



The goal of our monthly newsletter is to keep you abreast of changes in the legislature affecting your industry as well as important court decisions. Should you have any questions regarding any of this information, please feel free to contact us via phone or email.

## AFFIRMED: "ERROR IN JUDGMENT" INSTRUCTION NOT ALLOWED IN MEDICAL MALPRACTICE ACTIONS

On February 7, 2014, in *Passarello v. Grumbine*, the Pennsylvania Supreme Court upheld the Superior Court's ruling prohibiting courts from using the "error in judgment" jury instruction in medical malpractice cases.

The defendants sought to abrogate the Superior Court's earlier rulings that applied a blanket prohibition against the use of the instruction arguing that under certain circumstances, the instruction is warranted. The defendants also argued that if given carefully and correctly, the jury instruction is not *per se* confusing.

However, the Court held that the instruction should not be given because it has a propensity to mislead and confuse the jury. Significantly, the Court did not find fault with the substantive reasoning underlying the error in judgment instruction, but found that the terminology and other similar phrases such as "mistake in judgment," are confusing. The Court stated that "if a defendant desires an instruction that conveys the principle that an unfortunate result does not by itself establish negligence, he or she may request from the trial court an instruction, in the appropriate case, that an unfortunate result does not by itself establish negligence."

Ultimately, the Court agreed with the Superior Court's determination that the error in judgment instruction 1) wrongly suggests to the jury that a physician is not liable for negligence if he uses his own judgment; 2) improperly incorporates a subjective element into jury deliberations focused on the physician's state of mind; and 3) may lead a jury to incorrectly conclude that a physician is only liable if a decision is made in bad faith.

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