SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0256-15T3

DENNIS LIPINSKI, ADMINISTRATOR
OF THE ESTATE OF ERICA
LEIBOWITZ-LIPINSKI, deceased,

Plaintiff-Appellant,

v.

EDWARD T. KRUPP, M.D.,
MAMATHA G. MOHAN, M.D., and
CRESCENT INTERNAL MEDICINE
GROUP, LLC,

Defendants-Respondents,

and

MARGARET T. SNYDER, Ph.D.,

Defendant.

Argued November 10, 2016 – Decided February 15, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5645-12.

Ernest P. Fronzuto argued the cause for appellant (Fronzuto Law Group, attorneys; Mr. Fronzuto and Casey Anne Cordes, on the brief).

Scott T. Heller argued the cause for respondents Edward T. Krupp, M.D., and Crescent Internal Medicine Group, LLC (Rosenberg, Jacobs & Heller, P.C., attorneys; Sam Rosenberg and Julianne Cefalu, on the brief).

E. Burke Giblin argued the cause for respondent Mamatha G. Mohan, M.D. (Giblin, Combs & Schwartz, LLC, attorneys; Heather M. LaBombardi, on the brief).

PER CURIAM

Plaintiff Dennis Lipinski, administrator of the estate of Erica Leibowitz-Lipinski, appeals from the September 4, 2015 Law Division order denying his motion for a new trial following an adverse jury verdict on his complaint alleging medical malpractice. Plaintiff argues that "the combined timing, language and circumstances" surrounding the issuance of the trial court's supplemental deliberations charge coerced the jury into reaching an expeditious verdict that manifested a "surrender by one or more of the jurors['] convictions" and caused a "miscarriage of justice[.]" As a result, plaintiff argues that "the verdict is not sustainable" and the court thereby erred in denying his motion for a new trial. We disagree and affirm.

I.

Because the appeal only raises issues related to the court's instructions after the jury reported reaching an impasse in its deliberations, plaintiff's appeal was presented through

abbreviated transcripts. See R. 2:5-3(c). Therefore, we have no record of the factual evidence developed at trial and summarize here only what the court recounted in ruling on the new trial motion and plaintiff alleged in his brief and complaint.

Between 2004 and 2010, Erica, the estranged wife of plaintiff, consulted with defendant Margaret T. Snyder, Ph.D. (Snyder), a licensed psychologist. Erica had numerous issues in her personal life, including a recent separation from a boyfriend. Around May 2010, Erica visited defendant Crescent Internal Medicine Group (Crescent) and was treated by defendant Edward T. Krupp, M.D. (Krupp). During this visit, Erica sought medical assistance to quit smoking cigarettes. Krupp wrote Erica a prescription for the drug varenicline, commonly known as Chantix. During a follow-up visit on July 9, 2010, Erica was seen by defendant Mamatha G. Mohan, M.D., (Mohan) who renewed Erica's prescription for Chantix. Tragically, on August 10, 2010, Erica committed suicide at the age of twenty-eight. Erica left behind a suicide note indicating that she was distressed following a break-up with a boyfriend.

The Federal Drug Administration (FDA) issued warning material describing many potential "bad side effects" related to the use of Chantix and indicated that a patient should be monitored. The prescribing physicians knew about the potential side effects and told Erica "to report to them if things started to go badly."

Subsequent to the issuance of the FDA warnings, a scientific study out of Sweden reported that there was no apparent correlation between the use of Chantix and persons committing suicide.

Erica was survived by plaintiff who was designated as the administrator of her estate. On July 31, 2012, plaintiff filed a five-count complaint in the Superior Court against Snyder, Krupp, Mohan and Crescent as well as John Does 1-10[1] and ABC Corporations 1-10.[2] The complaint alleged that defendants "knew or should have known that [Chantix] posed a serious risk of suicide and/or violent tendencies"; defendants "knew or should have known that [Erica] had a history of psychiatric instability"; and defendants "deviated from the accepted standards of medical care and were negligent" as they failed to adequately monitor Erica's use of the drug and failed to warn her about its risks. The complaint alleged that defendants' negligence was the direct and proximate cause of Erica's death and the survivor's suit sought damages and attorneys' fees.

On May 7, 2014, plaintiff and defendants Krupp, Mohan and Crescent stipulated to the dismissal of the case against defendant

[1] John Does 1-10 is a fictitious name representing unknown physicians or other health care providers responsible for treating Erica.

[2] ABC Corporation 1-10 is a fictitious name representing unknown entities rendering services to Erica.

Snyder. A jury trial began on July 14, 2015, and continued until deliberations commenced on July 27, 2015. A total of eleven witnesses testified. Throughout the course of the trial, the jury was repeatedly reassured that the trial was on schedule and that it would conclude no later than July 28, 2015.

Following summations and the jury charge, the jury began deliberating at approximately 2:15 p.m. on July 27, 2015, submitted one question to the court at about 3:45 p.m., and deliberated for a total of two hours before being dismissed for the day. Jury deliberations resumed the following day at about 9:15 a.m. The jury submitted two questions to the court before the lunch break. After the lunch break and after a total of seven hours of deliberations, at approximately 3:00 p.m., the jury indicated in a note to the court "[w]e can't come to a verdict. What happens now?"

The discussion on the record that followed demonstrated that the court was under the mistaken impression that there was no New Jersey civil model jury charge for a deadlocked jury, only a criminal one. The court discussed with the attorneys the New Jersey criminal model jury charge as well as a New York civil model jury charge for deadlocked juries. The following colloquy ensued between the court and counsel:

THE COURT: My law clerk who's very able discovered that we pretty much changed everything. And, all we have left in New Jersey is a . . . three sentence charge. And then after that a four sentence charge. The three sentence charge [is] as follows[:] you have indicated that your deliberations have reached an impasse.

Do you feel that further deliberations will be beneficial? Or, do you feel that you've reached a point at which further deliberations would be futile. Please return to the jury room to confer and advise me of your decision in another note. Then, if they come back, you say when you feel a reasonable period of time has gone by subsequent to the delivery of your charge then you . . . ask them to come back and they do.

It is your duty as jurors to consult with one another and to deliberate with a view to reach an agreement, if you can do so without violence to individual [judgment]. Each of you must decide the case for yourselves. But, do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it's erroneous. But . . . do not surrender your honest conviction as to the weight [or] effect of evidence solely because of the opinion -- of your fellow jurors for the mere purpose of returning a verdict. You . . . are not partisans. You are judges, judges of the facts. So it's a two part process.

. . . .

New York has a long deadlock charge saying . . . remember that no other jury would do better than you etcetera, etcetera.

. . . .

[W]ould you all want me to use the more fulsome New York charge?

. . . .

[DEFENDANTS KRUPP'S AND CRESCENT'S COUNSEL]: [T]his is criminal. But, . . . it could be adapted for sure. . . . I have no problem with that judge.

. . . .

[PLAINTIFF'S COUNSEL]: You're going to do the first one just the short version?

THE COURT: I think I should, yes.

[PLAINTIFF'S COUNSEL]: Okay.

[DEFENDANTS KRUPP'S AND CRESCENT'S COUNSEL]: I think we're all in agreement.

[DEFENDANT MOHAN'S COUNSEL]: Yeah, . . . if they come back and say it's worthy of giving a further charge[.]

[PLAINTIFF'S COUNSEL]: Right.

With the agreement of all counsel, the court instructed the jury as follows:

> You've indicated that your deliberations have reached . . . an impasse. Go back to the jury room and answer the following question. Do you feel that further deliberations will be helpful to you?
>
> Or, do you feel that you've reached a point at which further deliberations would be useless or futile? So, please go to the jury room and confer as to whether further deliberations might be useful . . . or totally

> . . . futile. So, please return to the jury room to confer and advise me of your decision in another note.

After the jury left the courtroom, the court indicated to the attorneys that it "may have read [the jury charge] in the wrong [order]." The attorneys agreed and plaintiff's attorney stated that the court "at least [has] to tell [the jury] that they need to at least try [to reach a verdict]" first. The court agreed and advised that it would read "part of" the New York charge for deadlocked juries. The court immediately summoned the jury back into the courtroom and delivered the following charge:

> I want to tell you just a couple of things. . . . I know you're having a hard time. But, I do want to tell you that we had a [lengthy] process in selecting a jury. You all were chosen.
>
> That means that both sides thought you . . . were very good jurors . . . and had a lot of confidence in you. Both sides thought you could be fair and impartial. And -- both sides have confidence in you . . . as I do. There is no reason to believe that any retrial of this case would involve a jury that's more intelligent, reasonable, hard working, or fairer than you are.
>
> I don't think so. I think we'd be lucky to get one as good. So, all I ask you is . . . if each of you would . . . try to view this with a fresh slate. . . . [D]on't give up your own views and don't . . . just concede for the purpose of conceding. But, do . . . look at it with an open mind.

> That's why we chose you -- a lot of people we didn't choose. I saw a lot of you take notes. You all looked attentive. And, all I ask you if . . . it's possible, look at it as hard as you can. And, finally, I appreciate that the process can be difficult.
>
> In some respects it wasn't intended to be easy. It's . . . important that we have jurors and . . . that we try to reach the best -- possible. So, just take this in mind when . . . you deliberate. Thank you very much.

The jury returned to the jury room and counsel interposed no objection to the charge given. Approximately sixteen minutes later, at 3:57 p.m., the jury re-entered the courtroom after indicating that they had reached a verdict. By a vote of seven to one, the jury determined that plaintiff did not prove by a preponderance of the evidence that Krupp or Mohan deviated from accepted standards of medical practice in their care and treatment of Erica. At the request of plaintiff's attorney, the court polled the jury and confirmed the jury vote.

Thereafter, plaintiff filed a motion for a new trial, arguing that the court gave the jury the wrong charge. Specifically, plaintiff argued that the court should have given Model Jury Charge (Civil), 1.20, "Supplemental Instructions as to Further Deliberations by Jury" (1996) and pointed out that the charge given to the jury omitted the critical portion of that supplemental charge which states "[a]lthough you have a duty to reach a verdict,

if that is possible, I have neither the power nor the desire to compel you to reach a verdict." Plaintiff argued that the timing, language and circumstances surrounding the issuance of the charge coerced the jury into reaching an expeditious verdict without renewed deliberations.

After hearing oral argument, on September 4, 2015, the court denied the motion. In denying the motion, the court noted that the jury was careful, attentive and smart. The court observed that the jurors "[cared] a lot"; "went out of their way to disrupt their lives to get here"; and "worked very hard, even during deliberations." In describing the charge, the court stated it was "fair and close to the model charge" but not "perfect[.]" The court also noted that "no exceptions were taken." Regarding the verdict, the court observed that it "was not an unreasonable verdict" and no one "could have been terribly surprised at the verdict."

The court reasoned:

> Our system [of justice] is based on the premise that, for someone to upset a jury verdict, it must be clearly and convincingly shown that there was a substantive or procedural error that would compel disregarding a jury verdict.
>
> This is based on our concept that 8 jurors, 12 jurors, whatever the case may be, usually get things right. To upset a jury verdict, one may not speculate. One must

> prove by clear and convincing evidence that there was a miscarriage of justice. Either . . . substantive . . . or procedural . . . but I don't think that hurdle can be overcome here.
>
> [Plaintiff's attorney] says the jury was that divided. That kind of implies -- it's possible . . . that there were four-four or even five-three and a mass of them switched in a short period of time. We'll never know and we should never know because the jury is entitled to its privacy. It's equally likely that it was six-two and one of the two switched to seven-one but we'll never know. But the important thing is that, that's really speculation.
>
> I'm convinced on the record that we do not have any clear and convincing evidence of a miscarriage of justice. Therefore, I will deny the motion.

On the same date, the court issued an order entering judgment in favor of defendants and this appeal followed. On appeal, plaintiff argues that he is entitled to a new trial because the timing, context, and language used in issuing the supplemental instructions to the jury coerced them into believing that they had to render a verdict on July 28, 2015, and that the jury process was tainted because they did so in a matter of minutes. Plaintiff further contends that the trial judge failed to properly advise the jury that he did not have the power to compel a verdict, the jury verdict was coerced because dissenting jurors were improperly influenced to change their votes within minutes, and a miscarriage

of justice occurred. Plaintiff does not contend that the jury verdict was against the weight of the evidence.

II.

To support his argument, with the exception of In re Stern, 11 N.J. 584 (1953), plaintiff cites criminal cases almost exclusively. While coercive jury instructions have been the subject of much discussion in criminal appeals, there is scant published precedent in civil cases addressing instructions to a jury that reports an impasse in deliberations. In Stern, a civil case tried to a jury to determine mental competency and the need for a guardian, when the jury reported disagreement after five continuous hours of deliberation, the trial court instructed the jury as follows:

> Members of the Jury, you realize you have been trying to arrive at a verdict since 11:20 this morning, but we have been here two and a half days and the Court would appreciate it if you could see if you can arrive at a verdict, and therefore asks if you will not go back to the jury room, and the Court is willing to remain here until you arrive at a verdict. You, I am sure, realize that we have been here trying the case hoping to arrive at a verdict. It costs a lot of money to the state to maintain the court, and if you cannot arrive at a verdict it means that it will probably have to be retried which will take several days. See if you cannot arrive at a verdict. You may return to the jury room.
>
> [Id. at 587.]

The jury in Stern promptly returned with a verdict of incompetency by a vote of ten to two. On appeal, the Supreme Court held that giving the quoted charge was plain error because it coerced the jury to reach a verdict. The Court explained:

> [W]here the supplementary instruction has a natural tendency to interfere with the exercise of unfettered and unbiased judgment, by means of an illusory consideration or overemphasis of an extraneous factor, and the response is immediate, the inference of false direction and undue influence is entirely reasonable, if not indeed irresistible. Urging a jury to an agreement contrary to the individual opinion and judgment of one of the jurors on the merits of the issue may be coercion.
>
> [Id. at 588.]

Only one other New Jersey civil case addresses the issue of improper instructions to a disagreeing jury. See Rossetti v. Pub. Serv. Coordinated Transp., 53 N.J. Super. 293 (App. Div. 1958) (holding trial court did not abuse its discretion in granting a new trial because of potentially coercive instruction that included reference to cost of retrial and suggestion that the jury would be required to continue deliberating until it reached a verdict).

In this case, plaintiff did not object to the judge's supplemental charge. Consequently, plaintiff may prevail on this appeal only if it was plain error to give the supplementary charge.

Gaido v. Weiser, 115 N.J. 310, 311 (1989). The plain error rule permits this court to set aside a judgment even when error was not brought to the attention of the trial court, but only where the error is "clearly capable of producing an unjust result." R. 2:10-2; see Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999). Courts have described the plain error standard as erroneous action that deprives the litigants of "substantial justice." In re Stern, supra, 11 N.J. at 590; Ford v. Reichert, 23 N.J. 429, 434 (1957). But courts have also said that, in civil cases, the plain error rule "is discretionary and 'should be sparingly employed.'" Baker, supra, 161 N.J. at 226 (quoting Ford, supra, 23 N.J. at 435).

We conclude that the trial court's supplementary instruction in this case did not deprive plaintiff of substantial justice and was not clearly capable of producing an unjust result, particularly since the verdict was not "unreasonable." The New Jersey model jury charge which provides instructions for a deadlocked jury in civil trials states:

> You have informed me that you have been unable as a jury to reach a verdict in this case. I do not wish to know, and I direct each of you jurors not to tell anyone, how your vote stands.
>
> Although you have a duty to reach a verdict, if that is possible, I have neither the power nor the desire to compel you to reach a verdict.

I do want to emphasize the importance and the desirability of your reaching a verdict in this case provided that each of you can do so without surrendering or sacrificing principle or personal convictions.

You will recall that upon assuming your duties in this case each of you took an oath. That oath places upon each of you the responsibility of arriving at a true verdict based upon your own opinion and not merely by agreeing with the conclusions of the other jurors.

However, opinions can be changed by discussions in the jury room. The purpose of the jury system is to reach a verdict by comparing views and by considering the evidence with the other jurors.

During your deliberations each of you should be open-minded. You should consider the issues with proper attention to and respect for the opinions of each other. You should not hesitate to reexamine your own views in the light of your discussions.

You should consider also that this case must be decided at some time. You are selected in the same manner and from the same source from which any future jury must be selected. There is no reason to suppose that the case will ever be submitted to six persons more intelligent, more impartial or more capable of deciding it, or that additional or clearer evidence will ever be presented by one side or the other.

You may retire and take as much time as is necessary for further deliberations upon the issues submitted to you for determination.

> [Model Jury Charge (Civil), 1.20, "Supplemental Instructions as to Further Deliberations by Jury" (2006).][3]

While the supplementary charge given by the court was clearly not New Jersey Civil Jury Charge 1.20, it conveyed the critical principles contained in the model charge and did not have the coercive effect of the disapproved instructions given in Stern, supra, or Rossetti, supra. It included no comments about the expenses of retrial, and it did not omit a reminder that individual jurors should not surrender their honest convictions just to reach a verdict. Likewise, it did not suggest that the jury's deliberations might continue indefinitely if it could not reach agreement as condemned by our Supreme Court in State v. Figueroa, 190 N.J. 219, 240-42 (2007).

The supplemental charge was balanced. It requested jurors to deliberate "with an open mind" and to "try to view [the evidence] with a fresh slate." It cautioned jurors "don't give up your own views" and "don't just concede for the purpose of conceding." Although the judge did not tell the jurors that he did not have the power or desire to compel agreement, he stated

[3] Model charge 1.20 also suggests an alternative that repeats some of the language of Model Jury Charge (Civil), 1.12Q, "Deliberations" (2012). The latter charge is routinely read to jurors in the court's general instructions before the jury begins deliberations.

"all I ask you . . . if it's possible, look at it as hard as you can." Such a statement can hardly be characterized as coercive, particularly since the court's initial query to the jurors was for them to confer and determine whether further deliberations "might be useful" or totally "futile."

The circumstances here do not present the potential for pressure upon dissenting jurors that was the risk addressed in State v. Czachor, 82 N.J. 392, 399 (1980), and Figueroa, supra, 190 N.J. at 232. The record does not support an inference that the jury was coerced into reaching a verdict and, as the court pointed out, plaintiff's assertions to the contrary are speculative. Despite the timing between the supplemental charge and the verdict, given the length of time the jury had been deliberating, the fact that the jury was not reluctant to ask questions, and the fact that one dissenting voter did not succumb to any purported pressure, the supplemental charge was not coercive, did not include extraneous factors or have "a natural tendency to interfere with the exercise of unfettered and unbiased judgment" of the jurors. Stern, supra, 11 N.J. at 588. We are satisfied that the court did not abuse its discretion in giving a charge in essential conformity with model jury charge 1.20 after the jury had deliberated for seven hours over two days and reported

an impasse. Equally unavailing is plaintiff's contention that the court erred in denying plaintiff's motion for a new trial.

Affirmed.