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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5202-15T4

GUY BLESSING and MARLENE
HERBERT,

Plaintiffs-Appellants,

v.

NICHOLAS CHIU, M.D. and TOMS
RIVER ANESTHESIA ASSOCIATES,

Defendants-Respondents,

and

KAMLESH M. SHAH, M.D.,
GASTROENTEROLOGY CONSULTANTS,
and COMMUNITY MEDICAL CENTER,

Defendants.

Argued March 20, 2018 – Decided April 9, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. L-1980-
12.

David M. Fried argued the cause for appellants
(Blume, Forte, Fried, Zerres & Molinari, PC,
attorneys; David M. Fried, on the briefs.)

Timothy M. Crammer argued the cause for respondents (Crammer, Bishop & O'Brien, PC, attorneys; Timothy M. Crammer, on the brief).

PER CURIAM

Guy Blessing (plaintiff)¹ appeals from a June 7, 2016 order entering a judgment of no cause of action in the aftermath of a jury trial in his negligence lawsuit against Nicholas Chiu, M.D. (Chiu) and Toms River Anesthesia Associates; and a July 13, 2016 order denying plaintiff's motion for a re-trial. We reverse and remand for a new trial.

In December 2010, plaintiff underwent an endoscopic procedure at Community Medical Center.² Kamlesh M. Shah, M.D. (Shah)³ performed the endoscopy and Chiu was the anesthesiologist. During the procedure, plaintiff went into respiratory arrest. Plaintiff alleges the issues that occurred during the procedure caused cognitive defects, and he remains significantly compromised, requiring long-term care.

Shah began the procedure after Chiu administered anesthesia. Sometime thereafter, plaintiff's oxygen saturation rate began to

¹ Marlene Herbert brought a per quod claim; however, we only refer to Guy Blessing as plaintiff.

² Plaintiff settled with Community Medical Center prior to trial.

³ Claims against Shah and Gastroenterology Consultants were dismissed during trial.

decline and Chiu performed "chin-lifts" and "jaw thrusts" to alleviate any obstructions in plaintiff's airway. Plaintiff's oxygen stabilized, but dropped again, forcing the procedure to be aborted. Plaintiff's respiratory distress required the rapid response team to treat him. His heart rate was not effectively restored for eleven minutes.

On appeal, plaintiff argues the judge erred by barring his testimony at trial; rejecting a proposed jury charge, which would have accurately explained why plaintiff did not testify; and refusing to adequately address Chiu's change in testimony from deposition to trial. We conclude that cumulative errors at trial warrant a reversal.

At trial, plaintiff's counsel requested that plaintiff testify concerning his inability to perceive and recall ordinary events. Defense counsel moved to bar plaintiff's testimony, arguing he lacked competence to testify, and his testimony would not aid the jury in its determination. The judge conducted a N.J.R.E. 104 hearing, and found that plaintiff understood the meaning of taking an oath to testify, the importance of telling the truth, and the repercussions for false testimony. At the hearing, plaintiff's counsel questioned plaintiff regarding his age and the current year. The questions established that plaintiff

did not know his age or the year, arguably due to his substantial neurological deficit caused by the alleged negligence.

Plaintiff's counsel argued the testimony would allow the jury to hear and see plaintiff's medical condition. Defense counsel argued that such testimony would be prejudicial. The judge barred plaintiff's testimony finding that its prejudicial impact outweighed its probative value pursuant to N.J.R.E. 403.

At trial, defense counsel cross-examined plaintiff's neurology expert, plaintiff's life care planner expert, and plaintiff's mother regarding whether his limitations occurred from the incident or only became prevalent after he became blind.⁴ Plaintiff's neurology expert also testified about the tests he performed on plaintiff to evaluate his limitations. Defense counsel cross-examined the expert regarding a portion of the test questions in which the answers showed that plaintiff exhibited some comprehension.

Plaintiff argues that the judge abused his discretion by barring plaintiff's testimony at trial. "A trial court's evidentiary rulings are 'entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" Belmont Condo. Ass'n, Inc. v. Geibel, 432 N.J. Super.

⁴ Neither party asserts that plaintiff's blindness resulted from the surgery.

52, 95 (App. Div. 2013) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

N.J.R.E. 601 addresses the competency of witnesses and states:

Every person is competent to be a witness unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) except as otherwise provided by these rules or by law.

The rule reflects "the basic policy of our law that every person is qualified and compellable to be a witness and to give relevant and competent evidence at a trial." State v. Briley, 53 N.J. 498, 506 (1969). Our Supreme Court has expressed that as "a general rule that all persons should be qualified to testify, and that disqualification should be the exception." Germann v. Matriss, 55 N.J. 193, 217 (1970).

In weighing whether to admit or deny evidence at trial, a judge must perform a N.J.R.E. 403 analysis. N.J.R.E. 403 states, "[e]xcept as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence."

Applying this test, "[e]vidence should be barred if its probative value 'is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issue[s].'" Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 491 (1999) (second and third alteration in original) (quoting State v. Thompson, 59 N.J. 396, 421 (1971)). The burden is on the party seeking to exclude the evidence. Rosenblit v. Zimmerman, 166 N.J. 391, 410 (2001).

Relevant and probative evidence is often prejudicial to one party, and we "would ill-serve the cause of truth and justice if we were to exclude relevant and credible evidence only because it might help one side and adversely affect the other." Stigliano by Stigliano v. Connaught Labs., Inc., 140 N.J. 305, 317 (1995). Thus, we must not only determine whether the testimony is prejudicial, "but whether it [is] unfairly so." Ibid. The possibility that evidence may be "prejudicial does not justify its exclusion." State v. Morton, 155 N.J. 383, 453-54 (1998).

Plaintiff's counsel sought to have plaintiff testify to show the extent of his injuries related to the alleged negligence, which would have contradicted testimony from defense witnesses to the contrary. Although the testimony may have been prejudicial to Chiu, it would have had probative value in the jury's

determination, especially in light of the numerous witnesses who testified about plaintiff's condition. In other words, it would not have been substantially more prejudicial than probative.

We conclude that the judge abused his discretion in barring plaintiff's testimony. The judge determined that N.J.R.E. 601 was satisfied by finding plaintiff competent because he knew the value of the oath to testify, that he must testify truthfully, and he understood the harm in false testimony. The judge abused his discretion by barring testimony from plaintiff at trial. Any related prejudice does not substantially outweigh the probative value, which would have been refuted by defense counsel's cross-examination of plaintiff's witnesses.

Plaintiff next contends that the judge erred in failing to read the proposed charge explaining why plaintiff was barred from testifying at trial, and such failure prejudiced plaintiff. Plaintiff's counsel submitted a proposed jury charge advising the jury that plaintiff intended to testify, he was competent to testify, and he understood the obligation to tell the truth. The proposed charge stated:

As you know, the plaintiff did not testify at this trial. Plaintiff was available to testify, and intended to testify, but this [c]ourt conducted a hearing, outside of your presence, to determine if plaintiff was, in fact, competent to testify. Plaintiff was able to take an oath, swear to tell the

truth, and satisfied the [c]ourt that he understood the meaning of the oath and what it meant to tell the truth. However, the [c]ourt determined that plaintiff nevertheless did not have the mental capacity to otherwise understand or answer questions in a manner that could reasonably be determined to be reliable. Accordingly, the [c]ourt ruled that plaintiff lacked the capacity to testify.

Defense counsel objected to the proposed charge, arguing the charge would inject the judge's opinion about plaintiff's competency to testify in a case where plaintiff's impairments were at issue. Instead, the court read the following charge:

As you know, the plaintiff did not testify at trial. This was due to a ruling made by this [c]ourt. You shall not consider for any purpose or in any manner in arriving at your verdict the fact that the plaintiff did not testify. The fact should not enter into your deliberations or discussions in any manner at any time.

Appropriate jury instructions are essential to a fair civil trial. Komlodi v. Picciano, 217 N.J. 387, 409 (2014). A trial court's "[f]ailure to honor proper [jury charge] requests will ordinarily be deemed prejudicial error when the subject matter is fundamental and essential or is substantially material to the trial." State v. Green, 86 N.J. 281, 291 (1981).

Plaintiff's proposed charge informed the jury that the judge found plaintiff competent to testify, yet determined he lacked capacity to reasonably answer questions during his testimony. The

proposed charge intended to inform the jury of the judge's specific ruling so no questions existed as to why plaintiff did not testify.

The judge's charge did not explain why plaintiff did not testify, except to the extent that it was generally due to the judge's ruling. Although the judge directed the jury not to consider the absence of plaintiff's testimony in its determination, the charge created a prejudicial effect of having the jury contemplate why plaintiff failed to testify at his own trial. We conclude that the judge committed error in denying plaintiff's proposed jury charge.

Plaintiff next argues that Chiu's change in testimony from his deposition to trial amounted to a violation of McKenney v. Jersey City Medical Center, 167 N.J. 359, 371 (2001). Plaintiff contends that Chiu had an obligation to alert all parties of his change in testimony prior to trial.

In McKenney, our Supreme Court determined that when a party materially alters his or her testimony from deposition to trial, all other parties should be notified. Ibid. The Court stated:

[D]efense counsel had a continuing obligation to disclose to the trial [c]ourt and counsel for plaintiffs any anticipated material changes in a defendant's or a material witness's deposition testimony. Lawyers have an obligation of candor to each other and to the judicial system, which includes a duty of disclosure to the court and opposing counsel.

[Ibid.]

Chiu changed his testimony concerning the length of the procedure. He testified at his deposition that the procedure lasted "five to seven minutes" before it was aborted, while at trial Chiu testified that the procedure lasted one to two minutes. Chiu also testified at his deposition that the anesthesia chart reflected accurate information, yet at trial testified that the anesthesia chart was not intended to be a reliable timeline, but was only intended to reflect a "sequence of events."

The inconsistent testimony changed the scope and ability of plaintiff's expert to testify as to Chiu's possible negligence. Thus, it left plaintiff's expert having to provide an expert opinion on newly learned information at trial, rather than the information that Chiu provided at his deposition. Chiu violated McKenney by failing to alert the other parties of his changed testimony prior to trial and he harmed plaintiff in doing so.

Plaintiff also argues that the judge erred in charging the jury regarding Chiu's testimony. The judge declined to provide the jury with plaintiff's requested charge regarding the creation of false medical records, which stated in part: "If you find that Dr. Chiu knowingly and purposely created false medical records with the intent to deceive or mislead anyone, you may infer that the creation of such records . . . occurred because Dr. Chiu

believed that the accurate record would have been unfavorable in the trial of this matter." Instead, the judge provided the "False in One-False in All" charge, which stated: "If you believe that a witness or a party willfully or knowingly testified falsely to any facts significant to your decision . . . with the intent to deceive you, you may give it such weight as his or her testimony you think is entitled to." Although Chiu altered his testimony, the judge properly declined to provide the requested charge because no evidence existed that Chiu completed the anesthesia chart with the intent to create a false record.

Lastly, plaintiff asserts that the judge erred in denying his motion for a new trial. Having determined the existence of cumulative errors at trial, we need not discuss the denial of plaintiff's motion for a new trial. Although, such a motion should have been granted due to the multiple errors, which we have discussed in this opinion.

Reversed and remanded for a new trial on all issues. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION