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IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

TERRENCE E. BABB, M.D., v. GEISINGER CLINIC; PENN STATE GEISINGER HEALTH SYSTEM; ROBIN E. OLIVER, M.D.; and MICHAEL CHMIELEWSKI, M.D., APPEAL OF: GEISINGER CLINIC	No. 1229 MDA 2018
TERRENCE E. BABB, M.D. v. GEISINGER CLINIC; GEISINGER HEALTH SYSTEM	No. 1314 MDA 2018

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN SUPPORT OF TERRENCE E. BABB, M.D., AND IN SUPPORT OF THE JURY VERDICT BELOW BUT IN SUPPORT OF REVERSAL OF THE DENIAL OF PREJUDGMENT INTEREST

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Amicus curiae Association of American Physicians & Surgeons ("AAPS") respectfully submit this amicus brief in support of Terrence E. Babb, M.D., and in support of the jury verdict below while seeking reversal of the denial of prejudgment interest.

I. STATEMENT OF THE INTEREST OF AMICUS CURIAE

Founded in 1943, *amicus curiae* Association of American Physicians & Surgeons ("AAPS") is a non-profit membership corporation of physicians who practice in nearly every specialty and state, including Pennsylvania. AAPS defends the practice of private, ethical medicine, and works to preserve the sanctity of the patient-physician relationship. The U.S. Court of Appeals for the Third Circuit has cited an amicus brief by AAPS in the first paragraph of one of its decisions. See Springer v. Henry, 435 F.3d 268, 271 (3d Cir. 2006). The Illinois Supreme Court has likewise made use of an *amicus* brief submitted by AAPS. See Valfer v. Evanston Nw. Healthcare, 2016 IL 119220, ¶ 33, 402 Ill. Dec. 398, 408, 52 N.E.3d 319, 329 (discussing an *amicus* brief which was filed by the Association of American Physicians & Surgeons).

AAPS, as a physician's organization that has been active for more than 75 years, has a direct and vital interest in defending the integrity of the medical profession against wrongful conduct, as found by the jury below. Patients are far better off when physicians can practice with the basic security that there will be legal accountability for wrongful actions taken against them, which is at issue in this appeal.[1]

II. ARGUMENT

There is no basis for overturning the jury verdict below, which was the culmination of nearly 20 years of hard-fought litigation in this case. Geisinger severely harmed Dr. Babb by wrongly terminating him, and Geisinger should be legally accountable for the damages as found by the jury. A jury verdict, such as this one, should be upheld on appeal in the absence of some extraordinary reason to set it aside. No such remarkable argument is presented by Geisinger in its appellate brief, and thus the jury verdict should

[1] No person or entity other than the *amicus curiae*, its members, or counsel have (i) paid in whole or in part for the preparation of the *amicus curiae* brief or (ii) authored in whole or in part this *amicus curiae* brief.

not be disturbed on appeal.

It was reversible error, however, for the trial court itself to deny prejudgment interest on the jury award. In light of the extremely labored circumstances of this case, prejudgment interest is necessary to make Dr. Babb whole and attain justice. Without such interest, the award is insufficient to cover the immense time and expense incurred by Dr. Babb in fighting for justice nearly 20 years and the groundless reputational injury he suffered. The denial of prejudgment interest below should be reversed.

POINT I
IMMUNITY HAS NO APPLICATION TO THE FACTS FOUND BELOW.

Geisinger concedes that there is no immunity here under the federal Health Care Quality Improvement Act (HCQIA). (Geis. Br. 91 n.6)[2] It follows, therefore, that there is also no immunity under the narrower Pennsylvania Peer Review Protection Act ("PRPA"). 63 P.S. § 425.1 *et seq*. Any finding of immunity under the PRPA

[2] "Issues relating to Geisinger's immunity from damages under HCQIA, the subject of the holding in Babb I, were effectively removed from this case by the outcome in Babb II." (Geis. Br. 91 n.6)

would be inconsistent with the lack of immunity under HCQIA. Geisinger is simply misguided in arguing otherwise.

A recent decision interpreting PRPA by the Pennsylvania Supreme Court – which Geisinger ignores entirely in its appellate brief – demonstrates that the PRPA does not even apply to the sort of staffing decision at issue here. Reginelli v. Boggs, 181 A.3d 293 (Pa. Mar. 27, 2018). Law firms that advise hospitals have been abuzz since March 2018 about this sharp narrowing of the scope of the PRPA by the Pennsylvania Supreme Court.[3]

The dispute in Reginelli concerned the scope of an evidentiary privilege in connection with an evaluation of a physician's performance, and the Court narrowed the scope of this privilege to not include a physician practice group and its employed physicians and other licensed medical providers. The Court held that they are not protected by the PRPA even though they engaged in

[3] See, e.g., Robin Locke Nagele and Amalia V. Romanowicz, "Pennsylvania Supreme Court Signals Major Erosion of Peer Review Protection" (Mar. 28, 2018) http://www.postschell.com/publications/1498-pennsylvania-supreme-court-signals-major-erosion-peer-review-protection (analysis by the law firm Post & Schell, viewed 1/14/19).

performance review of a physician, while under contract with a hospital. 181 A.3d at 296-98, 306. The ruling by the Pennsylvania Supreme Court sent a clear signal that the PRPA is not a broad shield as sought by Geisinger here.

Even more pertinent is the *dicta* in Reginelli by the High Court. As explained by numerous law firms in the hospital bar, "the Court, in *dicta*, appears to have eliminated peer review protection for hospital credentialing."[4] This elimination by the Pennsylvania Supreme Court of peer review protection for hospital credentialing closes the door completely on Geisinger's misplaced demand for PRPA immunity on appeal here.

The Pennsylvania Supreme Court held in Reginelli that "[r]eview of a physician's credentials for purposes of membership (or continued membership) on a hospital's medical staff ***is markedly different*** from reviewing the 'quality and efficiency of service ordered or performed' by a physician when treating

[4] Id.

patients." Id. at 305 (emphasis added). The latter may be entitled to some protection by PRPA; the former is not.

The improper termination of Dr. Babb by Geisinger was akin to a credentialing decision that the Pennsylvania Supreme Court indicated is not protected by PRPA. The termination of Dr. Babb was "markedly different" from the sort of quality review that might be entitled to some protection by that statute. As Geisinger virtually concedes in its appellate brief, it was determined to get rid of Dr. Babb and was not trying to improve any particular quality of care for patients.

The Pennsylvania Supreme Court reinforced its very narrow view of the scope of PRPA by explaining that:

> although "individuals reviewing the professional qualifications or activities of its medical staff or applicants for admission thereto," 63 P.S. § 425.2, are defined as a type of "review organization," such individuals are not "review committees" entitled to claim the PRPA's evidentiary privilege in its section 425.4.

Id. at 305-06. While the facts in Reginelli focused on the scope of the evidentiary privilege, the scope for immunity would necessarily be the same. The rationale for both are identical. Where the

evidentiary privilege does not apply, neither does the immunity, which means it cannot protect Geisinger's termination of Dr. Babb.

The evidentiary privilege was established alongside with the immunity, and by sharply narrowing the scope of the former the Supreme Court thereby narrowed the scope of the latter. See Reginelli, 181 A.3d at 300 ("'[t]hrough these immunity and confidentiality provisions [§§ 425.3, 425.4] ... the Legislature has sought to foster free and frank discussion by review organizations'") (quoting Sanderson v. Frank S. Bryan, M.D., Ltd., 361 Pa. Super. 491, 522 A.2d 1138, 1140 (Pa. Super. 1987), which cites Steel v. Weisberg, 347 Pa. Super. 106, 500 A.2d 428, 430 (Pa. Super. 1985)).

The Pennsylvania Supreme Court was even expressly critical of Superior Court decisions that had interpreted PRPA more broadly, which reflects how strongly the Supreme Court felt about adhering to a limited scope for the PRPA. The Supreme Court held that "we disapprove of [Troescher v. Grody, 2005 PA Super 77, 869 A.2d 1014, 1022 (Pa. Super. 2005)] and its Superior Court progeny

(*e.g.,* Piroli v. Lodico, 2006 PA Super 291, 909 A.2d 846 (Pa. Super. 2006) in this regard." Reginelli, 181 A.3d at 305 n.9.

Accordingly, the trial court was correct when it denied Geisinger's JNOV motion on June 29, 2018, based on the following:

> The cause of action was breach of contract and not related to the information provided to any review organization, and as such, Defendants are not immune from liability under PRPA, and are not entitled to JNOV on that basis.

(Geis. Appx. 5) That ruling is underscored by the strong teaching by the Pennsylvania Supreme Court in Reginelli.

In sum, there is no immunity available to Geisinger under the PRPA, and the trial court ruling should be affirmed.

POINT II
NEITHER COLLATERAL ESTOPPEL NOR LAW OF THE CASE, AS ASSERTED BY GEISINGER, IS APPLICABLE HERE.

"Law of the case" doctrine is unavailing to Geisinger here, because it is merely discretionary. As the U.S. Supreme Court has emphasized:

> Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. See 1B J.

> Moore & T. Currier, Moore's Federal Practice para. 0.404 (1982) (hereinafter Moore). ***Law of the case directs a court's discretion, it does not limit the tribunal's power***. *Southern R. Co*. v. *Clift*, 260 U.S. 316, 319 (1922); *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912).

Arizona v. California, 460 U.S. 605, 618 (1983) (emphasis added).

The discretionary nature of "law of the case" doctrine has also been confirmed by the U.S. Court of Appeals for the Third Circuit. "'The ... doctrine does not restrict a court's power but rather governs its exercise of discretion.'" In re Pharmacy Benefit Managers Antitrust Litigation, 582 F.3d 432, 439 (3d Cir.2009) (quoting Pub. Interest Research Group of N.J. v. Magnesium Elektron, 123 F.3d 111, 116 (3d Cir.1997)) (citations omitted).

Geisinger cites no binding precedent for overturning a jury verdict based on "law of the case" doctrine. (Geis. Br. 68-72) It would be unjustified to do so, since the doctrine is discretionary rather than binding. The jury and the trial court declined to exercise their discretion as sought by Geisinger. By definition, this proper exercise of discretion cannot be a reversible error on appeal.

Geisinger's argument about collateral estoppel doctrine makes even less sense. (Geis. Br. 67-68) Collateral estoppel doctrine does not apply here because there was no final judgment on the breach of contract claim in a separate action. There was no other separate action and judgment on the same claim which could estop this one. As the Pennsylvania Supreme Court explained:

> Traditionally, Pennsylvania courts have applied the collateral estoppel doctrine only if the following threshold requirements are met: 1) the issues in the two actions are sufficiently similar and sufficiently material to justify invoking the doctrine; 2) the issue was actually litigated in the first action; and 3) a final judgment on the specific issue in question was issued in the first action. *See … Clark v. Troutman*, 509 Pa. 336, 502 A.2d 137, 139 (Pa. 1985); *Commonwealth v. Hude*, 492 Pa. 600, 425 A.2d 313, 320 (Pa. 1980) (plurality opinion). An issue is actually litigated when it is properly raised, submitted for determination, and then actually determined. *RESTATEMENT (SECOND) OF JUDGMENTS* § 13 cmt. d. For collateral estoppel purposes, a final judgment includes any prior adjudication of an issue in another action that is sufficiently firm to be accorded conclusive effect. *Id.* § 13 cmt. g.

Commonwealth v. Holder, 569 Pa. 474, 480, 805 A.2d 499, 502-03 (2002) (citation omitted).

Like its other arguments on appeal, Geisinger's reliance on collateral estoppel and law of the case doctrines should be rejected.

POINT III
THE MATERIALITY OF THE BREACH OF CONTRACT WAS PROPERLY DECIDED BY THE JURY

Materiality of a breach of contract is an issue for the jury to decide, and not a basis for overturning a jury verdict as Geisinger argues here. (Geis. Br. 80-84)

"[T]he question whether there has been a material breach of the condition is ordinarily for the jury." Cameron v. Berger, 336 Pa. 229, 235, 7 A.2d 293, 296 (1939). See also Int'l Diamond Imps., Ltd. v. Singularity Clark, L.P., 2012 PA Super 71, 40 A.3d 1261, 1279 ("The trial court abused its discretion in failing to submit to the jury questions of fact regarding Singularity's defense theory of "material breach," and in omitting to evaluate the materiality of Appellants' alleged breach according to the factors prescribed by Restatement (Second) of Contracts § 241.").

Geisinger's brief simply reargues the issue of materiality without making any showing of any insufficiency of the evidence for the jury verdict on this issue, or even mentioning that as the standard. "The jury's verdict must be accepted on appeal absent

trial error which casts serious doubt on the jury verdict or palpable insufficiency of evidence." Stokan v. Turnbull, 480 Pa. 71, 79, 389 A.2d 90, 94 (1978) (citing Burrell v. Philadelphia Electric Co., 438 Pa. 286, 265 A.2d 516 (1970); St. Clair Cemetery Ass'n v. Commonwealth, 390 Pa. 405, 136 A.2d 85 (1957); Carroll v. City of Pittsburgh, 368 Pa. 436, 84 A.2d 505 (1951)).

Geisinger establishes none of this in its appellate brief. Instead, it baldly asserts that "[t]he Trial Court committed an error of law," but cites no such specific error. Geisinger simply wants to reargue its case here, but it had a full and unfettered opportunity to argue that before the jury. Appeal is not for the purpose of a losing party to relitigate its case. An appellant is not allowed "to retry his case on appeal with the benefit of hindsight." Commonwealth v. Upshur, 2000 PA Super 376, ¶ 19 n.7, 764 A.2d 69, 76. Even with such hindsight, Geisinger fails to persuade, and its termination of Dr. Babb was improper as the jury found. In the Stokan case the Pennsylvania Supreme Court reversed an appellate decision for overturning a jury verdict, and the jury verdict here should stand.

POINT IV
IT WAS AN ABUSE OF DISCRETION TO DENY PREJUDGMENT INTEREST

The trial court tersely denied prejudgment interest based on the following:

> Justice does not require the Court [to] award prejudgment interest as Plaintiff was adequately compensated by the Jury verdict without interest, and was able to partially mitigate damages. Prejudgment interest is not warranted and the Court will not grant it.

(Geis. Appx. 2) This was an abuse of discretion because it fails to consider the immense harm caused to Dr. Babb and the burdensome litigation that he was forced to endure. Prejudgment interest should have been awarded to him to make him whole.

Terrence E. Babb, M.D., partially mitigated damages only by taking extraordinary measures, such as doing often-unattractive locum tenens work and even relocating to Alaska, as Geisinger concedes in its brief here. (Geis. Br. 15) Such life-disruptive efforts to mitigate damages should not have detracted from his claim for prejudgment interest, and it was an abuse of discretion for the trial court to hold otherwise. Moreover, the admitted fact that Dr. Babb was able to find work serves to underscore how wrongful

Geisinger's termination of him was, because if there truly were a quality of care deficiency as Geisinger pretended then Dr. Babb's medical career would have ended.

"In contract cases, statutory prejudgment interest is awardable as of right." Pittsburgh Construction Company v. Griffith, 2003 PA Super 374, 834 A.2d 572, 590 (citation omitted). "Prejudgment interest is recoverable from the time of performance on the amount due." Allegheny Energy Supply Co., LLC v. Wolf Run Mining Co., 2012 PA Super 163, 53 A.3d 53, 65 (citing Kessler v. Old Guard Mut. Ins. Co., 391 Pa. Super. 175, 570 A.2d 569, 573 (Pa. Super. 1990); Restatement (Second) of Contracts § 354(1)).

> Pennsylvania follows the Restatement rule that
>
> [prejudgment] interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due.

Cresci Constr. Servs. v. Martin, 2013 PA Super 66, 64 A.3d 254, 259 (citing Restatement (Second) of Contracts § 354).

"[In the light of all the circumstances, including any deficiencies in the performance of the injured party and any unreasonableness

in the demands made by him," prejudgment interest should be considered. Davis v. Borough of Montrose, 2018 PA Super 228, 194 A.3d 597, 613 (citing Restatement (Second) of Contracts § 354 cmt. d, while reversing a denial of prejudgment interest). There were no deficiencies in the performance by Dr. Babb, the injured party. There was nothing unreasonable in the demands that he made. No significant factors weigh against granting him prejudgment interest here.

Geisinger's wrongful termination of Dr. Babb constituted a breach of contract, as Geisinger concedes that the jury found. (Geis. Br. 50) Accordingly, "statutory prejudgment interest is awardable ***as of right***." Pittsburgh Construction Company, 2003 PA Super 374, 834 A.2d at 590 (quoted *supra*, emphasis added)

Justice further requires an award of prejudgment interest to Dr. Babb. Geisinger's wrongdoing, proven at trial, shattered Dr. Babb's promising medical career. He had to fight for nearly 20 years in litigation to attain this jury verdict. In light of the passage of time

and the incurrence of enormous legal expenses, prejudgment interest is essential to make him whole.

It constituted an abuse of discretion for the trial court not to consider the ordeal that Dr. Babb has endured due to Geisinger's wrongdoing, and how the award does not make Dr. Babb whole in the absence of prejudgment interest.

III. CONCLUSION

For the foregoing reasons, this Court should affirm the jury verdict below but reverse the denial of prejudgment interest.

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Dated: January 18, 2019

Certificate of Compliance of Confidentiality

The undersigned certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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Certificate of Compliance of Word Count

The undersigned certifies that this amicus brief does not exceed 7,000 words.

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