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Case Number 225,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JENNIFER F. DIVITA, Individually; and as Administratrix of the Estate of BENNY DIVITA, III, deceased; and as Parent and next Friend of BECKETT DIVITA, a Minor;	:	No. 225,2014
Plaintiffs Below, Appellants,	:	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
v.	:	IN AND FOR SUSSEX COUNTY
BAYHEALTH MEDICAL CENTER, INC. (At Kent General Hospital), A Delaware Corporation;	:	NO. S10C-03-030 ESB
Defendant Below, Appellee.	:	

APPELLEE'S ANSWERING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

Plaintiffs Below, Appellants Jennifer F. Divita, individually and as administratrix of the estate of Benny Divita, III and as parent and next friend of Beckett Divita ("Plaintiffs") filed a wrongful death complaint in the Superior Court of the State of Delaware in and for Sussex County on or about March 24, 2010. (A24-A34). The complaint alleged claims of medical negligence against Bayhealth Medical Center, Inc. ("Bayhealth") and two of Bayhealth's nurse employees, as well as against Michael Sweeney, M.D., and Internal Medicine of Dover, P.A., Dr. Sweeney's medical practice. (*Id.*). By the time of trial on December 2, 2013, the only defendants remaining in the case were Bayhealth, Dr. Sweeney and Internal Medicine of Dover, P.A. (A106). The cause of Mr. Divita's death, per the autopsy report, was aspiration of gastric contents. (B1-B7).

On Wednesday, November 27, 2013, five days before trial, Dr. Sweeney's counsel delivered to Plaintiffs two demonstrative exhibits: a timeline of events; and a 26-second animated video depicting the process of aspiration, which Dr. Sweeney's counsel indicated would be used with expert witness Dr. Schwab.[1] (B8-B11). On December 1, 2013, the day

[1] The animation was originally delivered by e-mail at 5:20 PM, but when Plaintiffs' counsel was unable to access the file, Dr. Sweeney's counsel personally delivered a flash

before trial, Plaintiffs produced two demonstrative exhibits to Defendants. (B12).

Plaintiffs moved to exclude the animation as untimely and prejudicial. The Court denied the motion, and the animation was played for the jury during Dr. Schwab's testimony after a limiting instruction was read. (A440) Trial concluded on December 12, 2013. The jury found Dr. Sweeney not negligent. While the jury found Bayhealth (through its employees) was negligent in treating Mr. Divita,[2] the jury answered 'no' to the question of whether the negligence had caused the death of Mr. Divita.

Plaintiffs filed a Motion for New Trial on December 20, 2013, arguing the Superior Court erred in allowing the jury to view the animation. (A488-A502). The Superior Court denied the Motion for New Trial on April 14, 2014. (A544-A545). Plaintiffs filed a Notice of Appeal to this Court on May 2, 2014.

This is Bayhealth's Answering Brief in opposition to Plaintiffs' appeal from the verdict below.

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drive containing the animation to Plaintiffs' counsel's office less than one hour later. (B8-B11)

[2] The jury did not specify the negligent acts or who had committed them.

SUMMARY OF ARGUMENT

1. Denied. The trial judge did not err by allowing the jury to view the animation or in denying Plaintiff's Motion for New Trial.

STATEMENT OF FACTS

I. The Medical Care

On April 4, 2008, Benny Divita was admitted to Kent General Hospital by his primary care physician, Dr. Sweeney, for complaints of nausea, vomiting, and right upper quadrant pain. In a surgical consultation, Dr. Fedalen prescribed Dilaudid for Mr. Divita's pain. Mr. Divita had a history of obstructive sleep apnea ("OSA") for which he used a C-PAP machine. At some point during the evening of Mr. Divita's hospital admission, his wife brought to the hospital the C-PAP machine Mr. Divita had been using at home to treat his OSA. (B13-B14)

Monica Myles, LPN ("Nurse Myles") cared for Mr. Divita from 11:00 PM until the next morning. She assessed the patient and recorded her findings around midnight. Nurse Myles testified that, at approximately 1:00 AM on the morning of April 5, 2008 she discussed with the patient and Nurse Marjorie Berna the patient's inability to get pain relief with the dose of medication ordered. (A316). A call was placed to Dr. Sweeney, who agreed to increase the dose of Dilaudid from two milligrams every four hours to three milligrams every four hours as needed. (A177-A178; A317-A318). Two milligrams were given at 1:08. (B15) A third was given at

1:15 AM. (B15) Nurse Myles had several more interactions with Mr. Divita between 1:15 AM and 4:00 AM which were documented in the chart.

Nurse Myles testified she did not become aware of Mr. Divita's C-PAP machine until she saw him wearing it while sleeping at approximately 4:00 AM on April 5, 2008. (A268). Bayhealth policy required a nurse to have a patient's home C-PAP unit inspected by maintenance and required the nurse to obtain a physician's order for its use. (A546-A552). Nurse Myles testified that she did not wake Mr. Divita and ask him to stop using the C-PAP machine until she could obtain a physician's order because he had told her "over and over again that he just wanted to get some rest, and if he fell asleep, not to wake him up." (A266). Nurse Myles further testified that there were no contraindications to Mr. Divita using the C-PAP machine, as he had no nausea or vomiting during her shift. (*Id.*; A274-A275; A286; A333). Instead of waking him at 4:00 AM, Nurse Myles checked his oxygenation levels, checked his respirations, and wrote a note to herself to remember to get the physician's order and to have the C-PAP machine checked by maintenance in the morning. (A268-A269). She did not record a respiratory rate at any time after midnight.

Nurse Myles continued to care for Mr. Divita after she saw him wearing the C-PAP mask at 4:00 AM. At approximately 5:40 AM, she

checked Mr. Divita's respirations when she was in the room to administer medication to the patient in the other bed in that room. (A324). She checked on him again between 6:00 and 6:15 AM and testified Mr. Divita was "still sleeping. He [was] breathing fine." (A325).

At 6:50 AM, Nurse Myles went into Mr. Divita's room to check on him again and found he was "really, really quiet." (A327). She tried to rouse him, but he did not respond. A code was called and CPR started. (*Id.*). Unfortunately, Mr. Divita could not be saved and he was declared dead at approximately 7:18 AM. The cause of death, according to the autopsy, was aspiration of gastric contents. (B1-B7). Nurse Myles testified that, when she found Mr. Divita unresponsive, the C-PAP mask was dry inside and there was no vomit in it. (A283).

Plaintiffs, through the expert testimony at trial, asserted the hospital staff breached the standard of care by failing to get a doctor's order for the C-PAP (B41; B145; B195-B198); and that Nurse Myles breached the standard of care by failing to take and record the patient's respiratory rate after 1:00 AM (B273-B274); by failing to monitor the patient's vital signs every four hours (B202-B203); by failing to re-check and record his blood pressure after administering medication (B216); by failing to recognize the

risks of aspiration (B201-B202); and by failing to re-assess pain levels after giving pain medication. (B221-B222)

Plaintiffs' Opening Brief asserts the hospital policy requires caution be used in patients with a "*recent* history of nausea and vomiting." (A546-A552) (emphasis added). (*See* Op. Br. at 4 n. 3, and at 5). It does not. The precise language of the policy states that "Caution should be exercised in . . . patients with nausea and active vomiting." (A547). At 4:00 AM on April 5, 2008, Mr. Divita did not have nausea or active vomiting; the last recorded instance of him vomiting was in the afternoon of April 4. He repeatedly denied having nausea or vomiting to Nurse Myles. (A266; A274-A275; A286; A321; A333). Mr. Divita had continuing orders for anti-nausea medications as needed, but Nurse Myles testified that they were not administered because they were not needed. (A286; A321; A323). In addition, Dr. Sweeney testified that, had Nurse Myles sought a physician's order from him for the use of the C-PAP, he would not have changed his orders. (A205-A206).

II. The Relevant Pre-Trial Litigation

During the discovery phase of this case, Dr. Sweeney identified expert witnesses, including Dr. Schwab, whom Plaintiffs deposed on October 10, 2013. (A41). When Plaintiffs' counsel asked during deposition what caused

Mr. Divita's death, Dr. Schwab testified that it was caused by massive aspiration, as indicated by the autopsy report. (A64-A65). At deposition, Dr. Schwab also testified about the mechanics of aspiration and the speed at which aspiration can take place, and stated aspiration can occur directly into the patient's lungs without the gastric contents entering or exiting the mouth:

> Typically, when people aspirate it happens very fast, and you can't even – you don't even know it's actually happening. So, what will happen is patients whether they have a tracheal tube or not, they will aspirate. They won't vomit like we are used to seeing somebody vomit. It won't come out of their mouth, that kind of stuff. It goes into their lungs and it happens very fast. I mean, it happened in a second and so, the whole – it's not as if somebody would wake up. This will just happen. And then if it goes into your lungs, you can die.

(A64-A65).

On October 28, 2013, Dr. Sweeney's counsel provided to Plaintiffs the Defendants' portion of the Pre-Trial Stipulation, which included a reservation of the right to introduce at trial "charts, drawings, and other demonstrative exhibits and to utilize enlargements of exhibits." (A110). Defendants also indicated they would use "Illustrations or Animations of relevant anatomy (for demonstrative purposes)." (*Id.*). Plaintiffs did not object.

In their portion of the Pre-Trial Stipulation, Plaintiffs also reserved the right to introduce demonstrative exhibits, including "any drawings, computations, photos, charts or timelines [or] aids relied on by witnesses in explaining their testimony to the jury." (A124). Plaintiffs further reserved the right to "use rebuttal exhibits" and to "introduce rebuttal exhibits . . . the identity of which cannot be known until the presentation of the Defendant's (*sic*) case at trial." (A109, A124). Plaintiffs also stated they would use a PowerPoint in their Opening but asserted: "Plaintiffs will not be providing PowerPoint to opposing counsel."[3] (A115, A124). Plaintiffs suggested the parties "exchange exhibits (demonstrative or otherwise) by November 22." (A115). Defendants suggested "(a)ll demonstratives and power points to be produced for inspection by November 25." (A115). The Stipulation was presented to the trial court and then approved at the Pre-Trial Conference held on October 31, 2013.

During the week before trial, the parties began exchanging exhibits, including demonstratives. On Wednesday, November 27, 2013, five days before trial was to begin, Dr. Sweeney's counsel delivered to Plaintiffs two demonstrative exhibits: a timeline of events; and a 26-second animated

[3] Plaintiffs never produced the PowerPoint before it was presented to the jury.

video depicting the process of aspiration.[4] (B8-B11). Dr. Sweeney's counsel indicated his intent to use the animation with expert witness Dr. Schwab. (B11A-B11C) On December 1, the day before trial started, Plaintiffs' counsel produced to the Defendants two demonstrative exhibits that he intended to use the following day. (B12).

The animation, titled "Regurgitation and Aspiration of Stomach Contents Directly Into the Lungs" demonstrates the testimony Dr. Schwab provided at deposition. The animation begins with an image of a male sleeping and wearing a C-PAP mask. The animation then tracks through the patient's gastric system to show his internal organs. The animation depicts gastric contents rising from the stomach and filling the lungs without entering the mouth or the C-PAP mask. It is consistent with and demonstrative of Dr. Schwab's testimony at deposition that aspiration can occur very quickly, and can occur directly into the lungs without the gastric contents entering or exiting the mouth. (A64-A65).

III. At Trial

On December 2, 2013, the first day of trial, Plaintiffs filed a motion *in limine* seeking to have the animation excluded. (A125-A132). Plaintiffs did

[4] The demonstrative was originally delivered by e-mail, but, when Plaintiffs' counsel was unable to access the file, Dr. Sweeney's counsel personally delivered a flash drive containing the animation to Plaintiffs' counsel's office.

not request the trial court decide the issue before their case-in-chief was presented, or before they rested. On December 3, 2013, Plaintiffs presented expert testimony on the mechanics of aspiration through their experts, Dr. Crocker (B69; B71-B72) and Dr. Penek (B146), and also elicited testimony on aspiration from Dr. Sweeney, whom Plaintiffs also called in their case-in-chief. (A169-A172). Both Dr. Crocker and Dr. Penek testified as to Plaintiffs' theory that Mr. Divita aspirated and died because, when he vomited, the gastric contents went into his mouth but could not exit his mouth because of the C-PAP mask and therefore went back down into his lungs. (B69; B146).

On December 10, 2013 the trial court viewed the animation and allowed *voir dire* of Dr. Schwab outside of the presence of the jury. (A367-A385). During *voir dire* Plaintiffs' counsel was allowed to cross-examine Dr. Schwab regarding the animation, without limitation. (A376-A385). Plaintiffs' counsel did not ask any questions about, or challenge the accuracy of, the anatomy depicted in the animation. (*Id.*). Following *voir dire*, the trial court heard oral argument. (A385-A390). After considering the written submissions, the animation itself, *voir dire*, cross-examination and oral argument, the trial court denied Plaintiffs' motion, finding:

> I think it fairly represents the defendant's view of what happened to Mr. Divita. In this case, the

> plaintiffs have a view of what happened; the defendants have a view of what happened. Each side has offered testimony in support of their respective view. I do believe that this animation is supported both by the autopsy reports and Dr. Schwab's testimony. I'm satisfied that there is a firm basis in those reports and his testimony to support this. I do think it will be helpful to the jury.

(A388-A390).

At the same time, the trial court granted Plaintiffs' request that a limiting instruction be read to the jury prior to the animation being shown. (A388-A389). When the jury returned, Dr. Schwab testified as to his opinions, including the mechanics of aspiration and the damage it can cause, including death. (A430-A438). The jury was then shown the animation that demonstrated the testimony Dr. Schwab had just given. Prior to the animation being shown, however, the trial court read the Plaintiffs' limiting instruction to the jury:

> The animation you are about to see represents only a re-creation of the defendant's version of the aspiration; and it should in no way be viewed as an actual re-creation of the aspiration; and, like all evidence, it may be accepted or rejected by you in whole or in part.

(A440).

The animation was shown, and Dr. Schwab narrated it to the jury as it played. (*Id.*). Dr. Schwab also explained to the jury the lone difference

between the animation, which showed gastric contents going into all five lobes of the lungs,[5] and what was reflected in the autopsy report, which showed Mr. Divita had full aspiration in all three lobes of the right lung and in the lower lobe of the left lung, but only partial aspiration in the left upper lobe. (A438). Plaintiffs then cross-examined Dr. Schwab without limitation. (*Id.*). Plaintiffs' counsel began his examination with the following statement: "Just to make this a little bit smoother, I want you to know that nobody is saying in this case that Benny Divita did not aspirate; nobody is saying that the C-PAP wasn't working; and nobody is saying that he should not have been using the C-PAP. Okay?" (A464).

Trial recessed at 3:37 PM on December 10, and at 11:55 AM on December 11, when Defendants rested. (B364) The jury was dismissed early both days. Plaintiffs chose not to call any rebuttal witnesses. The case was given to the jury at 1:00 PM on December 12, 2013. At 4:01 PM court reconvened and the verdict was read. (B365).

Plaintiffs moved for a new trial on the grounds that the trial court erred in allowing the jury to view the animation. The trial court denied the motion on April 14, 2014 and Plaintiffs filed this appeal.

[5] The right lung has three lobes; the left has only two.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE ANIMATION AND DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL

A. Question Presented

Was the trial court correct in permitting the jury to view a 26-second animation, following a limiting instruction, that was supported by the testimony of Defendants' fact and expert witnesses, and by the autopsy report, and in subsequently denying Plaintiffs' motion for a new trial on the same grounds? Answer: Yes. (A358-A363).

B. Scope of Review

"An appeal from a trial court's denial of a motion for new trial is governed by an abuse of discretion standard of review." *Barriocanal v. Gibbs, M.D.*, 697 A.2d 1169, 1171 (Del. 1997) (citations omitted); *Strauss v. Biggs*, 525 A.2d 992, 996-7 (Del. 1987). The reviewing court should not substitute its own notions of what is right for those of the trial judge, if the trial judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness:

> The essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action; and where a court has not exceeded the bounds of reason in view of the circumstances, and has not so ignored recognized rules of law or practice, so as

> to produce injustice, its legal discretion has not been abused; for the question is not whether the reviewing court agrees with the court below, but rather whether it believes that the judicial mind in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made.

Pitts v. White, 109 A.2d 786, 788 (Del. 1954); *See Chavin v. Cope*, 243 A.2d 694 (Del. 1968). *See also Wahle v. Medical Center of Delaware, Inc.,* 559 A.2d 1228 (Del. 1989) (upholding trial court's dismissal of action for failure of plaintiff to identify expert witness, and citing *Pitts*)

"Where…the appeal is grounded on allegations that the trial court erred as a matter of law or abused its discretion in certain evidentiary rulings, this Court will first consider whether the specific rulings at issue were correct." *Barriocanal, supra,* 697 A.2d at 1171. "If the court finds error or abuse of discretion in the rulings, it must then determine whether the mistakes constituted 'significant prejudice so as to have denied the appellant a fair trial.'" *Strauss v. Biggs*, 525 A.2d 992, 997 (Del. 1987) (quoting *Eustice v. Rupert*, 460 A.2d 507, 510 (Del. 1983)).

C. Merits of Argument

a. The Trial Court Properly Admitted the Animation

Plaintiffs have argued that the animation should have been excluded because it was untimely and because it was "speculative and prejudicial."

(Op. Br. at 7). The trial court's decision to admit the animation was correct because the Plaintiffs were not prejudiced by the timing of the disclosure, the animation was not speculative, and the animation's probative value outweighed any prejudice.

1. Plaintiffs Were Not Prejudiced By the Timing of the Disclosure

Plaintiffs do not cite a single case or evidentiary rule in support of their argument that the animation should have been excluded as untimely. In fact, it was not untimely. It was produced in the usual course of pre-trial disclosure of demonstrative exhibits.

In considering the timing of disclosure, Delaware courts have held that, in order to exclude evidence on the basis of late disclosure, the non-disclosing party must be prejudiced by the late disclosure. *See Paron Capital Management, LLC v. Crombie*, 2012 WL 214777, at *2 (Del. Ch. Jan. 24, 2012) ("So long as [defendant] suffered no unfair prejudice from Plaintiffs' delay in identifying [Exhibits], the delay itself does not automatically render the exhibits inadmissible."). In *Balan v. Horner,* 706 A.2d 518 (Del. 1998) this Court affirmed the trial judge's decision to allow an expert to use as a demonstrative aid a series of color slides depicting laparoscopic techniques which were produced for the first time on the

morning of the expert's testimony, even though they contained images that were significantly different than the procedure at issue. *Balan, supra,* 706 A.2d at 521.

In this case, Plaintiffs were not prejudiced by the timing of the disclosure, which contained nothing of substance that had not previously been disclosed in Dr. Schwab's deposition. The animation was delivered to Plaintiffs' counsel on November 27, 2013, five days before the start of trial and almost two weeks before it was shown to the jury. (B8-B11). Plaintiffs argue they had "no opportunity to depose the opposing causation experts, including Dr. Schwab, on the specific contents of the animation." (Op. Br. at 7). Plaintiffs never requested the opportunity to depose Dr. Schwab about the animation but, more to the point, Plaintiffs essentially did depose Dr. Schwab about the animation during his discovery deposition and again during *voir dire*. The animation did not include any content beyond what Dr. Schwab testified to at his discovery deposition: Aspiration can occur very quickly and gastric contents can go directly from the stomach into the lungs without entering or exiting the mouth. (A64-A65) This was not a case of a party being presented at the last minute with a new piece of substantive evidence or a new theory of defense. The animation merely demonstrated the testimony that Dr. Schwab had already given in discovery.

Plaintiffs also argue that they were deprived of the opportunity to "challenge the accuracy of the animation from an anatomical or physiological standpoint." (*Id.*). Again, Plaintiffs had that opportunity during *voir dire* and during cross-examination of Dr. Schwab, and did so, at least in terms of physiology. (A379-A380; A476). Counsel did not challenge the anatomic accuracy of the animation. (*Id.*).

Plaintiffs also claim they were deprived of the ability to prepare a competing animation. (Op. Br. at 7). Plaintiffs have not supported this argument with any facts that would demonstrate that they attempted to have a competing animation prepared, or that it would have taken longer than the two weeks that passed between the time it was disclosed to Plaintiffs on November 27, 2013 and the time it was shown to the jury on December 10, 2013, or when it could have been presented as rebuttal evidence on December 11 or 12, 2013.

Plaintiffs also point to the timing of the trial judge's decision on the motion in *limine*, arguing that because it occurred after the close of Plaintiffs' case, "Plaintiff was unable to have her experts rebut the animation." (Op. Br. at 8). Plaintiffs received the animation five days before trial began. It is 26 seconds long. There was ample time for them to forward the electronic file to their experts and elicit comment or criticism.

In all likelihood, they did. Plaintiffs also could have requested the trial court resolve the issue prior to the close of their case, but chose not to do so.

At trial, Plaintiffs did question their experts regarding the mechanics of aspiration during their case-in-chief, eliciting the opposing theory that the gastric contents entered the patient's mouth but were forced back down into the lungs because of the C-PAP mask. (B69; B146). Plaintiffs could also have called one of their experts as a rebuttal witness to follow Dr. Schwab. Because the Defendants rested at 11:55 AM on December 11, Plaintiffs could have offered rebuttal testimony that afternoon or on the morning of December 12.[6] Plaintiffs did not do so, choosing instead to save the issue for appeal.

In order to maximize their injury, Plaintiffs mischaracterize Dr. Schwab's testimony regarding when he first saw the animation: "According to defense expert Richard Schwab, M.D., he reviewed the animation ***two or three weeks prior to trial***. Despite the animation being produced to Dr. Schwab two or three weeks prior to trial, it was withheld from Plaintiff until the last business day before trial." (Op. Br. at 8) (Emphasis in the original). In fact, Dr. Schwab testified - *on December 10, 2013* - that he first saw the animation "two or three weeks ago, I think." (A377). Two weeks prior to

[6] There was no testimony at all on Monday, December 9, 2013. (B364)

December 10, 2013, was November 26, 2013 – the day before the animation was delivered to Plaintiffs.

This demonstrative exhibit was timely disclosed consistent with the rest of the demonstrative exhibits the parties intended to use at trial. In fact, it was produced four days prior to the Plaintiffs' demonstratives. Plaintiffs did not produce at all the demonstrative Power Point they used in their Opening Statement and then throughout the trial.

Plaintiffs argue that the animation contained opinion testimony that was not properly disclosed: "Dr. Schwab, in his discovery deposition, offered no opinions regarding whether the vomit stopped at Benny Divita's esophagus, such that it and [*sic*] did not go into his mouth or mask." (Op. Br. at 8, 9). On the contrary, Dr. Schwab *did* testify at his deposition about the process of aspiration and how it can occur without vomit appearing in the mouth or a C-PAP mask: "They won't vomit like we are used to seeing somebody vomit. It won't come out of their mouth, that kind of stuff. It goes into their lungs and it happens very fast. I mean, it happened in a second and so, the whole – it's not as if somebody would wake up. This will just happen. And then if it goes into your lungs, you can die." (A64-A65). The animation showed exactly that: gastric contents going directly into the lungs, without entering or exiting the mouth.

Plaintiffs were not prejudiced by the timing of the disclosure of the animation because the substance of the animation had been disclosed two months earlier at deposition in October 2013. In terms of substance, this was no different than having Dr. Schwab draw a series of pictures on a board as he testified at trial.

2. The Animation Was Not Speculative and Its Probative Value Outweighed Any Prejudice

Plaintiffs argue the animation had no probative value because the parties had stipulated aspiration was the cause of death. (Op. Br. at 9). The animation did have probative value because the parties disagreed as to how the aspiration took place. The defense asserted it happened very quickly and directly into the lungs. Plaintiffs argued that it occurred when gastric contents entered the mouth but were prevented from exiting by the C-PAP mask and forced back into the lungs. The animation supported the Defendants' theory and made the existence of facts asserted by the defense more likely than not. "Evidence has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be." *Stickel v. State*, 975A.2d 780, 783 (Del. 2009).

Here, Dr. Schwab testified both at deposition and at trial that the aspiration occurred very quickly, that the vomit went directly into the lungs, and that it was irreversible. (A64-A65; A430-A438). Nurse Myles testified

that when she found Mr. Divita unresponsive, his C-PAP mask was clean (i.e., there was no vomit in the mask). (A283). The animation – which showed how aspiration can occur without vomit going into the mouth or the CPAP mask – thus supported Dr. Schwab's and Nurse Myles's testimony.[7] It also supported the defense theory that it happened very quickly, and could not be reversed, as Plaintiffs' experts argued.

Plaintiffs Opening Brief argues "there is no evidence that the vomit did not go into the patient's closed mouth and, because it was closed and he was wearing a full face mask, then go back down his throat when he gasped for air after being unable to vomit." (Op. Br. at 10). There is evidence, however, that vomit did not go into the patient's mouth. First, as mentioned directly above, Nurse Myles testified that there was nothing in the patient's mask. (A283). Second, the autopsy report makes no mention of any changes in the tissues in the mouth as a result of coming into contact with gastric contents. (B1-B7). In addition, Dr. Schwab testified he did not believe there was any evidence that vomit entered the patient's mouth. (A383). Accordingly, there was evidence in the record from which the jury

[7] In making this argument, Plaintiffs once again attempt to mischaracterize the animation, asserting that it "showed *Mr. Divita* with a tight-fitting full-face CPAP mask." (Op. Br. at 10) (emphasis added). The animation was not a depiction of Benny Divita, nor was it a recreation of what happened to Benny Divita. It was the Defendants' version of the aspiration; that was made clear to the jury in the limiting instruction. (A440)

could find that the aspiration occurred quickly and directly into the lungs and was not affected by the presence of the C-PAP. The animation was probative of those facts.

The animation was also not speculative. As Dr. Schwab made clear in his testimony, the animation accurately portrayed the process of aspiration directly into the lungs. (A380). To support this portion of their argument, Plaintiffs selectively quote Dr. Schwab's testimony during *voir dire* that "we don't really understand aspiration, to be fair" and assert he had never physically witnessed the internal process of aspiration. (Op. Br. at 11). Dr. Schwab actually testified that the medical community does not really understand *why* aspiration occurs *directly* into the lungs:

> THE COURT: Just back up a little bit. Why doesn't it go in the mouth?
> THE WITNESS: That's a really good question. I mean, I – we don't really understand aspiration, to be fair. For most of us, when you're sitting up and if you're upright and you vomit, it comes out of your mouth; right . . . But in the hospital that's not what happens for most of these patients. They're on their back. Their head position can be different. And in most of – not – some of the time, that still happens. People get a basin and they'll throw up. But lots of times, it doesn't happen that way where it goes into your lungs. We don't really understand the 'why' to that. . . . But to my reading of the depositions and everything else, he didn't have vomitus in the C-PAP mask. If he had vomited in that mask, it would have been full of vomitus. It wouldn't have been subtle; it wouldn't

> have been slightly; there wouldn't have been just a little there. It would have been all over.

(A383-A384).

Dr. Schwab was very clear that he knew *how* aspiration occurs, and that the animation is an accurate recreation of that process: "No, but I think we understand the pathogenesis of how it happens. I don't think there's – it's the anatomy. There's no way – if you're trying to ask me if that animation is wrong, it's not wrong." (A380).

As for witnessing the act of aspiration, Dr. Schwab testified that he had seen it, but "not from the inside. Not that kind of animation. But I've seen plenty of patients aspirate in my presence in the ICU on the floor, yes. . . . and I've seen this multiple times. They'll be in the ICU; all of a sudden they desaturate. And they may regurgitate. You may see it. It will happen within five seconds; three seconds. And it – because what happens; all – that animation is exactly what happens." (A378, A380)

Accordingly, the animation was not speculative and had probative value and was properly admitted and shown to the jury following a limiting instruction.

b. **Even if the trial court erred in admitting the animation, the admission did not significantly prejudice Plaintiffs such that they are entitled to a new trial.**

As set forth above, the trial court did not abuse its discretion and properly admitted the animation as it met the requirements of D.R.E. 403. But assuming, *arguendo*, that the trial court abused its discretion by admitting the animation, Plaintiffs still are not entitled to a new trial because the admission did not significantly prejudice the Plaintiffs. "If we find error or abuse of discretion in the [evidentiary rulings] we 'must then determine whether the mistakes constituted *significant prejudice* so as to have denied the appellant a fair trial.'" *O'Riley v. Rogers*, 69 A.3d 1007, 1010 (Del. 2013) (quoting *Barriocanal v. Gibbs*, 697 A.2d at 1171) (emphasis added).

Plaintiffs fail to demonstrate "significant prejudice." Indeed, Plaintiffs' Opening Brief does not mention "significant prejudice." Instead, Plaintiffs suggest they need only show the "objectionable evidence *possibly affected* the jury's view of the case." (Op. Br. at 12) (emphasis added). In support of this assertion, Plaintiffs rely on *Berry v. Cardiology Consultants, P.A.*, 935 A.2d 255 (Table) (Del. 2007). That case and its holding are distinguishable here.

In *Berry*, this Court was asked to reverse a trial court's denial of a new trial after the trial judge allowed several treatise pages to be taken into the jury room in violation of D.R.E. 803(18), which provides, in part, that such material, if otherwise admissible, "may be read into evidence but may

not be received as exhibits." This Court held that "[t]he consequence of violating (the Rule) cannot be viewed as merely harmless" in light of the policy behind D.R.E. 803(18), which is to prohibit such articles from being brought into the jury room, where jurors may attempt to "interpret or apply the treatise on their own independent of the testimony of the expert witness(es) who (were) questioned about it." *Berry,* 935 A.2d at *2. The Court concluded that there was "no reliable mechanism to insure that a jury will not or has not so misused the text" and that D.R.E. 803(18) therefore provides a "bright line bar." *Id.* Thus, the question in *Berry* was not whether the evidence was admissible, but whether the court's handling of the evidence exposed it to possible mis-use by the jury.

Here, there is no such bright line bar. Before the jurors viewed the animation, they were given a limiting instruction which made clear the animation was only the defendant's version of the process, that it was not a recreation, and that it could be accepted or rejected, in whole or in part. (A440). They heard Dr. Schwab's narration, and Plaintiffs' cross examination. They heard the Plaintiffs' experts' competing theories of how the aspiration occurred. There was no jeopardy of the jury "misusing" or misconstruing the animation.

It is somewhat curious that Plaintiffs' Opening Brief neglects to mention the limiting instruction they requested and the court provided before allowing the jury to view the animation. The existence of the limiting instruction makes clear the Plaintiffs were not significantly prejudiced by the admission of the animation. *See Balan, supra,* 706 A.2d at 522 (Holding a limiting instruction effectively eliminated the danger of prejudice or confusion arising from a demonstrative aid); *Datskow v. Teledyne Continental Motors Air-Craft Products*, 826 F.Supp. 677, 686 (W.D.N.Y. 1993) ("Although defendant argues that there is no practical difference between recreating an accident and re-creating an expert's theory of the accident, the difference is both real and significant; it is the difference between a jury believing that they are seeing a repeat of the actual event and a jury understanding that they are seeing an illustration of someone else's *opinion* of what happened. So long as that distinction is made clear to them – as it was here – there is no reason for them to credit the illustration any more than they credit the underlying opinion."); *Altman v. Bobcat Co.*, 349 Fed. Appx. 758, 764 (3rd Cir. 2009) (Finding that a jury instruction informing the jury that an animation was not a recreation of the events at issue was sufficient to ensure that the defendant was not prejudiced by the admission of the animation).

The Plaintiffs were not "significantly prejudiced" by the admission of the animation because the animation was preceded by a limiting instruction and because it was simply a demonstrative aid which illustrated the testimony Dr. Schwab previously had given at deposition and which he gave at trial: aspiration can happen very quickly, and it can occur directly into the lungs without entering or exiting the mouth.

Plaintiffs argue that the jury could only have reached its verdict if it relied on the animation and accepted it as Defendants' version of the evidence. Plaintiffs assert that in order for the jury to have found that the hospital's negligence did not cause Mr. Divita's death, the jury must have concluded that "the C-PAP mask was irrelevant based on the animation." (Op. Br. at 12). That is not the only possibility, however. It is just as possible the jury decided the C-PAP mask was irrelevant based on Plaintiffs' counsel's statement to Dr. Schwab that "nobody is saying that the C-PAP wasn't working; and nobody is saying that he should not have been using the C-PAP. Okay?" (A464). Or, it is possible the jury determined the C-PAP mask was irrelevant based on Plaintiffs' counsel's closing argument, in which he stated:

> Again, we are not telling you he shouldn't have been wearing that CPAP mask at four o'clock in the morning. If he was monitored, okay, probably the right thing to do. That's what we told you.

> That's what our experts told you. The only reason why the issue of CPAP being on or off is because Dr. Sweeney told you, I wouldn't have ordered it in light of the nausea and vomiting.

(B355).

If the jury accepted that argument, it could have concluded that even if Nurse Myles had called Dr. Sweeney at 4:00 AM to tell him that Mr. Divita was asleep with a C-PAP mask, Dr. Sweeney would have asked whether the patient was nauseous or vomiting, Nurse Myles would have said "no" and Sweeney would have left his orders stand, just as Dr. Sweeney testified. (A205-A206). Under that scenario, the jury could easily have concluded that, despite a breach of the standard of care requiring a doctor's order for the C-PAP, the outcome would not have changed without any reference to the animation. It is also possible that the jury found the breach of the standard of care that did not cause harm was Nurse Myles' alleged failure to document respiratory rates after Plaintiffs' counsel argued in closing: "Respiratory depression is not the issue. Would the respiratory rate have maybe added something to what was going on with Bennie at 4:00 o'clock? Maybe, but respiratory depression is not why he died." (B357) There were numerous other breaches alleged that had nothing to do with the C-PAP or the animation.

The trial court correctly exercised its discretion in admitting the animation where it found it was supported by the evidence, probative of certain facts, and would assist the jury. (A388-A389) The trial court also correctly exercised its discretion in denying the Plaintiffs' Motion for New Trial on the same basis. The limiting instruction given at the time the jury viewed the animation cured any apparent defect.

CONCLUSION

For all of the foregoing reasons, and the reasons that may be explained at oral argument in this matter, Appellee Bayhealth Medical Center, Inc. respectfully requests this Court affirm the Superior Court's decision below denying Plaintiffs' Motion for a New Trial.

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