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THE APPROVAL OF THE COMMITTEE ON OPINIONS

AMBOY BANK F/K/A AMBOY NATIONAL BANK, Plaintiff, vs. LAWRENCE E. BATHGATE II and OAKSHIRE GROUP, LLC, Defendants; and LAWRENCE E. BATHGATE, II, Third Party Plaintiff, vs. GEORGE SCHARPF, Third Party Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MONMOUTH COUNTY DOCKET NO. MON-L-2810-15 Civil Action **OPINION** **(CBLP)**

Argued: October 29, 2021

Decided: October 29, 2021

Michael Kahme, Esq., and Eric I. Abraham**,** Esq., of Hill Wallack LLP attorneys for plaintiff, Amboy Bank f/k/a Amboy National Bank.

Dominic Aprile, Esq., of Bathgate, Wegener & Wolf, P.C. and Helen Davis Chaitman, Esq., of Chaitman LLP, attorneys for defendant Lawrence E. Bathgate, II.

HONORABLE MARA ZAZZALI-HOGAN, J.S.C.

The issue before the court concerns whether a witness who is being cross-examined during trial may consult with counsel during a break in that witness' testimony. Although In re PSE&G Shareholder Litigation, 320 N.J. Super. 112 (1998) and Rule 4:14-

3(f) address the issue in the context of discovery depositions, there is no clear guidance when trial testimony is underway. Accordingly, this opinion presents a novel legal issue.

I.

Rule 4:14-3(f) provides that "once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right of confidentiality or a limitation pursuant to a previously-entered court order." R. 4:14-3(f). As noted in the commentary, the Rule does not address its application during deposition breaks. Pressler & Verniero, Current N.J. Court Rules, comment R. 4:14-3(f)(Gann 2021). Meanwhile, in In re PS&EG Shareholder Litig., the court examined the issue and concluded as follows:

> Once the deposition commences there should be no discussions between counsel and the witness, even during recesses, including lunch recess, until the deposition concludes that day. However, at the conclusion of the daily deposition, counsel and the witness should be permitted to confer and to prepare for the next day's deposition.

320 N.J. Super. at 118.

Although that case related to deposition testimony, the court considered the dilemma in the context of "whether the court should impose the same type of restrictions on conversations with witnesses that are normally imposed during the actual trial of a case." Id. at 116. In analyzing the issue, the court rejected the blanket rule that a witness should not have the right to confer with his or her counsel during a deposition. Id. at 117 (citing Hall v. Clifton Precision, 150 F.R.D. 525, 529 (E.D. Pa. 1993) (barring private conferences during a deposition as well as communications during the "fortuitous occurrence of a coffee break, lunch break or evening recess")). Likewise, the court did

not address the corollary articulated in Chassen v. Fidelity Nat'l Title Ins. Co., Civ. No. 09-291, 2010 U.S. Dist. LEXIS 141852, at *6 (D.N.J. July 21, 2010).[1] There, the court concluded that where there was no proof that the conversation during a recess between the witness and his attorney concerned privilege, that the adversary's attorney was entitled to question the deponent regarding the substance of the conversation with counsel during the break.

II.

Here, defendant contends that the court should allow counsel to confer with defendant's expert because the court previously addressed this issue and allowed counsel to confer with a witness, making it the law of the case. That argument is misplaced for several reasons. First, the facts are distinguishable because the witness at issue earlier in the trial was called by plaintiff in its case in chief even though the witness was an attorney at the law firm of the individual defendant and was involved with some of the events that were relevant. His direct testimony had concluded. Defendant intended to call that witness in *his* case in chief but the attorneys agreed that it was more efficient for him merely to cross-examine that witness. Consequently, the court allowed defense counsel to speak with that individual between his direct and cross-examination. In contrast, here, the witness at issue is defendant's expert, and plaintiff is in the middle of cross-examination, which will not reconvene for almost two weeks.

The second reason why the argument fails is because the "law of the case" does

[1] Although citations to unpublished opinions are generally prohibited, see R. 1:36-3, courts have permitted such references in very limited circumstances. See, e.g., State v. T.C., 347 N.J. Super. 219, 239 (App. Div. 2002), certif. den. 177 N.J. 222 (2003) (considering an unpublished opinion but declining to discuss it at length). Here, the court has briefly cited to Chassen to provide context regarding an issue for which there are very few published cases and therefore, the court is not relying on it.

not apply here. Specifically, this discretionary doctrine instructs courts to respect the ruling of a different judge or panel of the same court during the pendency of a given case, unless presented by substantially different evidence, new controlling authority or a showing that the prior ruling was clearly erroneous. See generally, Lombardi v. Masso, 207 N.J. 517, 538-39 (2011). "It is entirely inapposite where, as here, in trial court proceedings, the same judge is reconsidering [her] own interlocutory ruling." Id. at 539. Therefore, defendant's arguments fail.

III.

To the extent other cases have allowed communications such as the one at issue, this case is distinguishable because it involves a witness, who is not being represented by counsel, and because the testimony is occurring at trial rather than a deposition. Unlike a deposition, a witness being called to testify at trial becomes in a sense "a ward of the Court. He [i]s not entitled to be cured or assisted or helped approaching his cross-examination." Perry v. Leeke, 488 U.S. 272, 274 (1989). In Perry, the trial court prohibited a criminal defendant from consulting with his attorney during a 15-minute recess while he was testifying. The Supreme Court upheld the conviction, stating that a criminal defendant had "no constitutional right to consult with his lawyer while he is testifying." Id. at 281. The Supreme Court explained that "[t]he reasons for the rule is one that applies to all witnesses – not just defendants. It is common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed." Id. The rationale behind such a prohibition is to prevent a witness from being coached and modifying his or her testimony or curing any deficiency in that testimony.

Here, the expert witness does not have an attorney-client relationship with defendant's attorney and therefore cannot invoke that privilege. In fact, during the course of his testimony, he has repeatedly emphasized that defense counsel is not his attorney. Concededly, R. 4:17-4 treats experts and their reports differently than a lay witness, having been amended in response to Adler v. Shelton, 343 N.J. Super. 511, 530 (Law Div. 2001), such that draft reports are shielded from discovery because they are considered to be trial preparation materials. Although drafts of expert reports may be subject to the work product doctrine, trial testimony is far different.

Ultimately, "[e]ach case must be dealt with on the basis of the individual facts presented to the court." In re PSE&G Shareholder Litig., 320 N.J. Super. at 117. In this case, the court recognizes that because of various scheduling issues, this expert will not be returning to continue with cross-examination for approximately thirteen (13) days, which is lengthier than the typical trial break. Given that he is in the middle of that cross-examination, however, the concern is that the expert would have the opportunity to change testimony, mitigate any damaging testimony or even cure any significant deficiencies that might otherwise be fatal to his opinions. There can be no claims of prejudice or unfairness because presumably, the attorney and expert engaged in some type of trial preparation or at the very least had the opportunity to do so. Regardless, even if they did not confer in advance of the trial, counsel for defendant can correct any testimony on re-direct examination notwithstanding the hiatus.

In light of the foregoing, while counsel and/or the individual defendant may engage in communications regarding logistics and/or scheduling with defendant's expert, they should not discuss any testimonial issues with the expert. To protect the

integrity of these proceedings, counsel for plaintiff may be permitted to confirm that this directive was complied with when the expert returns to testify.

/s/ MARA ZAZZALI-HOGAN, J.S.C.