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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5294-09T3

JEFFREY BUTTERMARK and NADXELLY BUTTERMARK, his wife,

Plaintiffs-Appellants,

v.

A.J.D. CONSTRUCTION CO., INC., and POWER ELECTRIC CO., INC.,

Defendants-Respondents,

and

APPLIED PROPERTY MANAGEMENT CO., F&G MECHANICAL CORP., and JENPAUL/GENPAUL,

Defendants,

and

A.J.D. CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

v.

POWER ELECTRIC CO., INC.,

Third-Party Defendant.

Argued March 7, 2011 - Decided March 25, 2011

Before Judges Lisa and Sabatino.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-230-05.

Eric Christopher Landman argued the cause for appellants (Law Offices of Herbert I. Ellis, P.C., attorneys; Mr. Landman, on the brief).

Daniel Zemann, Jr. (London Fischer LLP) of the New York and Texas bars, admitted pro hac vice, argued the cause for respondent A.J.D. Construction Co., Inc. (Cynthia V. Fitzgerald (London Fischer LLP), Anthony D. Capasso (London Fischer LLP), and Mr. Zemann, attorneys; Ms. Fitzgerald, Mr. Capasso, and Heather J. Berger, on the brief).

Timothy R. Holman argued the cause for respondent Power Electric Co., Inc. (Law Offices of Jonathan R. Westpy, attorneys; Mr. Holman, on the brief).

PER CURIAM

Plaintiff, Jeffrey Buttermark,[1] brought this action for injuries he claimed he sustained in a workplace accident. By the time the case was submitted to the jury, the only remaining defendant was the general contractor, A.J.D. Construction Co., Inc. (A.J.D.).[2] The jury found that A.J.D. was not negligent,

[1] Jeffrey Buttermark's wife, Nadxelly Buttermark, was also a plaintiff, asserting a per quod claim. Throughout this opinion, we will refer to Jeffrey Buttermark as "plaintiff."

[2] In addition to A.J.D., the other respondent in this appeal is third-party defendant Power Electric Co., Inc. At the end of plaintiff's case, Power Electric Co., Inc. moved for a directed verdict, which was unopposed and was granted. On appeal, plaintiff does not assert any error in that ruling. (continued)

and a no cause for action judgment was entered against plaintiff on April 23, 2010. Plaintiff's new trial motion was denied on May 28, 2010.

Plaintiff appeals from those two orders. He argues that two evidentiary rulings constituted reversible error, namely, (1) allowing A.J.D. to introduce testimony of plaintiff's alcohol consumption for the limited purpose of impeaching his credibility, and (2) denying plaintiff's application to present two rebuttal witnesses. We conclude that the trial court did not err with respect to the rebuttal witnesses. Although we conclude that admission of the alcohol consumption evidence was error, in the overall context of this trial and in light of the result reached by the jury, we deem the error harmless. Accordingly, we affirm.

Plaintiff was a union plumber employed by F&G Mechanical Corp. (F&G). A.J.D. was the general contractor in the construction of a high rise building in Hoboken known as the Independence Building. Plaintiff claims that on January 16, 2003, while leaving the job site at the end of the work day, he fell while descending a stair tower and was injured. Plaintiff contended that A.J.D. was negligent in the manner in which it

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(continued)
Accordingly, there is no need for us to address it and there is no basis for reversal as to Power Electric Co., Inc.

maintained the stairwell. In particular, he claimed there were no hand rails, the stairwell was poorly lit, and debris was strewn about.

Plaintiff was leaving the jobsite at about 3:00 p.m. He said be began his descent on the eighth floor, and between the seventh and sixth floors he stumbled upon some debris and fell, landing on his back, causing severe back injuries. He said he composed himself, descended the remainder of the stairway, and called his employer and reported the fall. He then got in his car and drove home. Plaintiff contended he was alone when he descended the stairwell and fell.

In addition to other witnesses, A.J.D. presented the videotaped testimony of two witnesses, plaintiff's co-employees with F&G, Martino Hronick and John Grilo, who said they descended the stairwell with plaintiff on January 16, 2003. They said they did not see him fall, and he did not say he fell. In a nutshell, the defense was that this accident never happened, or, alternatively, if plaintiff fell on that day, that was not the cause of any injuries to his back. Plaintiff had suffered a previous worksite injury about ten years earlier, when he fell onto concrete from a ladder, landing on his back.

When plaintiff was deposed, he was asked whether he had consumed any alcohol on January 16, 2003. He responded that he

did not. In a subsequent de bene esse deposition, Hronick testified over plaintiff's objection, that he and plaintiff typically had lunch together two or three days a week at a bar near the jobsite, that plaintiff usually had one or two vodka drinks at lunch time, and on January 16, 2003, plaintiff had one vodka drink. Although there was no testimony about the precise time of this alcohol consumption, the parties agree that it was approximately noon. The basis for plaintiff's objection was that there was no evidence that plaintiff was intoxicated or in any way deleteriously affected by alcohol consumption at the time of his alleged fall three hours later.

Prior to trial, plaintiff moved in limine to strike the portion of Hronick's testimony dealing with plaintiff's alleged alcohol consumption. Counsel for A.J.D. and Power Electric Co., Inc. opposed the motion. They conceded that plaintiff exhibited no observable evidence of intoxication at 3:00 p.m. (or any other time) on January 16, 2003. The judge ascertained that on January 16, 2003, plaintiff weighed about 235 to 240 pounds. Defense counsel nevertheless argued that it was "for the jury to decide based upon the fact that he had a drink whether or not it affected him." One defense attorney insisted that "[i]t's in fact the province of the jury to determine whether that glass of

Grey Goose [vodka] could have affected him at the time of his alleged accident."

The judge rejected defendants' opposition, concluding that "unless you have something to indicate his [in]sobriety, the prejudicial impact far outweighs any probative value." One of the defense attorneys then responded to the judge that an indication that plaintiff was not sober was "his own allegation . . . that he fell down the stairs."

It is thus clear that defendants sought to introduce evidence of plaintiff's consumption of one drink three hours before the accident in an effort to convince the jury that, if plaintiff fell, it was because he was inebriated. The judge rejected the defense position, commenting that falling down stairs does not equate to inebriation.

Defendants then shifted gears in a continuing effort to get this alcohol consumption evidence into the case. They pointed to plaintiff's deposition testimony in which he denied consuming any alcohol that day. They argued that contrary evidence could be used to impeach plaintiff's credibility. Plaintiff continued to argue that any probative value in that regard was still substantially outweighed by potential prejudice. Indeed, without evidence of a deleterious effect on plaintiff, the evidence had no probative value. However, the court was of the

view that when used for attacking plaintiff's credibility, "[i]t's a different analysis [than] when you're looking at the issue of whether the alcohol goes in to show the sobriety element." Without engaging in an N.J.R.E. 403 analysis, the judge denied plaintiff's motion to bar the evidence and said he would give an appropriate limiting instruction.

During plaintiff's direct testimony at trial, his attorney did not ask him about alcohol consumption. On cross-examination, one of the defense attorneys asked plaintiff whether he had anything to drink on the day of the alleged accident, to which plaintiff responded, "Nothing." Plaintiff's counsel continued his objection at sidebar because there was no evidence of intoxication. The judge simply said that "[o]nce the testimony [of plaintiff's alcohol consumption] goes in, I'll give the instruction."

In conjunction with the playing of Hronick's videotaped de bene esse deposition, the judge gave the following limiting instruction:

> Ladies and gentlemen, you just heard moments before some testimony regarding the consumption of one Grey Goose vodka by the plaintiff on January 16, 2003. You heard that testimony not for the reason that it impacts sobriety but because of the issue that it conflicts with the testimony of the plaintiff. There's nothing before you and you will hear no testimony and you will receive no evidence to indicate on any

> adverse impact as to the plaintiff's sobriety because of the consumption of one Grey Goose vodka. You are being presented with that testimony because of the conflicting nature of the plaintiff's testimony, not because of any impact on sobriety.

A.J.D.'s attorney began his summation by arguing that the jury should not believe that the accident happened. He said plaintiff had no proof to support his claim that he fell except for his own testimony. He urged the jury not to believe plaintiff because of "all of the untruths" he had told them. He immediately followed with this: "For instance, 'I didn't drink any alcohol on the day of the accident.'" Counsel then commented on other instances of allegedly untrue testimony by plaintiff.

As we stated at the outset, the jury returned a verdict finding no negligence on A.J.D.'s part. Therefore, the jury never reached the question of whether plaintiff was negligent and never allocated fault between plaintiff and A.J.D. Plaintiff moved for a new trial. He alleged he was denied a fair trial because of the alcohol consumption evidence and because of the court's refusal to allow him to call the two rebuttal witnesses, which we will later discuss.

In ruling on the new trial motion, the judge made an N.J.R.E. 403 analysis. He acknowledged that the alcohol

consumption issue had some "substance or merit." He reasoned that, by its nature, evidence of alcohol consumption is of an "inflammatory nature." However, he found that the sensitivity of the issue of alcohol consumption is heightened in conjunction with the operation of a motor vehicle or machinery, but to a much lower level with respect to someone "walking down the street or walking down a flight of steps." The judge also factored in that the evidence presented dealt with only one drink, consumed about three hours before the alleged accident, by a large individual. Those circumstances would not tend to lead a jury to find that there was any effect on plaintiff at the time of the alleged accident. Further, the judge considered that he had given a thorough and explicit cautionary instruction, which he assumed the jurors followed. Finally, the judge found there was no prejudice because the jury found no negligence by A.J.D. and never reached the issue of any potential negligence by plaintiff, which is where any possible prejudice might be manifested. The court was therefore satisfied that the admission of this evidence did not warrant a new trial.

Reviewing courts afford substantial deference to the exercise of discretion by trial courts in admitting evidence. Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div.

1999), certif. denied, 163 N.J. 79 (2000). Our review is guided by the mistaken exercise of discretion standard. Brenman v. Demello, 191 N.J. 18, 31 (2007). Such rulings should be overturned only if they result in a "manifest denial of justice." Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999).

Generally, all relevant evidence is admissible, N.J.R.E. 402, and it "may be excluded if its probative value is substantially outweighed by the risk of . . . undue prejudice . . . ." N.J.R.E. 403. "[F]or the purpose of impairing or supporting the credibility of a witness, any party . . . may examine the witness and introduce extrinsic evidence relevant to the issue of credibility . . . ." N.J.R.E. 607.

Plaintiff relies on Gustavson v. Gaynor, 206 N.J. Super. 540 (App. Div. 1985), certif. denied, 103 N.J. 476 (1986). In that automobile accident case, we found reversible error in the admission of the consumption of alcohol by the operator of a motor vehicle, where there was no evidence of intoxication. Id. at 547. The defendant in that case was underage (seventeen years old) and had consumed two or three bottles of beer about five or six hours before the accident. Id. at 543. The court denied defendant's motion to bar the evidence and held that it was admissible to provide "a continuity in the narrative leading

to the point of the actual collision." Ibid. The judge ordered that "he would not allow any suggestion that defendant was drunk or couldn't drive because of having had a couple of beers." Ibid. No limiting instruction was given. The jury found both drivers negligent, allocating fifty-five percent of the fault to defendant. Id. at 544.

We held that evidence of prior consumption of alcohol in the context of an automobile accident would be relevant "only when there is some supplementary evidence from which the trier of the fact may reasonably conclude that the drinking affected the safe operation of the vehicle." Id. at 544-45. We further held that "[t]he admission of such testimony without supporting evidence is unduly prejudicial in view of its capacity to inflame the jury." Id. at 545. Balancing the very low probative value of providing a narrative against the substantial prejudice, we held that the evidence should have been excluded, id. at 546, and we reversed and ordered a new trial. Id. at 547.

Plaintiff also relies on Gonzalez v. Silver, 407 N.J. Super. 576 (App. Div. 2009), a medical malpractice case in which plaintiff fell from a moving vehicle and injured his arm. Id. at 581. The defendant doctor performed surgery to correct a broken wrist, but did not detect a dislocated elbow. Id. at

581-82. The jury found no negligence. Id. at 585. The impeachment evidence at issue dealt with whether or not the plaintiff had been "car surfing" at the time he suffered his initial injuries. Id. at 593. We reasoned that this testimony was of "mariginal utility" and not sufficiently related to the central controversy of the case, id. at 595, and that "contradiction on such a collateral matter [was] especially likely to . . . inject prejudice." Id. at 594. We therefore held that the car surfing evidence should not have been admitted at trial. Id. at 595.

In the context of the case before us, the balancing of the probative value of the alcohol consumption evidence against its prejudicial effect does not weigh quite as heavily against admissibility as the evidence in Gustavson. That is because plaintiff's credibility was a critical issue in this case, whereas the "continuity in the narrative" in Gustavson, was virtually irrelevant. We part company with the trial judge, however, regarding his view that alcohol consumption evidence is much more significant in the driving context than in the context of someone falling down stairs. We think the two are comparable.

The common expression that someone is "falling down drunk" connotes the generally accepted view that individuals whose

physical functioning is adversely affected by alcohol consumption have difficulty in walking normally and negotiating stairs safely. Indeed, in standard drinking and driving reports, the police report upon their observations of indicia of intoxication relating to swaying, holding on to steady oneself, impaired gait, and performance of the psychophysical heel-to-toe test. Thus, we think the inherent prejudice is as significant in this context as in the driving context. However, as we stated, that prejudice is balanced in this case against evidence with more significant probative value than in Gustavson.

Nevertheless, throughout the trial of this case, the defense pointed to many inconsistencies in plaintiff's testimony and statements to impeach his credibility. The defense also had its two witnesses who directly contradicted plaintiff's version of the accident. Therefore, although plaintiff's credibility was a substantial issue in the case, the need for the alcohol consumption evidence to impeach his credibility was somewhat cumulative. We further note that it was defense counsel, not plaintiff, who opened the door to the subject of drinking by asking plaintiff about it on cross-examination. Had defense counsel not delved into this subject on cross-examination, there would have been no inconsistent statement to impeach. In this scenario, A.J.D.'s reliance upon N.J.R.E. 607 as authority to

attack the witness's credibility is misplaced. See, e.g., Serrano v. Underground Util. Corp., 407 N.J. Super. 253, 277-79 (App. Div. 2009) (disfavoring the practice of asking a witness questions on cross-examination about a collateral matter as a predicate to confront the witness with a prior inconsistent statement about that extraneous subject).

Comparing this case to Gonzalez, it is true that the impeachment evidence here, unlike in Gonzalez, was central to an issue in the case, namely plaintiff's credibility. In Gonzalez, the issue of whether the plaintiff fell from a particular position while car surfing was collateral to whether the defendant was negligent in his diagnosis and treatment of the plaintiff's dislocated elbow. Nevertheless, we found the car surfing evidence to be of very low probative value yet containing an "enormous potential for prejudice." Gonzalez, supra, 407 N.J. Super. at 594-95. The same applies here.

In our view, a correct application of N.J.R.E. 403 should have led to exclusion of the alcohol consumption evidence. That the evidence should have been excluded, however, does not end our inquiry. We must consider whether the admission of the evidence was "clearly capable of producing an unjust result." R. 2:10-2; Green, supra, 160 N.J. at 502.

In Green, all members of the Court agreed that the trial court erred in its application of N.J.R.E. 403 in not barring evidence of the plaintiff's racist remarks as bearing on his credibility. Id. at 501-02; id. at 504 (Pollock, J., dissenting). The Court split, however, on whether the error was harmful or harmless. A majority of the court found that the error required reversal, id. at 502-04 (majority opinion), while Justice Pollock, joined by Chief Justice Poritz, found that in the overall context of the trial evidence, the error was harmless and did not warrant a new trial. Id. at 504-05 (Pollock, J., dissenting).

We conclude from our review of the complete trial record that, in the context of this case, the error was harmless. The evidence involved only one drink, consumed about three hours before the alleged fall. Defendant weighed about 235 to 240 pounds, and a juror would expect from common experience that an individual that size would likely be unaffected by a single drink with lunch, especially three hours later. Most importantly, the judge gave a thorough and clear limiting instruction, and the jury never reached the issue of plaintiff's negligence. Finally, substantial evidence was presented impugning plaintiff's credibility and supporting the jury's finding of no negligence by A.J.D.

We need comment only very briefly on plaintiff's argument regarding his proposed rebuttal witnesses. One such witness was plaintiff's workers' compensation attorney. Plaintiff's proffer was that the attorney would testify that in the workers' compensation case, plaintiff's employer did not dispute the happening of the accident and the injury caused by it. The judge properly rejected that evidence because it would not refute the defense position that the accident never happened. A litigation position taken by a party in a separate case, in which negligence is not an issue, would not constitute competent evidence in this liability case against A.J.D. as tending to prove that the accident did happen and plaintiff was injured by it. The court did not mistakenly exercise its discretion in barring this proposed rebuttal witness.

Plaintiff's other proposed rebuttal witness was John Marcinak. Plaintiff initially sought to present this witness in his case in chief, to rebut the anticipated claim by the defense that plaintiff was temporarily reassigned from this job to another job site due to concerns over plaintiff's poor job performance. However, plaintiff had not named Marcinak as a witness in discovery and only identified him as a potential witness on the eve of trial. On that basis, the court precluded plaintiff from calling Marcinak in his main case.

Plaintiff testified at trial that, several months before his alleged accident, he was removed from the job site under circumstances in which he was unable to perform his job functions effectively because of debris on the site. As plaintiff described it, "the place [was] always a mess," workers from other trades constantly left debris scattered about, which interfered with his ability to do his job, and "AJD was notorious for having a sloppy job site." The defense presented evidence, through Hronick and Grilo, that defendant had been temporarily removed from the job site because of deficiencies in his job performance. Plaintiff did not object to those portions of Hronick's and Grilo's de bene esse deposition testimony. Instead, he proposed calling Marcinak as a rebuttal witness.

When the issue arose during trial, the judge said: "I think what might be a more pragmatic remedy is for the [c]ourt to now give a cautionary statement that the jury is to disregard any opinions presented through hearsay testimony via Mr. Marcinak or whoever proffered them as to why Mr. Buttermark was moved. We don't know that." Plaintiff's counsel immediately responded: "That's satisfactory, Your Honor." The judge then commented: "That makes more sense. If it would have been done at the time, I would have allowed it." He continued that

because the jurors had heard the defendant's witnesses render their opinions as to why plaintiff was removed from the job site, "it probably makes more sense to say that's hearsay opinion as to why he was removed and I am going to ask them to disregard it. Seems to be the appropriate remedy." When the jury returned, the judge immediately gave the proposed curative instruction, telling the jury that

> There were some discussions and conversations about Mr. Buttermark's removal from the site. You may recall that Mr. Mattliano indicated he had some discussions with Mr. Buttermark's employer. I'm going to direct you that you should not speculate as to the reason Mr. Buttermark left because the only reason that you were supplied was via a hearsay comment, but that there's no contest he wasn't removed from the site, but the reason why you should not speculate.

Plaintiff took no exception to that curative instruction and did not request any further instruction.

We find no basis for reversal in the disallowance of this proposed rebuttal witness. There are three reasons. First, plaintiff acquiesced in the alternative manner of dealing with the proposed subject matter to which the proffered rebuttal witness would have testified. Second, the judge did not mistakenly exercise his discretion in barring the evidence, which was merely cumulative of evidence already presented in plaintiff's case in chief. Finally, even if there was error, it

was harmless. This was a relatively insignificant issue in the overall context of this trial.

Affirmed.