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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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[ENTERED JUNE 21, 2018]

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2870

ESTATE OF BERNICE GOLDBERG
BY EXECUTOR GARY GOLDBERG,
Appellant

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

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. 2-14-cv-00980)
District Judge: Honorable Gerald A. McHugh

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
April 13, 2018

Before: CHAGARES, VANASKIE, Circuit Judges, and BOLTON, District Judge*.

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* The Honorable Susan R. Bolton, Senior United States District Judge for the District of Arizona, sitting by designation.

(Opinion Filed: May 10, 2018)

OPINION†

BOLTON, District Judge.

The Estate of Bernice Goldberg, by Executor, Gary Goldberg ("Appellant"), appeals from the district court's order denying its motion for a new trial after a jury trial and verdict in favor of Philip Nimoityn and Thomas Jefferson University Hospital (collectively "Appellees") on a medical negligence claim. For the reasons set forth below, we will affirm the district court's decision.

I.

Bernice Goldberg, an 80-year-old woman, was admitted to the hospital several times during the late spring and summer of 2011 due to myriad illnesses and conditions. Some admissions were for extended durations, with one lasting over a month. Ms. Goldberg suffered from chronic obstructive pulmonary disease ("COPD"), end-stage congestive heart failure, dementia, probable cancer,[1] and various acute illnesses, including a recurrent clostridium difficile infection. During a hospital admission in

† This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] During one of Ms. Goldberg's admissions, a scan revealed an abnormal mass in her pancreas that doctors thought was likely malignant. The family chose not to have the mass biopsied because they felt Ms. Goldberg would not be able to tolerate chemotherapy even if the mass were cancerous.

July, the attending physician diagnosed her with failure to thrive.

On August 11, 2011, Ms. Goldberg was admitted to Thomas Jefferson University Hospital. Upon admission, Ms. Goldberg had an elevated white blood cell count, was short of breath and required oxygen, and was experiencing loose bowel movements containing blood. Medical professionals attempted to place a nasogastric ("NG") feeding tube on August 15 but were unsuccessful. On August 16, the medical team consulted with Gary Goldberg, Ms. Goldberg's son, regarding the placement of a percutaneous endoscopic gastronomy ("PEG") feeding tube, and the procedure was scheduled for the next morning. On August 17, however, Ms. Goldberg expressly refused placement of a PEG tube and promised her doctors she would eat. Her children requested that the PEG tube be placed despite her wishes, and the treating physician ordered a psychiatric consultation to determine whether Ms. Goldberg was competent to make her own medical decisions. The psychiatric evaluation took place on August 18, and the attending psychiatrist deemed Ms. Goldberg incompetent. Placement of the PEG tube was rescheduled for August 19. In the meantime, however, Ms. Goldberg's condition declined. She became hypoxic and developed aspiration pneumonia. Ms. Goldberg was transferred to the intensive care unit on August 19 and passed away on August 24, 2011. Appellant subsequently filed this medical negligence claim, claiming that Ms. Goldberg died prematurely due to an unjustified delay in placing her PEG tube.

Appellees' expert, E. Gary Lamsback, M.D., prepared a pretrial report in which he opined that the delay in placing Ms. Goldberg's feeding tube was

appropriate. While preparing his report, however, he mistakenly assumed that a history and physical taken on August 19 was a continuation of the history and physical taken at admission, on August 11 and 12. He therefore cited Ms. Goldberg's aspiration pneumonia as a factor that made placement of a PEG tube too risky earlier in admission when, in fact, Ms. Goldberg was not diagnosed with aspiration pneumonia until August 19.

At trial, defense counsel showed him both history and physical reports and asked him whether they affected his report. Dr. Lamsback explained his mistake. Defense counsel then asked if the report contained "a typographical error" because of the mistake. Appendix ("App.") at 42. Dr. Lamsback responded, "Yeah, but it didn't change my conclusions. . ." *Id.* Defense counsel then asked Dr. Lamsback to opine whether it was safe to place a PEG tube in Ms. Goldberg on August 12. Plaintiff's counsel objected and at sidebar indicated that he did not know what Dr. Lamsback's opinion would be because his report was based on the mistaken assumption that Ms. Goldberg had aspiration pneumonia on admission. Plaintiff's counsel also indicated he had struggled with whether to file a motion concerning this issue before trial. The district court allowed Dr. Lamsback to answer the question, and he opined that, even without aspiration pneumonia, a tube should not have been placed on August 12 due to Ms. Goldberg's infection and breathing problems. Plaintiff's counsel cross-examined Dr. Lamsback, who admitted that aspiration pneumonia was one of the factors that informed his original opinion in his report.

At the end of the trial, the jury returned a verdict in favor of Appellees. Appellant moved for a new trial

arguing that Dr. Lamsback's opinion should not have been admitted because it was beyond the scope of his expert report. Appellant also sought a new trial arguing defense counsel suborned perjury by characterizing Dr. Lamsback's mistake as a typographical error and Dr. Lamsback committed perjury by agreeing with the characterization. The district court found that Dr. Lamsback's opinion—that placement of a PEG tube was inappropriate—was adequately expressed and disclosed in his report. The only difference in Dr. Lamsback's testimony at trial was that he conceded that one of the factual bases for his opinion was wrong. The district court also found that, although characterizing the mistake as a typographical error was "disingenuous at best," it did not amount to perjury. App. at 7. The district court denied Appellant's motion, and Appellant timely appealed.

II.

Appellant argues that the district court erred in failing to exclude Dr. Lamsback's testimony under Federal Rule of Civil Procedure 37(c) for failure to supplement Dr. Lamsback's report, failing to exclude Dr. Lamsback's testimony as beyond the scope of his expert report, and failing to grant a new trial based on the above failures and based on perjury and subornation of perjury. We have jurisdiction to review final orders of the district court. 28 U.S.C. § 1291.

In general, we review a district court's denial of a motion for a new trial for abuse of discretion. *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1095 (3d Cir. 1995). If the district court's denial "is based on application of a legal precept, our review is plenary and, in addition, any findings of fact on which

the court's exercise of discretion depends are reviewed for clear error." *Id.*

Appellant's first two arguments are effectively the same—that the district court should have excluded Dr. Lamsback's testimony because his opinion on whether a PEG tube placement was appropriate in the absence of aspiration pneumonia was articulated for the first time at trial. We review a district court's decision to admit or exclude evidence based on a failure to comply with pre-trial requirements for abuse of discretion.[2] *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1201 (3d Cir. 1978). Four factors aid us in this consideration: (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"; [3] and (4) the "bad faith or willfulness in failing to comply with the court's order." *Id.* at 1201–02.

Appellant knew about the mistake in Dr. Lamsback's report before trial. Plaintiff's counsel told the district court that he had struggled to decide whether to file a motion concerning the mistake before trial. Therefore, we cannot conclude that the district court erred in finding there was no surprise to Appellant. Furthermore, Appellant had the opportunity to cross-examine Dr. Lamsback and force him to admit that one of the major bases for his

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[2] For purposes of this appeal, we assume, without finding, that Dr. Lamsback's report should have been supplemented before the trial to clarify the error.

[3] This factor is irrelevant because Dr. Lamsback was a listed witness.

opinion that a PEG tube was contraindicated at admission was false. Therefore, the district court also did not err in finding that Appellant had the ability to cure any prejudice. Finally, 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. Since all relevant factors weigh in favor of admitting Dr. Lamsback's opinion, the district court did not abuse its discretion in doing so or in denying Appellant's motion for a new trial on this basis.

Appellant also argues that the district court should have granted a new trial because defendants' counsel suborned perjury by characterizing the mistake in Dr. Lamsback's report as a "typographical error" and Dr. Lamsback committed perjury by agreeing with this characterization. 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." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). "We review for clear error a trial court's factual finding that a witness's testimony was not false and we will not disturb that finding unless it is wholly unsupported by the evidence." *United States v. Hoffecker*, 530 F.3d 137, 183 (3d Cir. 2008). The district court found that the characterization of Dr. Lamsback's mistake as a typographical error was not perjury because Dr. Lamsback frankly admitted during both direct and

cross-examination that he had mistaken the dates of the history and physical reports and that Ms. Goldberg did not have aspiration pneumonia when she was admitted to the hospital. 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. Therefore, it was not an abuse of discretion for the district court to deny a new trial on this ground.

III

For the foregoing reasons, we will affirm the district court's decision to deny Appellant's motion for a new trial.

[ENTERED JUNE 21, 2018]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2870

ESTATE OF BERNICE GOLDBERG
BY EXECUTOR GARY GOLDBERG,
Appellant

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

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April 13, 2018

Before: CHAGARES, VANASKIE, Circuit Judges, and BOLTON, District Judge*.

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* The Honorable Susan R. Bolton, Senior United States District Judge for the District of Arizona, sitting by designation.

JUDGMENT

This cause came to be considered on the record submitted by the parties from proceedings before the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on April 13, 2018.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the decision of the district court to deny a new trial dated August 10, 2017 is affirmed, costs to be taxed to Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATE: May 10, 2018

Certified as a true copy and issued in lieu of a formal mandate on June 21, 2018

Teste: Patricia A Dodszuweit

Clerk, U.S. Court of Appeals for the Third Circuit

[ENTERED AUGUST 10, 2017]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 14-980

ESTATE OF BERNICE GOLDBERG,	**:**
by the Executor GARY GOLDBERG	**:**
Plaintiff,	**:**
v.	**:**
	:
PHILIP NIMOITYN, M.D. et al.,	**:**
Defendants.	**:**

MCHUGH, J. **AUGUST 10, 2017**

MEMORANDUM

This is a medical malpractice action brought under a tenuous theory of liability that was rejected by a jury, leading to the present Motion for a New Trial.

Plaintiff's theory was that his mother, Bernice Goldberg, 81 years of age and suffering from a number of serious co-morbidities, died prematurely as a result of delay on the part of her physician in inserting a percutaneous endoscopic gastrostomy (PEG) tube to assist in providing her nutrition. The defense theory was principally rooted in principles of patient autonomy—Mrs. Goldberg's own refusal to authorize placement of the tube. But the defense also contended that placement of the tube was

contraindicated during the early days of the hospital admission that led to Mrs. Goldberg's death, because of a series of problems, which included an elevated respiration rate, an elevated white blood cell count, bloody diarrhea, and the possibility of a serious infection known as C. difficile. In addition, the defense expert cited aspiration pneumonia as another contraindication to earlier placement of the tube. At trial, however, on direct examination, that expert admitted that he had misinterpreted the date of certain records, and as a result his reliance on aspiration pneumonia was therefore an error.

Plaintiff, now proceeding *pro se*, contends that he was prejudiced at trial because this admission constituted a "change" in the expert's opinion leaving Plaintiff's counsel surprised and unable to cross-examine effectively. This argument lacks merit.

Mrs. Goldberg was admitted to Thomas Jefferson University Hospital a number of times during the summer of 2011. The multiple records from these admissions were in some instances hard to differentiate. Defendants' expert, E. Gary Lamsback, M.D., made a serious error in his review of those records. Dr. Lamsback identified the existence of aspiration pneumonia at the time of Mrs. Goldberg's final admission to Jefferson in mid-August. In fact, that diagnosis had been reached during an earlier admission, also in August, and Dr. Lamsback confused the two: the diagnosis he thought was rendered on August 19, was actually rendered on August 11 or 12.

In his report, Dr. Lamsback erroneously cited the existence of aspiration pneumonia as one contraindication to placement of a PEG tube, and

reiterated that opinion during his deposition. Plaintiff contends that when the error was acknowledged at trial, his attorney was unfairly surprised. The record squarely refutes this. When the objection was raised at trial, it was clear that Plaintiff's counsel, Steven Horn, has identified Dr. Lamsback's error in advance of trial. The critical portion of the colloquy at sidebar is as follows:

> Mr. Horn: Right. And Judge, I struggled with this, whether I should have made a motion – before yesterday. And every time I thought about this case, I struggled with it because it's such a defective -- At the same time, now I don't know what his opinions are.

It is clear from this exchange that Mr. Horn was well aware of Dr. Lamsback's mistake, by virtue of his words "every time I thought about this case." It is equally clear that Mr. Horn contemplated filing some form of motion before trial, but chose not to. Plaintiff now seizes upon his counsel's last statement in that colloquy—the assertion that "now I don't know what his opinions are"—as evidence of prejudice.

The contention that Plaintiff's counsel was unaware of the expert's opinion is unsupportable. The *opinion* Dr. Lamsback rendered in court was the same as it was before trial: there were medical contraindications to placement of a PEG tube until later in Mrs. Goldberg's admission, at a point where she was too weak to undergo the procedure.[1] The only thing that changed at trial was that Dr. Lamsback was forced to admit that one of the bases

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[1] In addition, the defense raised a strong argument that the insertion of PEG tube has little impact on increased longevity.

for his opinion was incorrect. Defense counsel, having identified the error, chose to address it on direct examination of her witness.

The issue in dispute was hardly "outside the scope of the expert's report." To the contrary, was squarely addressed in the expert's report, just incorrectly. On that score, Plaintiff was in no respect prejudiced by this turn of events; in the hands of a skilled cross-examiner, an error like Dr. Lamsback's is a gift. Few lines of cross-examination are more effective than one which shows that an expert relied upon a fact or a premise that is demonstrably untrue. Indeed, Dr. Lamsback was forced to confess his error on the stand in open court, was cross-examined by Mr. Horn, and was further impeached with his deposition. Trial Tr. 6/29/2017 at 38–42, 43–45. In short, as a result of this sequence of events, Plaintiff was placed in the fortunate position of being able to demonstrate to the jury that one of the pillars of the opposing expert's opinion was false.

Applying the test established by the Third Circuit in *DeMarines v. KLM Dutch Airlines*, 580 F.2d 1193, 1201–02 (3d Cir. 1978), there was neither prejudice nor surprise. And not only did Plaintiff have the ability to cure any "prejudice," but the expert's mistake actually provided Plaintiff with a prime opportunity to attack both the validity of his conclusions and his credibility. At all times, Dr. Lamsback's opinion remained the same, but his ability to defend that opinion was substantially undermined by his acknowledged error.

Consistent with the hyperbolic tone in which Plaintiff has litigated this case, he also accuses defense counsel of suborning perjury for eliciting

testimony that Dr. Lamsback's error was merely "typographical." Although defense counsel's characterization was disingenuous at best, it hardly qualifies as perjury. Under both federal and Pennsylvania law, perjury requires the misrepresentation of some *material* fact. Defense counsel's weak attempt to minimize the seriousness of Dr. Lamsback's mistake had no substantive import, as the witness frankly admitted that he was simply wrong. It was for the jury to decide how to assess the significance of that error, and the credibility of the expert, and in doing so they had the benefit of the cross-examination conducted by Plaintiff's counsel.

Plaintiff's Motion for a New Trial will be denied. An appropriate Order follows.

/s/ Gerald Austin McHugh
United States District Judge

[ENTERED AUGUST 10, 2017]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 14-980

ESTATE OF BERNICE GOLDBERG, by the Executor GARY GOLDBERG
Plaintiff,
v.

PHILIP NIMOITYN, M.D. et al.,
Defendants.

ORDER

This 10th day of August, 2017, upon consideration of Plaintiff's Motion for a New Trial, Defendants' Responses thereto, and Plaintiff's Reply, it is hereby **ORDERED** that Plaintiff's Motion (Dkts. 84 and 90) is **DENIED**.

It is **FURTHER ORDERED** that Judgment shall be entered in favor of Defendants and against the Estate of Bernice Goldberg.

The Clerk shall mark this case closed for statistical purposes.

/s/ Gerald Austin McHugh
United States District Judge

[ENTERED JUNE 13, 2018]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

17-2870

ESTATE OF BERNICE GOLDBERG BY
EXECUTOR GARY GOLDBERG,

Appellant

v.

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JANE DOES 1-10; CORPORATE DOES 1-10;
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KANZARIA, M.D.; MICHAEL BARAM, M.D.; JAY
SELLERS, M.D.; CARDIOVASCULAR MEDICAL
ASSOCIATES; THOMAS JEFFERSON
UNIVERSITY HOSPITAL

Present: SMITH, Chief Judge, McKEE, AMBRO,
CHAGARES, JORDAN, HARDIMAN,
GREENAWAY, VANASKIE, SHWARTZ, KRAUSE,
RESTREPO, and BIBAS Circuit Judges, and
BOLTON, District Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

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* The Honorable Susan R. Bolton, Senior United States District Judge for the District of Arizona, sitting by designation. Pursuant to Third Circuit I.O.P. 9.5.3., Judge Bolton's vote is limited to panel rehearing.

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Michael A. Chagares
Circuit Judge

Dated: June 13, 2018
tmm/cc: Gary L. Goldberg, Esq.
Karyn Dobroskey Rienzi, Esq.