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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3929-15T1

KATHLEEN COSTELOW,

Plaintiff-Appellant,

v.

IMTIAZ AHMAD, M.D., and
CARDIOTHORACIC & VASCULAR
ASSOCIATES, d/b/a COMPREHENSIVE
VEIN TREATMENT CENTER,

Defendants-Respondents.

Argued January 18, 2018 — Decided February 6, 2018

Before Judges Nugent, Currier and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Docket No.
L-1649-12.

Christina Vassiliou Harvey argued the cause
for appellant (Lomurro, Munson, Comer, Brown
& Schottland, LLC, attorneys; Jonathan H.
Lumurro, of counsel; Christina Vassiliou
Harvey, on the briefs).

Joseph R. Lang argued the cause for
respondents (Lenox, Socey, Formidoni,
Giordano, Cooley, Lang & Casey, LLC,
attorneys; Joseph R. Lang and Michael A.
Pattanite, Jr., on the brief).

PER CURIAM

Kathleen Costelow, plaintiff in this medical malpractice action, appeals from an order of disposition entered on a jury verdict of no cause for action. Plaintiff tried the case on the theory she underwent radiofrequency ablation surgery to treat her varicose veins without first giving informed consent. She alleged defendant Imtiaz Ahmad, M.D., failed to advise her of the procedure's risks. Specifically, she alleged he failed to inform her of the risk of nerve damage that could affect her motor skills, failed to inform her there was an alternative treatment that had no risk of permanent nerve damage, and downplayed the risk of nerve damage. She also alleged she suffered severe injuries as a result of the procedure.

The jury rejected plaintiff's claim, answering "no" to this, the first question on the jury verdict sheet:

Has the plaintiff established by a preponderance of the evidence that the defendant failed to comply with the applicable standard for disclosure, that is, failed to give the plaintiff all the information that a reasonable person in the patient's position would expect a doctor to disclose in order that the patient might make an informed decision?

On appeal, plaintiff argues she is entitled to a new trial because the trial court committed two errors that separately or cumulatively require reversal: the court did not excuse biased

jurors for cause, and it did not mold the jury charge and verdict sheet to the facts the parties developed during the trial. Having considered plaintiff's arguments, the record, and applicable legal principles, we have determined her arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following comments.

Plaintiff's point of departure concerning each juror she claimed demonstrated a pro-defendant bias was the juror's affirmative response to a standard voir dire question: "Do you have any feelings about whether or not society is too litigious?" It is hardly surprising that many jurors held such an opinion. Contrary to plaintiff's argument, however, the record demonstrates the trial court followed up appropriately with all such jurors and determined, despite the jurors' beliefs that society was too litigious, the jurors could fairly decide the case before them.

We have analyzed plaintiff's argument under the "traditional and sound rule that trial court decisions whether to excuse prospective jurors for cause are given substantial deference." Catando v. Sheraton Poste Inn, 249 N.J. Super. 253, 258 (App. Div. 1991). That is so because decisions whether to excuse prospective jurors for cause are "discretionary decisions which engage the trial judge's superior ability to evaluate the whole person in the courtroom." Ibid. (quoting State v. Marshall, 123 N.J. 1, 85-87

(1991)). On the record before us, we have found no abuse of discretion in the trial court's decisions.

Moreover, plaintiff exercised only four of six peremptory challenges. We addressed this issue in Catando:

We thus adopt the following rule in civil cases, if a challenge for cause is erroneously denied but the party does not use an available peremptory challenge to excuse the juror, the error is harmless; if all peremptory challenges have already been exhausted, and the challenged juror therefore sits, the error requires reversal; if the party unsuccessfully challenging the juror for cause thereafter uses a peremptory challenge to excuse him, exhausts all peremptory challenges, and makes a clear showing on the record of a desire to excuse another, subsequently summoned juror, and that that juror was objectionable, that is, one to whom the party objects for particular, more than trivial, articulated reasons, the erroneous denial of the excuse for cause becomes reversible error.

[249 N.J. Super. at 264-265 (emphasis added).]

Thus, even if the trial court had erroneously exercised its discretion by denying plaintiff's challenges for cause, the error was harmless, because plaintiff failed to exercise all of her peremptory challenges. Moreover, the record does not demonstrate the voir dire process was plagued by an unchecked litany of complaints expressed by jurors in open court. Such a litany of complaints, expressed in open court and thus potentially tainting an entire jury panel, resulted in the Court in Pellicer v. St.

Barnabas Hosp., 200 N.J. 22, 47 (2009) finding irrelevant that attorneys did not exhaust their peremptory challenges.

Plaintiff's argument concerning the jury verdict form and the court's jury instructions is equally unavailing. Plaintiff's primary contention is that the second question on the jury verdict sheet was unnecessary and confusing. The second question on the jury verdict sheet read: "Has the [p]laintiff established by a preponderance of the evidence that the undisclosed risk occurred and harmed the [p]laintiff?" As previously mentioned, however, the jury never reached the second question. Rather, the jury determined plaintiff had failed to prove by a preponderance of the evidence that defendant failed to comply with the applicable standards of disclosure, that is, "failed to give [plaintiff] all the information that a reasonable person in the patient's position would expect the doctor to disclose in order that the patient might make an informed decision."


Plaintiff did not object to the first question. In fact, she had asked the court to add language to the court's draft question, and the court included plaintiff's proposed language in the version the jury considered.

Considering the entirety of the trial, including the testimony of plaintiff's witnesses, and considering the jury charge as a whole, we find no error in either the verdict sheet

or the court's charge. The first question on the jury verdict sheet, which was the only question the jury answered, clearly encompassed plaintiff's three allegations that defendant failed to advise her the procedure could affect her mobility, failed to advise her of alternative treatment, and downplayed the risk of nerve damage. As previously noted, plaintiff's arguments to the contrary are without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


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