

MARTIN SNYDER, D.P.M. and KATHY  
SNYDER, his wife,

Plaintiffs

vs.

SCRANTON HOSPITAL COMPANY, LLC  
d/b/a REGIONAL HOSPITAL OF  
SCRANTON and/or d/b/a REGIONAL  
HOSPITAL SURGERY CENTER, and  
NORTH AMERICAN PARTNERS IN  
ANESTHESIA (PENNSYLVANIA), LLC,

Defendants

and

ERWIN MORITZ, M.D.,

Additional Defendant

IN THE COURT OF COMMON PLEAS  
OF LACKAWANNA COUNTY

CIVIL ACTION – LAW

NO. 19 CV 83

MAURIB. KELLY  
LACKAWANNA COUNTY  
2020 DEC 31 P 4:41  
CLERK OF  
JUDICIAL RECORDS  
CIVIL DIVISION

### ORDER

The COVID-19 pandemic and the resulting safety directives issued by the Pennsylvania Department of Health (“DOH”) have required courts, litigants, and lawyers to devise and employ innovative methods for conducting in-person jury trials, including the increased usage of advanced communication technology (“ACT”). Plaintiffs’ motion *in limine* in this malpractice action arguably tests the boundaries of that creativity and adaptability, and seeks leave of court to project plaintiffs’ children and grandchildren via the Zoom videoconferencing platform on monitors and screens in the courtroom during the opening statements and closing arguments “in order to introduce all of them to the jury,” to “allow [them] to observe opening and closing statements,” and to enable “the jury to see

and understand that Plaintiffs' family is close knit and supportive." Defendants oppose that request on the grounds that it "serves no legitimate evidentiary purpose," is "intended to inflame the jury from the outset of trial," and will "divert the jury's attention away from the facts and circumstances and instead engender improper sympathy."

By way of relevant background, on March 6, 2020, Governor Tom Wolf issued a "Proclamation of Disaster Emergency" in response to the COVID-19 public health crisis, and subsequently renewed that disaster emergency proclamation by amendments dated June 3, 2020, August 31, 2020, and November 24, 2020. *See Wolf v. Scarnati*, 233 A.3d 679, 684-685 (Pa. 2020); *McGrath v. Board of School Directors of the City of Scranton*, 2020 WL 5904514, at \* 7 n.4 (Lacka. Co. 2020); <https://www.pema.pa.gov/Governor-Proclamations/Documents/Amendment/COVID-19-112420.pdf>. By virtue of a series of Orders on March 16, 2020, March 18, 2020, April 1, 2020, and April 28, 2020, the Supreme Court of Pennsylvania declared "a general, statewide judicial emergency," generally closed all Pennsylvania courts to the public, and suspended all jury and non-jury trials through June 1, 2020. *In re General Statewide Judicial Emergency*, 228 A.3d 1280 (Pa. 2020); *In re General Statewide Judicial Emergency*, 228 A.3d 1283, 1286 (Pa. 2020); *In re General Statewide Judicial Emergency*, 229 A.3d 229, 231 (Pa. 2020); *In re General Statewide Judicial Emergency*, 230 A.3d 1015, 1018-19 (Pa. 2020). On May 27, 2020, it announced that the statewide judicial emergency would cease as of June 1, 2020, and that the President Judges of each judicial district could file "[s]elf-effectuating extensions of local emergencies" and continue to "[s]uspend jury trials until such time that they can be

conducted consistent with prevailing health and safety norms.”<sup>1</sup> In re General Statewide Judicial Emergency, 234 A.3d 408, 409 (Pa. 2020).

On May 29, 2020, President Judge Michael J. Barrasse extended the judicial emergency in the Court of Common Pleas of Lackawanna County through June 30, 2020, In re the 45th Judicial District, No. 2020 MD 179 (Lacka. Co. May 29, 2020), and on June 25, 2020, he further extended the local judicial emergency through September 4, 2020. In re the 45th Judicial District, No. 2020 MD 206 (Lacka. Co. June 25, 2020). The latter Order further provided that “[j]ury trials are suspended through September 4, 2020, and, at this time, are scheduled to resume on Tuesday, September 8, 2020.” Id. at p. 2. On September 1, 2020, a supplemental Order was filed which extended the local judicial emergency, but directed that “[j]ury trials shall resume as of Tuesday, September 8, 2020, and shall be scheduled by the Judges of the Court of Common Pleas.” In re the 45th Judicial District, No. 2020 MD 300 (Lacka. Co. Sept. 1, 2020). It expressly cautioned that “[a]ll in-person access and proceedings to courts and courtrooms may be limited, at the discretion of the judge who is assigned to the matter or courtroom, in order to safeguard the health and safety of court personnel, court users, and members of the public.”<sup>2</sup> Id.

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<sup>1</sup>The Order of May 27, 2020, also stated that “[t]he Administrative Office of Pennsylvania Courts remains ready to provide guidance to the appellate and local courts concerning implementation of technological resources and maintenance of appropriate health-and-safety measures to protect court personnel, court users, and members of the public.” In re General Statewide Judicial Emergency, 234 A.3d 408, 409 (Pa. 2020). To that end, the Administrative Office of Pennsylvania Courts (AOPC) created a Jury Trial Working Group on May 11, 2020, “to identify issues and to provide best practice recommendations for resuming jury trials while ensuring public health and safety.” On June 25, 2020, the Working Group issued its 27 page report, entitled “COVID-19 Guidelines for Pennsylvania’s Judiciary: Resuming Jury Trials,” which provided comprehensive “recommendations based upon currently-available public health information.” See <http://www.pacourts.us/assets/files/page-1305/file-9559.pdf>.

<sup>2</sup>It bears noting that by Order dated December 22, 2020, the local judicial emergency was extended through February 28, 2021, and that “[j]ury trials are suspended through February 28, 2021.” In re the 45th Judicial District, No. 2020 MD 408 (Lacka. Co. Dec. 22, 2020). However, the above-captioned matter has been scheduled for trial on Monday, March 15, 2021, and presumably will proceed to trial on that date. (Docket Entry No. 188).



To comply with the guidelines published by the Centers for Disease Control and Prevention (CDC) and the Orders issued by the Pennsylvania DOH, Courtroom No. 1 in the Lackawanna County Courthouse has been reconfigured due to physical space limitations and the need to socially distance, and equipped with new audio and visual technology, plexiglass protective barriers, and other accessories designed to ensure the safety of jurors, litigants, lawyers, and court personnel.<sup>3</sup> Counsel tables now face the jury box, rather than the bench, and trial witnesses testify from the seat designated for juror no. 9 in the jury box, not from the witness stand adjacent to the bench. Jurors are seated in the large gallery that is normally used by the public, so that at least six feet of sustained physical distance may be maintained between each juror. A video camera positioned on a tripod is focused upon the testifying witness and projects that image onto large mobile screens that are located in the front of the gallery where the jurors are seated, as well as onto smaller monitors situated on counsel table and the bench.

Lawyers may question witnesses only while seated at counsel table or standing at the podium located between the counsel tables, and must remain at least six feet distant from the witness and opposing counsel in the process. All lawyers and witnesses utilize portable microphones that provide enhanced audibility throughout the courtroom, and all exhibits must be displayed via the available screens and monitors so that they may be observed by the witnesses, jury, counsel, and parties. Under no circumstances may an exhibit or item of evidence be handed to a witness or juror to examine, nor may counsel

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<sup>3</sup>To assure appropriate social distancing, prospective jurors report to the theater at the nearby Scranton Cultural Center, and jury selection is conducted in the large ballroom of that facility before the chosen jury is escorted by court personnel to the courthouse for trial.



approach a witness unless at least six feet of physical distance is maintained at all times. Every individual in the courtroom must wear a “face covering” that complies with the DOH Secretary’s most recent Order effective November 18, 2020, unless medical proof is provided that wearing such a face covering would cause or exacerbate a medical or mental health condition or disability, and sidebar discussions of evidentiary objections have become non-existent. During opening statements and closing arguments, counsel must maintain at least six feet of sustained physical distance from the nearest juror, the opposing parties, and their attorneys, and jury deliberations are conducted in either the jury assembly lounge or the courtroom itself, rather than the jury deliberation room, to enable all jurors to be socially-distanced.

The jury’s use of the gallery for seating deprives the public of its ability to attend trials in-person in Courtroom No. 1. To satisfy the constitutional requirements of public access to trials, special audio and video technology has been installed to transmit the proceedings into adjacent Courtroom No. 4 where they may be viewed on large mobile screens by socially distanced family members, friends, and members of the public.<sup>4</sup> As recommended in the “Resuming Jury Trials” report issued by the AOPC Jury Trial Working Group, (*see* n.1, *supra*, at p. 21), the jurors are advised during the opening instructions of the various measures taken to ensure their health and safety, including their

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<sup>4</sup>The First Amendment to the United States Constitution guarantees the public the general right to attend criminal trials. *See* Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596, 606 (1982); *In re 2014 Allegheny County Investigating Grand Jury*, 181 A.3d 349, 354 (Pa. Super. 2018) (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980)), *aff’d*, 223 A.3d 214 (Pa. 2019). Article I, Section 11 of the Pennsylvania Constitution states that “[a]ll courts shall be open,” and likewise grants “a general right of public access to criminal proceedings, as well as to judicial records.” Com. v. Curley, 189 A.3d 467, 472 (Pa. Super. 2018). The constitutional and common law rights of public access apply with equal force to civil trials. Storms ex rel. Storms v. O’Malley, 779 A.2d 548, 569 (Pa. Super. 2001), *app. denied*, 569 Pa. 722, 806 A.2d 862 (2002).

socially-distanced location in the gallery which is customarily used by the parties' family and friends, and members of the public. Jurors are also informed that those individuals are able to view the proceedings on screens located in Courtroom No. 4, and that the jurors should not draw any conclusions or inferences from the fact that those individuals are not present in Courtroom No. 1.

In anticipation of the impending trial on March 15, 2021, the parties filed 25 motions *in limine*, and between November 25, 2020, and December 18, 2020, rulings were issued on 24 of those motions. (Docket Entry Nos. 202-226). The remaining motion is "Plaintiffs' Motion *In Limine* to Allow Plaintiffs' Family Members to Appear and Be Seen Via Zoom During Opening and Closing Statements" seeking court approval "to project Plaintiffs' five children and several grandchildren on the video monitors and screens in the courtroom, via Zoom and without sound, during opening statements and closing statements." (Docket Entry No. 193 at pp. 1, 9). Plaintiffs submit that they "intend to do this in lieu of having all of the family members in the first row of the gallery as Plaintiffs' counsel normally would in order to introduce all of them to the jury, and allow Plaintiffs' family to observe opening and closing statements." (*Id.* at p. 9). They assert that "a large part of Plaintiffs' damages is the effect of [the male plaintiff's] inability to interact with his family members in the same fashion" due to his injury, and that their Zoom request will enable "the jury to see and understand that Plaintiffs' family is close knit and supportive of their father and grandfather." (*Id.* at p. 10).

Defendants counter that "Plaintiffs' request will produce no admissible evidence and will instead and improperly engender juror sympathy for the Plaintiffs before the first piece of evidence is ever introduced." (Docket Entry No. 201 at p. 2). They argue "that the

virtual appearance of Plaintiffs' family members during opening and closing statements is improperly meant to constitute part of Plaintiffs' damages evidence," and "that Plaintiffs improperly confuse a video projection of Plaintiffs' family members during opening and closing statements for properly admissible evidence of Plaintiffs' damages in this case." (*Id.* at pp. 3-4). Noting that "Plaintiffs are free to elicit testimony regarding the same during the trial itself," defendants maintain "that Plaintiffs' request serves no legitimate evidentiary purpose," is "intended to inflame the jury from the outset of trial," and will "divert the jury's attention away from the facts and circumstances at issue." (*Id.* at pp 4-5).

Based upon plaintiffs' proffered reasons for seeking to display their family members "via Zoom during opening and closing statements," their ACT request would create more problems than it would solve. If plaintiffs wish "to introduce" their family members to the jury, they may call them as witnesses at trial, or, if appropriate, seek to offer into evidence a day-in-the-life film featuring the male plaintiff's "inability to interact with his family members in the same fashion as he did before his arm was rendered useless." *See, e.g., Wagner v. York Hospital*, 415 Pa. Super. 1, 8-10, 608 A.2d 496, 499-500 (1992), *app. discontinued*, 532 Pa. 646, 614 A.2d 1143 (1992). As for the family members' desire "to observe opening and closing statements," they may view the trial proceedings in Courtroom No. 4 by virtue of the new audio and video technology that has been installed. Moreover, to avoid any alleged prejudice resulting from the inability of counsel to "hav[e] all of the family members in the first row of the gallery as Plaintiffs' counsel normally would," a cautionary instruction will be issued to the jury explaining their absence due to the jurors' use of the gallery seating and the need for social distancing.



To the extent that plaintiffs seek to display their family members on the courtroom screens and monitors as proof that plaintiffs' "family is close knit and supportive of their father and grandfather," their requested ACT use would constitute improper opening statement and closing argument. Although the right to present an opening statement and closing argument in a civil case is part of the constitutional right to be represented by an attorney, the trial court is vested with the discretion "to regulate addresses by counsel to the jury." Daddona v. Thind, 891 A.2d 786, 798 (Pa. Cmwlth. 2006), *app. denied*, 589 Pa. 732, 909 A.2d 306 (2006); Butler v. Flo-Ron Vending Co., 383 Pa. Super. 633, 649-650, 557 A.2d 730, 738 (1989), *app. denied*, 523 Pa. 646, 567 A.2d 650 (1989). Our Supreme Court has stated that "[t]he purpose of an opening statement is to apprise the jury how the case will develop, its background and what will be attempted to be proved; but it is not evidence." Com. v. Parker, 591 Pa. 526, 537, 919 A.2d 943, 950 (2007)) (quoting Com. v. Montgomery, 533 Pa. 491, 498, 626 A.2d 109, 113 (1993)). "A party is entitled to argue the evidence during closing arguments, including all logical inferences," Hammons v. Ethicon, Inc., 190 A.3d 1248, 1283 (Pa. Super. 2018), *aff'd*, 240 A.3d 537 (Pa. 2020), but "this latitude does not include discussion of facts not in evidence which are prejudicial to the opposing party." Risperdal Litigation W.C. v. Janssen Pharmaceuticals, Inc., 174 A.3d 1110, 1117 (Pa. Super. 2017); Hycza v. West Penn Allegheny Health System, Inc., 978 A.2d 961, 977 (Pa. Super. 2009), *app. denied*, 604 Pa. 706, 987 A.2d 161 (2009). Indeed, as part of the standard preliminary instructions in civil cases, juries are advised at the outset of a trial that "[a]n opening statement is not evidence" and "closing arguments are not evidence." Pa. SSJI (Civ.) § 1.170 (5th ed. 2020).

Thus, the portrayal of plaintiffs' family members on screens and monitors during opening and closing statements as some form of evidence "that Plaintiffs' family is close knit and supportive" would violate the hornbook rule that opening statements and closing arguments are not part of the evidence and may not be considered as such by the jury. Once again, plaintiffs are free to present testimonial evidence at trial regarding the closeness and supportiveness of plaintiffs' family and the impact that the male plaintiff's injuries allegedly have had on his ability to interact with his children and grandchildren. But proof of those disputed issues may not be offered during an opening statement and closing argument in the format requested by plaintiff.

While it is true that "[i]n appropriate cases, counsel is permitted to use visual aids during opening and closing statements to assist the jury in understanding the evidence," Risiperdal Litigation W.C., 174 A.3d at 1117, the continuous display of plaintiffs' family members on the screen and monitors in the courtroom would not be a proper use of demonstrative evidence under the circumstances. The constant image of plaintiffs' family members, particularly younger grandchildren who may be more restless during extended opening statements and closing arguments, could serve as a distraction for the jurors and interfere with their ability to focus on the remarks and arguments by counsel. As a practical and technical matter, the continual projection of plaintiffs' family on the courtroom screens and monitors would hinder, and possibly prevent, plaintiffs' counsel from displaying medical records and other exhibits on the available screens during his opening statement and closing argument. Additionally, the prospect of multiple family members directly facing the jurors on large projection screens throughout the addresses by counsel could

make the jurors uncomfortable, and as a result, not have the positive effect desired by plaintiffs.

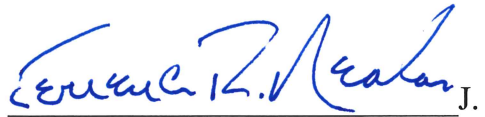
Finally, defendants have articulated plausible prejudice that they may unfairly suffer from plaintiffs' ACT request "before the first piece of admissible evidence is ever introduced." (Docket Entry No. 201 at p. 5). The Supreme Court has recognized that "the opening statement can often times be the most critical stage of the trial, because here the jury forms its first and often lasting impression of the case." Parker, 591 Pa. at 537, 919 A.2d at 950 (quoting Montgomery, 533 Pa. at 498, 626 A.2d at 113). In addition to defendants' fear that the perpetual display of plaintiffs' children and grandchildren before the presentation of any evidence could inflame the passions of the jurors or prompt them to act out of sympathy, *but see* Pa. SSJI (Civ.) § 12.00 (5th ed. 2020) (admonishing jurors that "[n]either sympathy nor prejudice may influence your deliberations."), there is a legitimate concern that the grant of plaintiffs' ACT motion ultimately would divert the jurors' attention from the evidence discussed and arguments presented during the addresses by counsel. *See DiMonte v. Neumann Medical Center*, 751 A.2d 205, 208-209, 212 (Pa. Super. 2000) (discussing allegations "that during appellant's closing argument, the judge left the courtroom returning to the doorway moments later with a sign with the number '7' written on it" as "an indication to counsel he had seven minutes to finish his closing argument," and "remand[ing] this matter for an evidentiary hearing to determine if there is any merit to appellant's claims of judicial comportment during the trial, and the effect, if any, on appellant's due process right to a fair trial."). In sum, inasmuch as plaintiffs' proffered reasons for allowing their "family members to appear and be seen via Zoom during opening and closing statements" may be addressed satisfactorily by other means



identified above, and in light of the potential harm that would be caused by granting that ACT request, plaintiffs' motion for leave of court to permit their children and grandchildren to be observed by the jury and to witness the opening and closing statements by way of the Zoom platform will be denied.

AND NOW, this 31st day of December, 2020, upon consideration of "Plaintiffs' Motion *In Limine* to Allow Plaintiffs' Family Members to Appear and Be Seen Via Zoom During Opening and Closing Statements," defendants' response thereto, and the memoranda of law submitted by the parties, and based upon the reasoning set forth above, it is hereby ORDERED and DECREED that "Plaintiffs' Motion *In Limine* to Allow Plaintiffs' Family Members to Appear and Be Seen Via Zoom During Opening and Closing Statements" is DENIED.

BY THE COURT:

  
Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. C. P. 236 (a)(2) and (d) by transmitting time- stamped copies via electronic mail to:*

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