No. _____

In the Supreme Court of the United States

ESTATE OF BERNICE GOLDBERG
BY EXECUTOR GARY GOLDBERG,
Petitioner,

v.

PHILIP NIMOITYN, M.D., JOHN DOES 1-10; JANE DOES 1-10; CORPORATE DOES 1-10; KENNETH ROSENBERG, M.D.; MITUL KANZARIA, M.D.; MICHAEL BARAM, M.D.; JAY SELLERS, M.D.; CARDIOVASCULAR MEDICAL ASSOCIATES; THOMAS JEFFERSON UNIVERSITY HOSPITAL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gary L. Goldberg
***Counsel of Record**
LAW OFFICES OF GARY L. GOLDBERG
1106 River Avenue
Lakewood, NJ 08701
(732) 370-9090

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
206 East Cary Street♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTIONS PRESENTED

1. In *National Hockey League v Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), this Court ruled that the failure to comply with Rule 26 and 37 of the Federal Rules of Civil Procedure requires severe sanctions. In this case, the Third Circuit affirmed a district court's decision to deny a new trial notwithstanding the facts that Rule 26 and Rule 37 of the Federal Rules of Civil Procedure were violated in bad faith.

The first question presented is:

Is a federal court required to follow the federal Rules of Civil Procedure and procedural due process, which mandate that an expert's report and deposition testimony must be supplemented pretrial, or the expert's testimony must be excluded at trial if the testimony is at variance with the expert's report and deposition testimony, and outside the scope of the expert's report?

2. In *United States v Dunnigan*, 507 U.S. 87, 94 (1993), this Court held that "A witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." In this context, the Court of Appeals held that given that the witness's false testimony occurred after he explained that his report contained a factual error, that there was no clear error in the district court's finding of no perjury.

The second question presented is:

May a court not find perjury even though a material statement, designed to mislead and influence the jury, was knowingly testified to falsely?

PARTIES TO THE PROCEEDINGS

Petitioner is the Estate of Bernice Goldberg by Executor Gary Goldberg. Respondents are Philip Nimoityn, M. D., John Does 1-10; Jane Does 1-10, Corporate Does 1-10; Kenneth Rosenberg, M.D.; Mitul Kanzaria, M.D.; Michael Baram, M.D.; Jay Sellers, M.D.; Cardiovascular Medical Associates; Thomas Jefferson University Hospital.

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Estate of Bernice Goldberg, by Executor Gary Goldberg, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit is unpublished and is reproduced in the Appendix ("App") at 1a. The opinion of the District Court for the Eastern District of Pennsylvania (the "District Court") also is unpublished and is reproduced at 11a.

JURISDICTION

The Third Circuit entered its judgment on May 10, 2018. A Petition denying Panel Rehearing and Rehearing En Banc was entered on June 13, 2018. This Petition is timely filed within ninety days thereafter and Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OF CIVIL PROCEDURE INVOLVED

Procedural and Substantive Due Process are at issue. The Federal Rules of Civil Procedure, specifically Rule 26(e), provides as follows:

Supplementing Disclosures and Responses

(1) In General. A party who has made a disclosure under Rule 26(a)- or who has responded to an interrogatory, request for production, or request for admission- must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns in some respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

Rule 37(c) provides sanctions for the failure to disclose, to supplement an earlier response or to admit as follows:

(1) Failure to Disclose or Supplement

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.

STATEMENT OF THE CASE

This case involves a medical malpractice claim associated with an 80 year old woman, Bernice Goldberg, who was hospitalized at Thomas Jefferson University Hospital several times in the Spring and Summer of 2011. Throughout all of the admissions, nutrition was a major concern.

On August 11, 2011, Bernice Goldberg was admitted to Thomas Jefferson University Hospital.

Her lungs were clear to auscultation. A percutaneous endoscopic gastronomy ("PEG") feeding tube was demanded by the family for nutrition. On August 17, 2011, Bernice Goldberg refused placement of the PEG tube and a psychiatric consultation was ordered to determine whether Bernice Goldberg was competent to make her own medical decisions, notwithstanding the fact that she had been found to be incompetent to make medical decisions in a prior admission. A psychiatric evaluation was completed and Bernice Goldberg was deemed incompetent. Placement of the PEG tube was scheduled; however, Bernice Goldberg's condition declined. Bernice Goldberg was transferred to the intensive care unit on August 19 and passed away on August 24, 2011. Subsequently, a medical malpractice claim was filed alleging a deviation from the standard of care, in the failure to timely place a PEG tube for feeding.

Appellees' expert, E. Gary Lamsback, M.D., prepared a pretrial report, and was deposed in connection with his report, wherein he opined that the delay in placing Bernice Goldberg's feeding tube was appropriate. However, while preparing his report, and in his deposition, Dr. Lamsback confused a history and physical obtained on August 19, 2011, with a history and physical taken on admission on August 11, 2011. In both his pretrial report, and in his deposition, Dr. Lamsback opined that the presence of double lung pneumonia on admission on August 11 significantly impacted on his opinion that the delay in placing the feeding tube was appropriate. In fact, Ms. Goldberg was diagnosed with double lung pneumonia on August 19, and not August 11.

The expert's report and deposition testimony were never supplemented prior to trial, contrary to Rule 26(e)(2). Appellant's attorney objected to the expert's testimony and moved to bar the expert's testimony, which was denied.

At trial, to defuse and minimize the error, defense counsel, on direct examination, asked Dr. Lamsback if his report contained a "typographical error", to which he responded "Yeah..." On cross-examination, the defense expert admitted that he found the presence of pneumonia to be a significant factor that formed the basis of his opinion to justify the delay in placing the feeding tube. In fact, pneumonia was not present at that time.

At the end of the trial, the jury returned a verdict in favor of Appellees.

Subsequent to the jury verdict, Appellant moved for a new trial arguing that the defense expert's testimony and opinion should not have been admitted because it was outside the scope of his report. In addition, Appellant sought a new trial arguing that defense counsel had suborned perjury and that the expert committed perjury in that his report, in fact, did not contain a typographical error, but in fact, that the expert had based his opinion to delay the placement of the PEG tube, believing that Bernice Goldberg had pneumonia, on August 11, when in fact she did not have pneumonia until August 19. The district court labeled defense counsel's characterization as "disingenuous at best", but did not find perjury, and denied Appellant's motion for a new trial. 11a.

The Appellant appealed to the Third Circuit Court of Appeals. In the appeal, as raised in the District Court, Appellant relied on the fact that respondent failed to supplement or amend the error in the expert's report and deposition testimony as required by Rule 26(e)(2). Furthermore, Appellant argued that the expert committed perjury, and defense counsel suborned perjury, when the expert testified that there was "a typographical error" in his report, when in fact there was no typographical error, but rather, a confusing of hospital admissions by the expert which he relied upon to form the basis of his opinion to justify the delay in placement of the PEG tube. Even the district court commented "that one of the pillars of the opposing expert's opinion was false." 14a.

The Court of Appeals affirmed the District Court's order. 1a In an eight page opinion, the Third Circuit Court of Appeals acknowledged "that Dr. Lamsback's report should have been supplemented before trial to clarify the error." 6a. Nevertheless, in a non sequitur, the Court of Appeals held that "Appellant fails to raise any argument as to why Appellees' failure to supplement Dr. Lamsback's report was in bad faith", notwithstanding the fact that Appellees had two years between the report's creation, deposition, and trial, yet Appellees, who had a duty under the rules, failed to supplement the report or the expert's deposition testimony.

Appellant filed a Petition for Panel Rehearing and Rehearing En Banc which was denied on June 13, 2018. 17a.

This Petition followed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW. THE COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT FOSTERS DISRESPECT FOR THE RULE OF LAW IN PERMITTING THE FLOUTING OF THE FEDERAL RULES OF CIVIL PROCEDURE WITHOUT CONSEQUENCE.

The Court of Appeals' decision warrants review because the failure to adhere to the Federal Rules of Civil Procedure creates chaos, permits trial by ambush, and violates procedural and substantive due process, and fundamental fairness.

Rule 26(e) of the Federal Rules of Civil Procedure provides as follows:

Supplementing Disclosures and Responses

> (1) In General. A party who has made a disclosure under Rule 26(a)- or who has responded to an interrogatory, request for production, or request for admission- must supplement or correct its disclosure or response:
>
> (A) in a timely manner if the party learns that in some respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing
>
> (2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement

> extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

Here, it is undisputed that the Appellees failed to supplement the information included in the expert's report and to supplement the information given during the expert's deposition. Rule 26(e) uses the word "must", not "shall". And in (2) of the Rule, the word "duty" is used; that is, "duty to supplement extends both to information included in the report and to information given during the expert's deposition."

Discretion is not unbridled. The issue here is that the District Court abused its discretion in permitting the defense expert to change his opinion at trial, which was outside the scope of his report. Even the Court of Appeals, in a footnote, on page 5 of the Opinion acknowledged "that Dr. Lamsback's report should have been supplemented before trial to clarify the error." But Rule 26 does not say "should", but rather the Rule says "must"; that there is a "duty to supplement" which "extends both to information included in the expert's report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due."

Rule 37 of the Federal Rules provides sanctions for the Failure To Disclose, To Supplement an Earlier Response, or To Admit. Rule 37(c) provides for the exclusionary consequences of inadequate disclosure

in the discovery process, which includes the failure to supplement an earlier response. That Rule provides, in part,

(1) Failure to Disclose or Supplement

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

The Court of Appeals, in its opinion, disregards Rule 37, and fails to follow controlling case law. In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), this Court held that the failure to comply with Rule 37 requires severe sanctions. In reversing the Third Circuit Court of Appeals, this Court held that "The lenity evidenced in the opinion of the Court of Appeals while certainly a significant factor in considering the imposition of sanctions under Rule 37, cannot be allowed to wholly supplant other and equally necessary considerations embodied in that Rule."

Moreover, the Court of Appeals' decision is in conflict with its own circuit case law and circuits around the country. In *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1201 (3d Cir. 1978), the Third Circuit established four factors to consider when reviewing a district court's decision to admit or exclude evidence based on a failure to comply with pre-trial requirements for abuse of discretion. The four factors are (1) "the prejudice or surprise in fact of the party against whom" the witness testified; (2) "the ability of that party to cure the prejudice" (3) "the

extent to which waiver of the rule against calling unlisted witnesses disrupts "efficient trial of the case", and (4) "bad faith or willfulness in failing to comply with the court's order." *Id.* At 1201-02.

Undoubtedly, Appellant was surprised when the district court failed to bar the expert's testimony as the appellee had a duty to supplement Dr. Lamsback's report and deposition testimony before the trial to clarify the error. Appellant's counsel made clear that now he did not know what Dr. Lamsback's opinion was. 13a. Both the District Court and the Court of Appeals acknowledged that one of the major bases for Dr. Lamsback's opinion that a PEG tube was contraindicated at admission, was false. 13a-14a.

The Court of Appeals' finding that the Appellant had the ability to cure the prejudice on cross examination is weak. Effective cross-examination requires advance preparation. When the defense expert amended his report and deposition testimony at trial, plaintiff's ability to adequately cross-examine the expert, or the opportunity to develop and introduce new and competing evidence, was compromised.

Finally, the Court of Appeals' decision states that "Appellant fails to raise any argument as to why Appellees' failure to supplement Dr. Lamsback's report was in bad faith. Rather, Appellant simply argues that because Appellees had two years between the report's creation and trial, they must have willfully and in bad faith failed to supplement it. Given this dearth of factual allegations as to how Appellees acted in bad faith, the district court did not err in failing to find any bad faith."

The Court of Appeals' decision eviscerates the Federal Rules of Civil Procedure, is at variance with controlling case law, and is disingenuous given the circumstances of this case. Appellees had two years between the report's creation and deposition testimony and trial to amend the expert's report. What more must a litigant establish to prove bad faith? There is no "dearth of factual allegations as to how Appellees acted in bad faith." It is undisputed, that Appellees, aware of the error in their expert's report, failed to supplement their expert's report and deposition testimony as required by the Rules. Then, on direct examination of their expert, the Appellees attempted to minimize, trivialize and deflate the expert's mistake, mischaracterizing it as a "typographical error". "Flagrant bad faith" and a "callous disregard" of the Rules of Civil Procedure are manifest. In *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. ___ (2017), this Court held that Federal Courts have inherent power to sanction bad faith and to impose sanctions for abuse of the judicial process. For the Court of Appeals to state that there is a "dearth of factual allegations as to how Appellees acted in bad faith", is a failure on the part of the Court of Appeals to apply standards of rational evaluation.

II. THE DECISION OF THE COURT OF APPEALS CREATES A NEW STANDARD FOR PERJURY CONTRARY TO CONTROLLING CASE LAW.

The District Court found that Appellees' counsel's characterization was "disingenuous at best" 15a when Appellees' counsel misrepresented to the court, and jury, characterizing as a "typographical error" the error of Appellees' expert believing that Bernice

Goldberg had pneumonia on admission to Thomas Jefferson University Hospital on August 11, 2011, when in fact she did not have pneumonia until August 19. When, however, Appellees' counsel elicited information from their expert, knowing that the procured information was false, Appellees' counsel's characterization was much more than "disingenuous at best"; defense counsel suborned perjury, and the expert committed perjury in giving a false answer under oath.

Defense counsel knew that the expert's report did not contain a typographical error, but rather contained an opinion different from the opinion she was trying to procure at trial. When defense counsel asked of Dr. Lamsback on direct examination "And so did you have a typographical error in your report..." to procure the answer, Yeah...", defense counsel suborned perjury and the expert committed perjury. The Court of Appeals' decision that "Given that the mischaracterization was suggested after Dr. Lamsback explained that his report contained a factual error and that he admitted the same on cross-examination, we conclude that there was no clear error in the district court's finding of no perjury", is irrational. The mischaracterization was material nonetheless, and intended to influence the jury.

In *United States v. Hoffecker*, 530 F.3d 137, 183 (3d Cir. 2008), the standard for perjury is:

1). The witness committed perjury.

2). The defense counsel knew or should have known that the testimony was false.

3). The testimony was not corrected.

4). There is a reasonable likelihood that the perjured testimony could have affected the judgment of the jury.

When Dr. Lamsback testified falsely, there was a misrepresentation of a material fact designed to influence the jury. In *Kungys v. United States*, 485 U.S. 759, 770 (1988), this Court held that a false statement is material if it has "a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." The testimony need not have actually influenced, misled or impeded the proceeding. *United States v. Williams*, 993 F.2d 451, 455 (5th Cir. 1993); *United States v. Gribben*, 984 F.2d 47, 52 (2d Cir. 1993).

The United States Supreme Court has held that a broad construction of materiality is appropriate in the context of false declarations in connection with civil depositions. *United States v. Kross*, 14 F.3d 751, 754 (2d Cir. 1994), and *United States v. Holly*, 942 F.2d 916, 924 (5th Cir. 1991). Moreover, in *United States v. Kross*, the court held that a statement may be material to any proper matter of inquiry, including collateral matters that might influence the outcome of decisions before the tribunal, such as determining credibility issues. And, in *United States v. Reilly*, 33 F.3d 1396, 1419 n.20 (3d Cir. 1994), the court stated that materiality is not negated merely because the tribunal did not believe the testimony or sought cumulative information. And in *United States v. Gaudin*, 515 U.S. 506 (1995), this Court held that materiality as a question of law should be determined by the jury. The Court of Appeals' decision that "Given that the mischaracterization was suggested after Dr. Lamsback explained that his report

contained a factual error and that he admitted the same on cross-examination, we conclude that there was no clear error in the district court's finding of no perjury", establishes a new standard for perjury contrary to controlling case law.

CONCLUSION

The Court of Appeals' decision affirming the District Court should not stand. Certiorari is appropriate here to bring the Court of Appeals into compliance with Supreme Court precedents and the rule of law.

Respectfully submitted

Dated: September 6, 2018

/s/ Gary L. Goldberg
Gary L. Goldberg
*Counsel of Record
LAW OFFICES OF
GARY L. GOLDBERG
1106 River Avenue
Lakewood, NJ 08701
(732) 370-9090

Counsel for Petitioner