

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANNE BERRY, Individually, and in her)
Capacities as Surviving Spouse of Howard) No. 614, 2006
Scott Berry, and as Administratrix of the)
Estate of Howard Scott Berry, Deceased;) Court Below: Superior Court
Marian Wilcox and Michael Berry and) of the State of Delaware in
Howard Scott Berry, Jr.,) and for New Castle County
)
Plaintiffs Below,) C.A. No. 04C-10-102
Appellants,)
)
v.)
)
CARDIOLOGY CONSULTANTS, P.A.,)
a Delaware corporation, ANDREW)
DOOREY, M.D.,)
)
Defendants Below,)
Appellees.)

Submitted: September 5, 2007

Decided: October 2, 2007

Before **STEELE**, Chief Justice, **HOLLAND, BERGER, JACOBS** and **RIDGELY**, Justices constituting the court *en banc*.

ORDER

This 2nd day of October 2007, it appears to the Court that:

(1) Plaintiff-appellant Anne Berry appeals a Superior Court judge's denial of her motion for a new trial following a jury verdict for defendants-appellees Cardiology Consultants, P.A., and Andrew Doorey, M.D. Specifically, Berry

argues that the trial judge abused her discretion by admitting into evidence three exhibits¹ from a learned treatise in violation of Delaware Rule of Evidence 803(18)² and then by denying a motion for a new trial. Cardiology characterizes the four pages admitted into evidence as “charts” and as “algorithms.” Cardiology maintains that admitting them did not violate D.R.E. 803(18) because these charts were not “text” from a learned medical treatise. After reviewing the disputed exhibits in the record, we conclude that the “charts” as admitted included explanatory “text” that cannot be distinguished in a principled way from a “text from learned treatises,” which the policy underlying D.R.E. 803(18) bars allowing into the jury room during deliberations. Therefore, we find that the trial judge erroneously admitted the exhibits into the jury room. Because we cannot be confident that the exhibits did not inappropriately affect the outcome, we reverse and remand the case to the Superior Court for a new trial.

(2) On November 21, 2007, Howard Scott Berry, Berry’s husband, underwent successful cardiac bypass surgery at Christiana Hospital. Howard’s cardiologists, who worked for Cardiology, prescribed Amiodarone in response to a

¹ For the purpose of this Order, to admit the exhibits into evidence should be understood to mean to allow them into the jury room during deliberations along with all other physical or demonstrative evidence.

² D.R.E. 803(18).

post-surgery episode of atrial fibrillation. Four months later, Howard died from “Acute Pneumonitis due to Amiodarone Toxicity.”

(3) At trial, Cardiology called Dr. Eric Prystowsky as an expert witness. Prystowsky testified that he co-authored the algorithm contained in the “ACC/AMA/ESC³ Guidelines for the Management of Patients with Atrial Fibrillation published in the Journal of American College of Cardiology 2001.” He further testified about the applicability of that algorithm to Howard’s atrial fibrillation treatment. At the end of Prystowsky’s testimony, Cardiology sought to offer portions of the guidelines as exhibits. Berry objected that the exception to the hearsay evidence rule, D.R.E. 803(18), categorically prohibited admitting text from learned treatises, but the trial judge overruled that objection. After a lengthy discussion with trial counsel, the trial judge ultimately agreed to admit four pages from the “Guidelines” into evidence as Defense Exhibits 20, 21, and 22.

(4) Delaware Rule of Evidence 803(18) states:

[t]o the extent called to the attention of an expert witness upon cross-examination, or relied upon by him in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as reliable authority by the testimony or admission of the witness or by other

³ American College of Cardiology / American Heart Association / European Social of Cardiology

expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(5) According to *Weinstein and Berger*, the purpose of Rule 803(18)⁴ is to help “ensure that the jurors will not be unduly impressed by the treatise, and that they will not use the text as a starting point for conclusions untested by expert testimony. . . .”⁵ The *Handbook of Federal Evidence* notes that the “provision attempts to prevent jurors from overvaluing the written word. . . .”⁶ *Jones on Evidence Civil and Criminal* states:

The last sentence of the rule permits the attorney to read relevant passages from the treatise into evidence to bolster, or as the basis of questions to challenge the witness, but neither the treatise itself, or the relevant passages, may be received as exhibits. This restriction is intended to prevent jurors from attempting to interpret or apply the treatise on their own independent of the testimony of the expert witness(es) who are questioned about it.⁷

(6) We review a trial judge’s ruling on the admission and presentation of evidence for abuse of discretion.⁸ Having examined the disputed exhibits, we find that the pages are not simply charts, but also that they contain paragraphs of

⁴ Delaware’s rule is identical to the Federal Rule of Evidence 803(18).

⁵ 4 *Weinstein and Berger, United States Rules*, ¶ 803(18)[02], at 803-375 (1995).

⁶ Michael H. Graham, *Handbook of Federal Evidence* § 803:18, at 415 (6th ed. 2006).

⁷ 5 *Jones on Evidence Civil and Criminal*, § 35:28, at 317 (7th ed. 2003).

⁸ *Cropper v. State*, 746 A.2d 275 (Del. 2000).

explanatory text, which D.R.E. 803(18) clearly prohibits. Therefore, we find that admitting the guideline pages was an abuse of discretion because it violated D.R.E. 803(18). The consequence of so doing cannot be viewed as merely harmless. The treatises explaining the policy of D.R.E. 803(18) inform us that admitting text as an exhibit and allowing the exhibit to be carried into a jury room, as opposed to reading it aloud in a courtroom to challenge or bolster an expert's testimony, may induce a jury to freelance the jurors' own views of the meaning of the text. Because there is no reliable mechanism to insure that a jury will not or has not so misused the text, D.R.E. 803(18) raises a bright line bar to admitting the written text. The fact that a portion of the exhibit contained "charts" or "algorithms" explained by their author on the stand constitutes no principled or meaningful distinction sufficient to overcome the bright line prohibition contemplated by D.R.E. 803(18). Accordingly, we reverse and remand the case to the Superior Court for a new trial.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED and REMANDED for a new trial. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice