



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH HINEMAN :

Plaintiff Below, : No. 229,2015

Appellant :

v. : C.A. No. Below: N10C-03-014 CLS

PAUL IMBER, D.O., and EAR, NOSE :
THROAT, AND ALLERGY :
ASSOCIATES, LLC, a Delaware Company :

Defendants Below, :
Appellees :

Appeal from the Superior Court of the State of Delaware,
In and For New Castle County, C.A. No. N10C-03-014 CLS

APPELLANT’S REPLY BRIEF

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Dated: October 5, 2015

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SUMMARY OF ARGUMENT

Appellant-Plaintiff Joseph Hineman (hereinafter “Plaintiff or “Appellant”) submits this reply brief in further support of his appeal against Appellee-Defendants Paul Imber, D.O., and Ear, Nose, Throat and Allergy Associates, LLC, a Delaware Company (“Defendant” or “Appellee.”)

First, the trial court in its ruling on Defendant’s Motion in Limine permitted the introduction of evidence of Plaintiff’s Marijuana use prior to his injury for the very limited purpose of eliciting opinion testimony from Defendant’s expert, Dr. Gillespie, on how it may have affected Defendant’s physical examination Of Plaintiff. (A 93) Defendant ignored the restrictions imposed by the trial court and instead in opening statement, cross-examination of Plaintiff, and closing argument, made several pejorative references regarding Plaintiff’s marijuana use without ever once raising the issue at trial with Defendant’s expert.

Second, Defendant’s argument that Plaintiff’s objection to the introduction of Plaintiff’s marijuana use was waived by raising the issue for the first time on appeal is without merit. Plaintiff argued vehemently in his answering brief to Defendant’s Motion in Limine that the prejudicial effect of allowing marijuana testimony outweighed any probative value. (A 80-85) This objection was clearly of record at trial and not raised for the first time on appeal. Requesting the court for a curative instruction at the end of the trial as Defendant proposes would be

analogous to a request to close the door after the proverbial Trojan Horse was admitted.

Third, Defendant's argument that the prior lawsuit was for the same injuries as in the instant case is similarly without merit. This lawsuit against Dr. Imber is for the stroke-related injuries resulting from the delay in medical treatment, due to Defendant's failure to send or refer Plaintiff to a hospital for further evaluation and care. Plaintiff's allegation at trial was that he would have arrived at the hospital in time to receive clot-busting medication and treatment but for Defendant's failure to immediately refer him to the hospital. The prior lawsuit against his father and Michael Epp related to circumstances which caused the puncture wound in the back of Plaintiff's throat. Defendant's argument at trial that Plaintiff was blaming everyone, including his father and Michael Epp for his injuries was misleading and the prejudicial effect of references to the second lawsuit outweighed any probative value.

ARGUMENT

I. PLAINTIFF'S OBJECTION TO MENTION OF MARIJUANA USE AT TRIAL WAS TIMELY AND NOT MADE FOR THE FIRST TIME ON APPEAL AS STATED BY DEFENDANT

As a matter of law, objections made of record in a Motion in Limine regarding evidentiary matters are preserved at trial. Defendant erroneously states that "Plaintiff failed to fairly present this issue to the Superior Court." as required by Rule 8 of the Rules of the Supreme Court. Defendant ignores the strenuous argument made by Plaintiff in his answering brief to Defendant's Motion in Limine introduction of marijuana use evidence at trial. (A 80-85) To renew the objections during trial would have been superfluous.

Defendant further argues that plaintiff should have objected after the conclusion of Dr. Gillespie's testimony (during which no questions regarding marijuana were posed by defense counsel). This would have been analogous to closing the door after the proverbial Trojan Horse was allowed in. Further mention of marijuana to the jury at that point would only have served to highlight that prejudicial testimony which had been strenuously objected to by Plaintiff during the Motion in Limine argument. The bell could not be unrung.

II. DEFENDANT SHOULD NOT BE ALLOWED TO IGNORE THE EXPLICIT RESTRICTIONS IN THE COURT'S ORDER ON THE PERMISSIBLE USE OF MARIJUANA EVIDENCE AT TRIAL

The trial court in its June 20, 2012 ruling on Defendant's Motion in Limine permitted the introduction of evidence of Plaintiff's marijuana use prior to his injury for the very limited purpose of eliciting opinion testimony from Defendant's expert, Dr. Gillespie, regarding how marijuana may have affected Defendant's physical examination of Plaintiff. "Defendants argue that Plaintiff's marijuana use may have affected his perception of injury or pain threshold. The evidence is admissible for that purpose." (Underlining added). (A 93) Despite the clear ruling of the court, Defendant at trial made several pejorative references to marijuana during opening statement, cross-examination of Plaintiff, and closing argument regarding Plaintiff's marijuana use prior to his injury. Never once however did Defendant's counsel raise the issue of marijuana with the defense expert Dr. Gillespie, which was the only permissible use of this evidence allowed by the court in its pretrial ruling.

III. PLAINTIFF'S PRIOR LAWSUIT WAS, NOT FOR THE SAME INJURIES NOR SIMILAR ALLEGATIONS OF FAULT AND REFERENCES TO IT AT TRIAL WERE PREJUDICIAL AND LIKELY TO CONFUSE THE JURY

Defendant's argument that the prior lawsuit was for the same injuries as in the instant case is simply without merit. The allegations of negligence against the Defendant are failure to timely refer Plaintiff to a hospital in a timely manner for further evaluation and care, thereby preventing him from receiving the time sensitive clot-busting medication which could have prevented the subsequent stroke related injuries he ultimately suffered. The prior lawsuit against Defendant's father and coworker were for circumstances relating to the initial injury which was a puncture to the rear of Plaintiff's throat.

The allegations of fault are entirely different in the two lawsuits as are the injuries for which compensation was sought by Plaintiff. Defendant's argument that "Mr. Hineman blamed his injuries on two other people in the prior lawsuit, is misleading at best. It was because of the risk of confusion by the jury and the prejudicial nature of Plaintiff that Plaintiff objected to references to the prior lawsuit. The suits are for two separate injuries and based upon two separate sets of facts regarding liability.

CONCLUSION

For the reasons stated here and in the Opening Brief, Appellant respectfully submits that the court below erred in permitting references to the prior lawsuit, and that Defendant committed reversible error by making several pejorative references to marijuana, which were not contemplated by or allowed by the courts June 20, 2012 Order. Verdict of the jury and judgment should be reversed.

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