SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5682-14T2

SCOTT JONES,

Plaintiff-Appellant,

v.

SOUTH JERSEY INDUSTRIES, INC.
d/b/a SOUTH JERSEY GAS COMPANY,

Defendant-Respondent.

Submitted May 10, 2017 – Decided July 21, 2017

Before Judges Alvarez and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-15354-06.

Obermayer Rebmann Maxwell & Hippel LLP, attorneys for appellant (Gregory D. Saputelli, Matthew A. Green, and Stephen H. Barrett, on the briefs).

Jasinski, P.C., attorneys for respondent (David F. Jasinski, of counsel and on the brief; John C. Hegarty, Jennifer C. Van Syckle, and Rebecca D. Winkelstein, on the brief).

PER CURIAM

Plaintiff Scott Jones appeals a jury's March 27, 2015 verdict in favor of defendant South Jersey Industries, Inc., doing business as South Jersey Gas Company. He contends that the jury instructions, and the manner in which deliberations were scheduled, were fatally flawed and warrant reversal. We disagree, and thus affirm.

The underlying action arises from defendant's termination of plaintiff, a long-term employee, and sought damages under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 49. The retrial[1] extended over the course of six days. Including jury selection, the matter was scheduled over nearly two months from beginning to end.

Starting the first day of jury selection, the trial judge warned the jury to expect a lengthy trial, but also told them they would not be asked to come in on a Friday. At the close of the case, the judge charged the jury after extensive discussion with counsel. His closing instruction included Civil Model Jury Charge 1.20, which states: "[i]t is your duty as jurors to consult with one another and to deliberate with the view to reaching an

[1] In Jones v. South Jersey Industries, Inc., No. A-3175-09 (App. Div. Aug. 30, 2011), we vacated the original jury's verdict and remanded for a new trial.

agreement if you can do so without compromising your own individual judgment."

Shortly after jury deliberations began the morning of March 25, 2015, the jury asked its first question, requesting a definition for the term "preponderance of the evidence." While the judge was addressing this with counsel, the jurors asked three additional questions, including a request for a definition of the term "disability." After a lengthy discussion with counsel, the judge reread the model charge defining both terms. Later that afternoon, plaintiff's counsel asked that the jury be given the charges in writing. The judge agreed, and the following morning before deliberations resumed, the jury was given written copies of the instructions, including Model Jury Charge 1.20.

On Thursday, March 26 at 1:42 p.m., the jury asked, "What happens if we cannot get question number one? We're stuck at four and four, please advise." The judge proposed, and counsel agreed, to advise the jury that it needed to "keep deliberating until they have at least an agreement of seven people as to the first question[.]" The judge told the jury:

> I have your question. I have discussed the question with the attorneys, and the, the short answer to your question is . . . the instruction that . . . you continue to deliberate until at least seven of you have agreed upon an answer. In the event that seven, [] because your vote either has to be

eight to zero or seven to one. I'm using seven to one as an example only because you're at four and four. So you have to continue deliberating, going over the evidence, discussing with your fellow jurors your various positions and what you think the evidence showed in order to come to a decision on that question. If the answer to that question leads you to question two, my instructions for question two are the same. If the answer to that question doesn't lead you to question two, then you'll let us know that.

Let me say this before I ask you to return to go back in to deliberate. I don't want my reaction or the attorneys' reaction to anything or any question that you have to seem in any way or to understate in any way how much appreciation we have for what you guys are doing right now. This hasn't been easy for anybody, not the least of which are you who just happen to be the people who got selected. And while I understand that we're in our seventh week and none of the weeks were what I would consider to be easy for any of you, we had delays because of my judicial education, we had weather delays, we had closings, we've had a lot of things that have happened, and none of us are taking any of those things for granted, and they are all factored in in terms of our appreciation of what you're doing.

Having said that — and, again, I don't mean to underestimate your involvement in any way — but your involvement started seven weeks ago and for the rest of the room, and I'm not counting myself in this, this process started years ago, and the end of the process is where we are right now. And the rules that we have for deliberation, while — while simple by definition, not simple in terms of practice, meaning you guys have to live with the fact that at least the conversation needs to

> continue until at least seven of you have agreed upon the answer to any question. It happens to be here your focus is still on question one. So while my instruction, or my answer to your question is a relatively simple one, that you have to deliberat[e] until at least seven of you agree as to an answer, we understand, I understand that that is by no means a simple task, or even simple news to hear. But, nonetheless, that is the only real instruction that I can give to you at this point, and with as much appreciation as I can try and express.
>
> So with that, I'm going to ask that you return to the jury deliberation room, resume your deliberations with that response in mind. And thank you.

At 3:45 p.m., the judge advised counsel that he would dismiss the jury for the day since one juror had "child pick-up issues." When the jury was returned to the courtroom, the judge "ask[ed] that [the jury] be here ready to resume [] deliberations at 9 a.m. tomorrow morning, [Friday,] with the same instructions as usual." The jury was then excused.

Shortly thereafter, the judge told counsel that one of the jurors had a "problem" with Friday. He added that the court attendant was "going to go find out more about that and then let [him] know." The following colloquy took place when the court attendant returned:

> The Court: [Court attendant,] was there any additional information from our juror who said he had qu-

> Court Attendant: All he said was, "I can't make it tomorrow." When he went by me when I took him out downstairs he never said anything else other than that when he —
> The Court: After I told him to come in tomorrow?
>
> Court Attendant: Yes.
>
> The Court: Okay.

Thereafter, defense counsel questioned the fairness of instructing that the jury come in on Friday when throughout the trial, they had understood they would not have to appear on Fridays.

> [DEFENSE COUNSEL]: You know, Judge, I want — The jurors knew that Friday was not a . . . jury day.
>
> THE COURT: Well, I mean, yes, but they also knew that they weren't going to be here past March 19[].
>
> [DEFENSE COUNSEL]: Agreed.
>
> . . . .
>
> THE COURT: - that's obviously not the case.
>
> [DEFENSE COUNSEL]: But we didn't even ask them whether or not they could come in tomorrow.
>
> THE COURT: I know.
>
> [DEFENSE COUNSEL]: We just assume that . . . they could come in. So I, -
>
> . . . .
>
> THE COURT: - I don't agree with that characterization of it because -
>
> [DEFENSE COUNSEL]: Well —

> THE COURT: I get updates from Jury Management that you don't get. But I take, I take your point that we didn't address them on the record to say can everyone be here tomorrow.
>
> [DEFENSE COUNSEL]: No, we didn't, and it is — I think it's unfair at this point in time to have — just say, okay, one juror is not going to be here tomorrow.
>
> THE COURT: Well, no one is saying that.
>
> [DEFENSE COUNSEL]: Well, I'm presuming that one juror is not going to be here tomorrow.
>
> THE COURT: Okay. Well, we'll know that tomorrow.

The judge acknowledged that the jury had not been asked to come in on Fridays except for one Friday in February to which they had agreed in open court. He then asked defense counsel what the solution would be, to which defense counsel responded:

> Well, my solution is I think that it should have been handled in a different way. If they, if we had asked the jurors whether or not they could have made it and one said I absolutely couldn't have made it, could have been brought back on Monday, you know, with, with regards to this. I mean I think at this point in time where we're at and at the, you know, the critical, you know, juncture that we're, where we're at with regard to deliberations that these jurors have been deliberating now for, you know, ten hours, twelve hours, I don't know the math, and for one juror to just announce that he's not coming in tomorrow, that he can't make it, I frankly think that it is, that's it's unfair. I think it's unjust with regards to, to prejudice. I think both sides are prejudiced with regards to it.

The judge said that if the juror did not appear the following day despite being told to do so, he would "deal with it."

The following day, Friday, March 27, all the jurors appeared and resumed deliberations. The jury's verdict, framed by the questions on the jury verdict sheet, found that plaintiff had not proven by a preponderance of the evidence that he was suffering from a disability prior to the termination of his employment. The vote was unanimous. The jury also unanimously found that plaintiff had not proven by a preponderance of the evidence that his employer perceived him to have a disability. Plaintiff alleges the jury deliberated no more than half an hour on the morning of March 27 before rendering its verdict. As plaintiff's counsel left the building, she saw juror number four standing in a hallway being comforted by another juror.

In rendering his decision denying plaintiff's application for a new trial, the judge observed that the jury in this case had asked thirty-six questions during the testimony, four during deliberations, and that "[t]his was not a jury whose members were intimidated or reluctant to ask for further guidance." He reiterated that although he did not repeat to the jury, following the jury questions, that they should not "surrender [their] conscientious scruples or personal convictions[,]" that he had

earlier so advised them and provided that instruction in the written charge. The jury at no time informed him that they were unable to reach a verdict, had not yet reached any "mandatory questions," nor did the court pressure them to render a verdict by, for example, improperly reminding them of the expense of a trial. He also mentioned that neither the attorneys nor he "believed that the jury was at a point where it was 'unable to reach a verdict'[.]"

The judge also observed that no objection was made by either party to the charge, and that in addition to the juror seen crying by counsel on the way out of the courthouse, he and court staff observed members of the jury crying as they were "saying goodbye but those tears were accompanied with the jurors reflecting on the relationships developed over their service in a positive joyful manner." In the judge's opinion, the jurors were merely expressing the emotion attendant to having spent seven weeks in trial, and having grown close during that time. He concluded by noting that had the jury felt coerced, they would have returned a verdict on March 26 by the end of the day, as opposed to having resumed deliberations the following morning. The judge further noted that the jury voted unanimously on the only two questions they were required to answer in order to reach their verdict.

In the judge's opinion, the verdict was supported by sufficient evidence in the record. The jury heard from experts whose opinions they could, at its option, accept or reject. He concluded that the jury reasonably reached its decision that plaintiff had not established that his employer was aware of his alleged disability.

Plaintiff raises two points on appeal:

> [POINT I]
>
> THE COURT'S SUPPLEMENTAL JURY INSTRUCTIONS AND DIRECTIONS HAD AN INHERENTLY COERCIVE EFFECT ON THE JURY AND CREATED THE RISK, OR CAPACITY, OF BEING OPPRESSIVE, AND RESULTING IN A VERDICT BASED ON EXTRANEOUS FACTORS.
>
> > [A.] Requiring the Jury to Come to Court on Friday to Deliberate Substantially Increased the Inherent Coercive Effect of the Court['s] Instructions.
>
> [POINT II]
>
> FAILURE OF COUNSEL TO OBJECT TO A SUPPLEMENTAL INSTRUCTION SUCH AS THE ONE GIVEN IN THE INSTANT CASE IS OF NO CONSEQUENCE, SINCE THE INSTRUCTION CONSTITUTED "PLAIN ERROR."

I.

The trial court's ruling on a motion for a new trial "shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1. "That inquiry requires employing a standard of review substantially similar to that used at the trial level, except that the appellate court must

afford 'due deference' to the trial court's 'feel of the case,' with regard to the assessment of intangibles, such as witness credibility." Jastram v. Kruse, 197 N.J. 216, 230 (2008) (quoting Feldman v. Lederle Labs., 97 N.J. 429, 463 (1984)).

Since plaintiff did not object to the supplemental jury instruction, we review this claim of error employing the plain error standard of review:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interest of justice, notice plain error not brought to the attention of the trial or appellate court.
>
> [R. 2:10-2.]

"Relief under the plain error rule, [Rule] 2:10-2, at least in civil cases, is discretionary and 'should be sparingly employed.'" Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999) (quoting Ford v. Reichert, 23 N.J. 429, 435 (1957)). The error must be "sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." Mason v. Sportsman's Pub, 305 N.J. Super. 482, 495 (App. Div. 1997) (citation omitted).

Courts have held that the failure to provide "clear and correct jury charges" can constitute plain error. Das v. Thani,

171 N.J. 518, 527 (2002). As we allowed in plaintiff's prior appeal, "[j]ury charges 'must outline the function of the jury, set forth the issues, correctly state the applicable law in understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them [.]" Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (quoting Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591-92 (1966)).

The contention that the combination of the instructions and the jury's service on a Friday had a coercive effect is belied by the record. First, although the judge may have overlooked the language regarding the fact jurors should not surrender their personal convictions in order to reach a verdict, the jury had the full written instruction during deliberations, and had been previously told not to do so. Additionally, we cannot but agree with the judge that this was a very active jury who through their questioning demonstrated a comfort level in the process. The cases plaintiff cited involve judges who mention the cost of a jury during the course of instructing a jury to continue to deliberate to reach agreement (In re Stern, 11 N.J. 584, 586-87 (1953)), or being told by a judge that since he had "nothing going" over the weekend, that he would keep the jury deliberating as long as it took them to reach a verdict, (State v. Figueroa, 190 N.J. 219, 227 (2007)), or being told that, in addition to a trial being

an expensive proposition, that they would be kept "a while" because a judge "want[ed] a verdict." (Rosetti v. Pub. Serv. Coordinated Transp., 53 N.J. Super. 293, 296 (1958)).

The judge's instruction in this case, which we earlier quoted at some length, was designed only to assure the jury that their services were appreciated, to apologize for the closings and other unexpected difficulties that delayed the process of the trial, but in no fashion was it coercive. The judge reinstructed the jury, and they returned to the jury room to continue deliberations. Neither counsel objected to the instruction. It was plaintiff's attorney who requested that the instructions be given to the jury in writing. This is not an instance in which relief under the plain error rule is warranted, as no error occurred. See Baker, supra, 161 N.J. at 226.

We add that the timeline in this case counters the suggestion that the jury would have felt coerced. The judge instructed the jury on March 26, early in the afternoon, after they had eaten lunch. They continued to deliberate for two hours, were excused for the day, and returned the following morning. Thus, we are satisfied that no miscarriage of justice under the law has occurred.

Affirmed.