

Recent Pennsylvania Superior Court Ruling Has Profound Impact on Jury Selection

This week, a three-judge panel in the Pennsylvania Superior Court unanimously ruled Common Pleas Judges throughout the Commonwealth **should** observe all voir dire questioning, otherwise subjecting themselves to reversible error, in *Trigg v. Children's Hosp. of Pittsburgh of UPMC* (2018 Pa. Super. 129).

The plaintiffs, Mendy Trigg and Smithfield Trust, Inc., filed a lawsuit against the Children's Hospital of Pittsburgh of UPMC in Allegheny County Civil Division, which ultimately proceeded to trial in March 2017. In accordance with the Civil Division of the Court of Common Pleas of Allegheny County's jury selection process, a judge was **not** assigned to preside over jury selection. To the contrary, this was performed by a court clerk in the Jury Assignment Room, outside the presence of a judge. During *voir dire*, each prospective juror individually met with the court clerk and the parties' attorneys whereby the clerk asked a series of standardized questions to the individual jurors, followed by, at most, five additional questions by the parties' attorneys. The clerk also permitted brief follow-up questions. Once questioning every prospective juror concluded, challenges for cause were presented to a "Calendar Control Judge," who read a transcript of the questions and answers pertaining to those prospective jurors subject to challenge. Then, the judge, without observing the jurors and their demeanor during the *voir dire* process, ruled that all three of the challenged jurors were unbiased and impartial. Consequently, the plaintiffs exercised three out of their four preemptory strikes on these jurors. One of the jurors plaintiffs challenged for cause had family members who were physicians that could "do no wrong" and, per the juror's answers to *voir dire*, would "probably, yes" favor the medical profession.

After a Defense verdict, the plaintiffs filed an appeal, asserting, *inter alia*, the trial court failed to strike jurors for cause despite exhibiting bias and prejudice, and erred by not personally observing *voir dire*.

The defendant/appellee hospital raised the palpable-error deference standard put forth by the Superior Court in *McHugh v. Proctor & Gamble*, 776 A.2d 266 (Pa. super. 2001). Pursuant to the palpable-error deference standard, a trial judge is given great deference during the jury selection process and can only be reversed when the court committed "palpable error." However, the panel in *Trigg* found that the palpable-error deference standard only applies when a trial judge actually observes the original *voir dire*. Because the trial judge in *Trigg* did not observe *voir dire*, the lower court was deprived "of any greater perception of the jurors' partiality than an Appellate Court can discern by reviewing the same, cold record." The Superior Court emphasized that a trial judge's personal observations of voir dire is essential to its ability to properly evaluate whether or not prospective jurors should be stricken for cause. In *Triggs*, the Trial Judge "acquired none of the wisdom or insight that he could have from noting a jurors' furtive glance, a tremor of voice, a delayed reply, a change in posture, or myriads of other body language."

After a *de novo* review, the Superior Court reviewed the "same, cold record" as the trial judge and held that the prospective juror whose family included physicians was biased and should have been stricken for cause. Accordingly, as the trial court should have stricken this juror for cause, the lower court committed reversible error as the appellants were forced to exhaust all of their preemptory challenges, one of which was used to remove this juror. The Superior Court remanded the matter for a new jury selection and trial.

Comment: While falling short of mandating all trial judges to personally observe *voir dire*, this recent Superior Court decision sends a strong message throughout the Commonwealth that it will not look kindly to trial judges who fail to be present during jury questioning. The Superior Court stated, when trial judges choose not to partake in this critical process, they stand in no better position than a higher court to assess

05.24.18



jurors, as they as well are only limited to the written record. Going forward, if trial judges fail to be present for jury questioning, they will no longer receive the benefit of the palpable-error deference standard if their rulings are appealed, and will instead be subject to a *de novo* appeal.

This decision will have profound impact on jury selection. It easily opens the door to parties who receive an unfavorable verdict at trial to appeal so long as the trial judge was not present for jury questioning. We anticipate most judges will adhere to the Superior Court's ruling and actively participate in the *voir dire* process moving forward.