surgery is not a black-and-white proposition. Medicine has aspects of art as well as science. A range of conduct can fall within the standard of care. Deciding what constitutes the standard of care is itself a proposition that necessarily involves a complicated discussion of anatomy, various medical topics and analyses of the procedure's risk/benefit analysis. Juries must consider the expert testimony, balance cross-cutting risks and benefits and decide whether or not the conduct met the prevailing standard of care. Juries simply cannot make this determination without a full and complete picture of the circumstances in which the surgery is being performed.

In this case, the physician met his burden of convincing the jury that he was not negligent. The trial court discharged its responsibility by allowing the jury to consider evidence relevant to the standard of care and by allowing the case to be presented to the jury in a meaningful and understandable way. There is every reason

to believe that the jury properly considered the evidence and reached a just decision on the merits; there is no indication that the jury was confused. In such circumstances, the trial court should be applauded, not reversed.

Moreover, evidence of the "risks and complications" identified had nothing to do with the informed consent form or any claim that Plaintiff had consented to the negligence, if it occurred. Thus, allowing this evidence to be presented in this case is fully consistent with and does not deviate from *Brady*. Accordingly, this Court should conclude that there is no basis for precluding this evidence and should vacate the decision below in its entirety.

B. The Superior Court's Decision Would Inappropriately Make Physicians Strictly Liable for Patient Harm.

Reduced to its essence, the Superior Court's decision imposes a strict liability standard on physicians in a negligence case. By precluding evidence of inherent risks and complications in surgery or other procedures, and by making Defendants defend malpractice actions with one arm tied behind their backs, the Court's ruling makes physicians *de facto* guarantors of patient safety by rendering them potentially liable for any harm that occurs – even where the harm is caused by a complication and not by negligence.

As has long been recognized, only this Court or the Pennsylvania legislature can create new causes of action. *See D'Errico v. DeFazio*, 763 A.2d 424, 433 (Pa. Super. 2000). For the last two centuries, there has been no cause of action in strict

liability against physicians for their conduct in performing surgery or other procedures. Moreover, any decision to permit strict liability in the context of medical malpractice requires a balancing of complex social, medical, and legal policies that must be considered and evaluated. They were not considered here.

It is no overstatement to say that the approach below will broadly affect the manner in which medicine is practiced. Every day, physicians in this Commonwealth are required to perform surgeries that involve inherent risk of non-negligent complications in emergent (or other less-than-ideal) circumstances where the likelihood of complications is real. Holding physicians strictly liable simply because a patient has suffered a complication or experienced an adverse result because of a complication – even where the physician prudently performed the procedure and could not control the outcome – will make physicians less likely to perform these procedures.

Moreover, any rule that precludes, on an across-the-board basis, evidence regarding risks and complications will have significant adverse economic consequences on the provision of health care services in this Commonwealth. If physicians can be held liable for all harm sustained by a patient simply because the surgery or procedure resulted in complications, physicians will be required to procure additional malpractice insurance – of course, at an increased expense to the physicians, and, ultimately, to the general public. More troubling of course is the

fact that any liability will be open-ended, because physicians will have great difficulty deterring what they cannot necessarily control.

The court system will also be affected by such a dramatic change in tort law. Making physicians the guarantors of patient safety and favorable outcomes would drastically increase the number of cases that are filed where injury has occurred as a result of a complication without any wrongful or negligent conduct. Indeed, the logical extension of Plaintiff's approach would render all physicians (not just those performing surgery) potentially liable for any adverse outcome if they are barred from presenting evidence of risks and complications to a patient and unable to fully defend themselves.

Pennsylvania can hardly afford such expansion of medical malpractice liability. Pennsylvania is already suffering from a resurgence of the medical malpractice crisis that plagued Pennsylvania in the early 2000s. *See* American Tort Reform Association's December 5, 2017 "Judicial Hellholes" Report (identifying a surge of new lawsuits and a string of multimillion dollar verdicts resulting in the return of "The City of Unbrotherly Torts" (Philadelphia, Pennsylvania) to the list of "Judicial Hellholes."). As the American Tort Reform Association noted in its report: (i) unlike many other states, Pennsylvania does not place any limit on noneconomic damages in medical malpractice claims; (ii) WalletHub's 2017 ranking of the Best & Worst States for Doctors placed Pennsylvania's medical environment 44th in the

country and (iii) the state's medical malpractice payouts *per capita* are exceeded by only two other states, New Jersey and New York. *Id.*

Defendants in medical malpractice cases already must deal with a relaxed "increased risk of harm" standard of care, (*Hamil v. Bashline*, 224 Pa. Super. 407, 307 A.2d 57 (1976)), may not have the jury instructed on the "error in judgment rule" (*Passarello v. Grumbine, M.D.*, et al., 29 A.3d 1158 (Pa. Super. 2011)), may not introduce informed consent forms in negligence cases (*Brady v. Urbas*, 111 A.3d 1155 (Pa. 2015)) and must have physicians, not staff, explain the contents of consent forms or be sued for battery (*Shinal v. Toms*, 162 A.3d 429 (Pa. June 20, 2017)). Against this backdrop, the practice of medicine in Pennsylvania has become more treacherous and more expensive. This latest decision – if left to stand – will only add fuel to this existing fire. This Court should not allow the hard-fought strides that the legislature has made to reduce malpractice premiums to evaporate.

This Court should reject Plaintiff's and the Superior Court's approach and refuse to allow a *per se* rule (*i.e.*, precluding evidence of risks and complications) to dramatically change the way in which medical malpractice cases are tried. Because, here, evidence regarding risks and complications which Defendants could not control was relevant to whether Defendants should be held liable for the injuries that resulted, the Superior Court erred in reversing this verdict. This Court should vacate the Superior Court's decision and reinstate the trial court's decision.

C. There was no Abuse of Discretion.

The Superior Court's decision must be vacated for an important additional reason; that is, because it usurps the trial court's exercise of its broad discretion on evidentiary issues.

As the Superior Court recognized, it has long been the accepted and general rule in this Commonwealth that trial courts are afforded broad discretion in determining the admissibility of evidence. Slip Op. at 3. This Court has repeatedly recognized this fundamental tenet of trial practice. *See Commonwealth v. Bardo*, 551 Pa. 140, 709 A.2d 871, 877 (1998) (admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion). Moreover, Pennsylvania courts recognize that there is great latitude as to what evidence is admissible. *Commonwealth v. Crews*, 536 Pa. 508, 523, 640 A.2d 395, 402(1994)("[a]dmissibility depends on relevance and probative value."); *Commonwealth v. Spiewak*, 533 Pa. 1, 8, 617 A.2d 696, 699 (1992)("[e]vidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material fact.").

Although the Superior Court gave lip service to these longstanding precepts, it did not properly apply them in its decision. While acknowledging, on the one hand, the "host" of Pennsylvania cases which permitted general testimony regarding risks

and complications, Slip. Op. at, 6, and while conceding that admissibility of this evidence must be considered on a "case by case basis," the Court nonetheless found that the evidence of unavoidable complication should not be admitted *in this case* without ever explaining how the trial court abused its discretion in allowing the evidence to be admitted. The Superior Court thus plainly substituted its subjective judgment as to admissibility for that of the trial court, disregarded the trial court's discretion, and without valid explanation, took away a defense verdict from Defendants.

Usurping the role of the trial court on evidentiary issues ignores both longstanding Pennsylvania jurisprudence and the practical necessity of allowing trial courts the latitude they enjoy. Trial courts are forced to make difficult evidentiary decisions in the heat of battle quickly. Our system cannot tolerate this type of second-guessing; moreover, any such rule would render almost every verdict non-final and all outcomes unpredictable.

Because there is nothing new, novel or different about this case that requires this Court to reformulate the scope of the trial court discretion or the relevance of evidence necessary to decide standard of care issues, and because it is wholly improper for the Superior Court to require exclusion of evidence tending to show that Plaintiff's injury was outside of Defendants' control, this Court should vacate the Superior Court's decision in its entirety.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, *Amicus Curiae*, respectfully request that the Supreme Court of Pennsylvania REVERSE the Order of the Superior Court.

Respectfully submitted,

LAMB McERLANE PC

Dated: January 8, 2018

By: /s/ Maureen M. McBride

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v.	:	
Evan Shikora, D.O., University of Pittsburgh Physicians d/b/a Womancare Associates, Magee Womens Hospital of UPMC, Appellants	:	

PROOF OF SERVICE

I hereby certify that this 8th day of January, 2018, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

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IN THE SUPREME COURT OF PENNSYLVANIA

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