IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DONAND R. NESS AND RUTHETTA NESS	)	
Plaintiffs,	)	
v.	)	C.A. No. 05C-02-130 JAP
GLEN E. GRAYBEAL, M.D., AND GRAYBEAL & AKANA, P.A.,	)	
Defendants	)	

Submitted: October 29, 2008
Decided: January 16, 2009

MEMORANDUM OPINION

Francis J. Murphy Jr., Esquire, Murphy and Landon, Wilmington, Delaware, Attorney for the Plaintiffs

Dennis D. Ferri, Esquire, Morris James LLP, Wilmington, Delaware, Attorney for the Defendants

A. *Background*

This medical negligence case has been tried twice before, with both trials ending in a hung jury. The alleged negligence occurred during the treatment of Donald Ness for injuries he received from a fall. Mr. Ness died after this suit was filed from causes unrelated to the events giving rise to this suit. The plaintiffs are his widow (who brings a loss of consortium claim) and Mr. Ness's son in his capacity as the executor of Mr. Ness's estate (who brings the survival action). The defendant is Glenn Graybeal, M.D. and his professional corporation.[1] The instant dispute arises from plaintiffs' request (which defendants oppose) to call Blaine Wright, Mr. Ness's grandson, as a witness in the third trial. Mr. Wright was not listed as a witness on the previous pretrial orders.

On May 19, 2003 Mr. Ness, fell approximately 15 feet while descending a ladder after cleaning the roof of his home. Mr. Wright, who was at the Ness home at the time, did not see his grandfather fall but was alerted to the fall by neighbors. He immediately called 911 and relayed information from Mr. Ness to the 911 dispatcher. Of particular importance here is Mr. Ness's complaint of neck pain which Mr. Wright allegedly repeated to the dispatcher.

[1] David Foley, M.D. was named as a defendant. Plaintiffs claimed that Dr. Foley was the apparent agent of Bayhealth Medical Center, which was also named as a defendant. The jury in the first trial found in favor of Dr. Foley, thus terminating the claims against Bayhealth predicated upon the alleged agency of Dr. Foley. This Court granted a motion by Bayhealth seeking a ruling that Dr. Graybeal was not the apparent agent of Bayhealth, thus ending the plaintiffs' claims against Bayhealth.

Mr. Ness was taken to the emergency room at Milford Memorial Hospital where he was examined by Dr. Graybeal. In a deposition taken before he died, Mr. Ness testified that he told Dr. Graybeal he felt like he had suffered a "pinched nerve" in his neck. At trial, Dr. Graybeal flatly denied that Mr. Ness made him aware of any neck pain or injury.[2] After examining Mr. Ness and reviewing a report of x-rays which were taken at Dr. Graybeal's request, Dr. Graybeal allowed Mr. Ness to return home.

Later the same day Mr. Ness complained of pain, whereupon he was taken to the emergency room for a second time. This time he was admitted for an overnight stay for pain control and was discharged the following morning by Dr. Graybeal. The night after that discharge Mr. Ness was taken to the emergency room for the third time. During this visit he manifested signs of cervical cord syndrome and was flown to Thomas Jefferson University Hospital where he underwent surgery. According to plaintiffs the surgery, which was intended to relieve the compression of Mr. Ness's cervical spinal cord, was performed too long after the initial injury and, as a consequence of the delay, Mr. Ness suffered quadriplegia.

Plaintiffs allege that Dr. Graybeal negligently treated Mr. Ness during his first visit to the emergency room as well as during Mr. Ness's second visit and the ensuing overnight stay at the hospital. With respect

[2] Trial transcript 4/16/08 at 18.

to Mr. Ness's initial visit to the emergency room, plaintiffs generally claim that Dr. Graybeal was negligent because he purportedly failed to diagnose and treat the evolving cervical cord syndrome. Plaintiffs contended at both previous trials that had Dr. Graybeal diagnosed a cervical herniation and torn cervical ligament during Mr. Ness's first visit to the emergency room, surgical intervention could have been done in time to avoid the quadriplegia which ultimately befell Mr. Ness. For his part, Dr. Graybeal contends his examination and treatment of Mr. Ness were appropriate under the circumstances. He also denies that his treatment proximately caused any harm to Mr. Ness.

The primary factual issue with respect to Dr. Graybeal's care during the initial emergency room visit is whether Dr. Graybeal was made aware that Mr. Ness was experiencing neck pain or had suffered a neck injury. Heretofore the plaintiffs have relied primarily upon the deposition testimony of Mr. Ness that he told Dr. Graybeal in the emergency room, testimony that was contradicted by Dr. Graybeal.
They contend that Mr. Wright's testimony strongly corroborates Mr. Ness's deposition testimony.

The exact scope of Mr. Wright's anticipated testimony is not entirely clear from plaintiffs' moving papers but it is possible to discern more about the scope of this testimony from a supplemental interrogatory answer served by plaintiffs. According to that answer Mr. Wright would testify that his grandfather was complaining of neck pain

as he lay on the ground after the fall and that Mr. Wright conveyed this to the 911 dispatcher. He is also expected to testify that Mr. Ness "kept groaning that his neck and back hurt" and that he was lapsing in and out of consciousness. Plaintiffs state they anticipate Mr. Wright would further testify that he was "shocked" when Mr. Ness returned from the hospital roughly two hours later and that Mr. Ness's legs were "not working right." Finally, they expect Mr. Wright will tell the jury that prior to the accident Mr. Ness was an active man.

B. Analysis

The analysis here focuses on Civil Rule 16 which governs pre-trial orders. Mr. Wright was not listed as a witness in the pretrial order and, in effect, plaintiffs are asking the Court to modify the pretrial order so as to add him as a witness.[3] Two recent opinions from the Delaware Supreme Court inform this Court's analysis of the issue. In *Wright v. Moore,*[4] the Court concluded it is necessary to weigh any "manifest injustice" to the moving party against any prejudice resulting to the non-moving party. Shortly after *Wright* the Supreme Court announced in *Cuonzo v. Shore*[5] four factors to be considered by a trial court when deciding whether to modify a pre-trial order. Neither *Wright* nor *Cuonzo*

[3] It is important for the moving party to recognize the procedural context in which its application arises and bring it to the attention of the trial court. "When a party fails to formally move for modification [of the pretrial order], it neglects to focus the trial court's attention on the factors informing on the amendment determination and generally prevents the creation of an adequate record as to the other four factors, thus limiting our effectiveness in reviewing the trial court's decision." *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1223 (10th Cir. 2000).
[4] 953 A.2d 223 (Del. 2008).
[5] 958 A.2d 840 (Del. 2008).

expressly requires or permits the trial courts to consider the importance of the evidence to be excluded when making this determination. On the other hand neither expressly precludes such consideration. This Court must determine, therefore, the role that the importance of the evidence subject to exclusion plays in the *Wright - Cuonzo* analysis. For the reasons which follow, this Court concludes that it is obligated to take that factor into consideration when making the determination whether to modify a pretrial order.

1. *The teachings* of Wright *and* Cuonzo

In *Wright v. Moore*[6] an unsuccessful personal injury plaintiff had obtained a reversal of a judgment for the defendant. On remand the plaintiff sought to introduce new evidence at the second trial of actual medical expenses incurred between the first and second trial. The Superior Court denied this request, whereupon the plaintiff sought, and the Supreme Court accepted, an interlocutory appeal.

The Supreme Court framed the issue on the interlocutory appeal in *Wright* in terms of Civil Rule 16 and whether the trial court properly refused to modify the pretrial order. According to the *Wright* court, "there is no absolute bar in Delaware to admitting new evidence in a second trial after reversal and remand."[7] Rather, Rule 16 permits a trial court to amend a pretrial order

[6] 953 A.2d 223 (Del. 2008).
[7] *Id*. at 226.

to permit new evidence, but according to the Rule it may do so "only to prevent manifest injustice." The *Wright* court concluded, therefore, that the guiding principle is whether the refusal to modify a pretrial order constitutes a manifest injustice which injustice "must be balanced against any contention [by the nonmoving party] that to do so would unfairly prejudice [the nonmoving party]."[8]

A few weeks after *Wright* the Supreme Court had occasion to provide instruction on how trial courts are to determine the existence of manifest injustice in the context of a motion to modify the pretrial order. In *Cuonzo v. Shore*[9] the Superior Court excluded several photographs in a motor vehicle accident case on the basis that they were not properly identified in the pretrial order. On appeal the Court again expressed the view that "manifest injustice" is the focal point of the analysis. Citing its holding in *Green v. Alfred I. DuPont Institute,*[10] the Court identified four factors which a trial judge should consider when determining whether the moving party has demonstrated manifest injustice:

> (1) the prejudice or surprise in fact of the party against whom the proffered documents would have been submitted;
>
> (2) the ability of the party to cure the prejudice;
>
> (3) the extent to which waiver of the rule against admission of unlisted documents would disrupt the orderly and efficient trial of the case or of other cases in the court; and
>
> (4) bad faith and willfulness in failing to comply with the court's order.[11]

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[8] *Id.*.
[9] 958 A.2d 840 (Del. 2008).
[10] 759 A.2d 1060 (Del. 2000).
[11] *Cuonzo*, 958 A.2d , at 845-46.

These factors are frequently employed by the Federal courts when determining whether there is "manifest injustice" under the nearly identically worded portion of F.R. Civ. Pro 16. They first appeared in 1977 in *Meyers v. Pennypack Woods Home Ownership Ass'n*[12] and are frequently referred to as "the *Pennypack* factors."[13]

The factors adopted in *Cuonzo* do not on their face require the trial judge to assess the importance of the evidence which would be excluded if the pretrial order is not modified. Factors (1) and (2) relate exclusively to the prejudice to the non-moving party and the ability of that party to cure the prejudice; factor (3) concerns only the orderly administration of the case, and (4) focuses on the conduct of the moving party in failing to include the witness or evidence in the pretrial order. But, our Supreme Court has recognized that "manifest injustice" is a distinct concept from the absence of prejudice. As noted previously, in *Wright* it held that the injustice must be balanced against any prejudice to the non-moving party.[14] The question becomes, therefore, whether the Supreme Court intended to preclude assessment of the importance of the potentially excluded evidence in *Cuonzo* or whether, under *Wright*, the lower courts are still required to consider that factor. For the following reasons this

[12] 559 F.2d 894, 904 (3d Cir. 1977) *overruled on other grounds, Goodman v. Lukens Steel Co*., 777 F.2d 113 (3d Cir. 1985), *aff'd*, 482 U.S.. One court traced the rule to *Spray-Rite Service Corp. v. Monsanto*, 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984). *Bristol Steel & Iron Works v. Bethlehem Steel Corp*., 41 F.3d 182 (4th Cir. 1994). But the *Spray-Rite* itself cited *Pennypack* as the source of the rule.
[13] *Velez v. OVC, Inc*., 2004 WL 1175726 (E.D. Pa. May 25, 2004) (stating that factors had become known as "the *Pennypack* factors").
[14] *Wright*, 953 A.2d at 226.

Court concludes that it must consider the importance of the evidence to be excluded when applying *Cuonzo.*

2. *This Court must consider the importance of the evidence to be excluded*

It is important to note at the outset that nothing in *Cuonzo* suggests that the Supreme Court intended to forbid the lower courts from considering the importance of the evidence to be excluded. A fair reading of *Cuonzo* in this regard is limited to the conclusion that the lower courts must, at a minimum, consider the so-called *Pennypack* factors. The Court's silence in *Cuonzo* on whether lower courts should also consider the importance of the issue is best understood in light of the fact that neither party in *Cuonzo* presented the issue in their briefs to the Court. Given the Court's traditional reluctance to decide issues not argued before it,[15] it is not surprising that the Court did not mention consideration of the importance of the evidence. Finally, the notion that the Supreme Court impliedly overruled its *Wright* decision just weeks after announcing that decision defies both common sense and the Court's own operating procedures.[16]

There is substantial reason to believe from other Supreme Court opinions that the Court did not intend to forbid consideration of the

[15] *See, e.g., Flamer v. State*, 953 A.2d 130,134 (Del.2008)) (holding that "the failure of a party appellant to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal").
[16] The Supreme Court Internal Operating Procedures call for a hearing *en banc* "when there is a reasonable likelihood that a prior decision of this Court may be modified or overruled. (I.O.P VII (4)). *Cuonzo* was heard by a panel of three Justices.

evidence to be excluded. The Supreme Court seemingly endorsed consideration of that factor in *Green v. Alfred I. DuPont Institute of the Nemours Foundation*. As mentioned earlier, the Supreme Court introduced the *Pennypack* factors to Delaware jurisprudence in *Green.*[17] In *Green* the Court was confronted with the exclusion of expert testimony in a medical negligence case. It applied the *Pennypack* factors and concluded that the Superior Court abused its discretion in excluding the expert testimony. Before doing so, however, the Court was careful to note the importance of the excluded testimony and concluded that when "the excluded evidence goes to the very heart of plaintiffs' case and might well have affected the outcome of the trial, the exclusion of the evidence warrants a new trial, even if there was other evidence of the same general character."[18] The significance of the importance of the evidence to the holding in *Green* was later emphasized by the Supreme Court when it wrote:

> Underlying our ruling in *Green* is the principle that a litigant has the right to introduce all relevant evidence ... which goes to 'the very heart' of a case and could affect the outcome of the trial.[19]

This Court concludes, therefore, that consideration of the importance of the evidence subject to exclusion is permitted, if not required, by our Supreme Court precedent.

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[17] The Supreme Court in *Green* did not mention *Pennypack* by name, but instead cited to *Smith v. Rowe*, 761 F.2d 360, 365 (7th Cir. 1985). The genealogy of *Smith v. Rowe* demonstrates in short order that *Smith's* original ancestor is *Pennypack*: the *Smith* court cited *Spray-Rite*, 684 F.2d at 12451226 which cited *Pennypack* as the source of the rule.

[18] *Green*, 759 A.2d at 1063 (internal quotation marks omitted).

[19] *Barrow v. Abramowicz*, 931 A.2d 424, 430 (Del. 2007).

Other jurisdictions have allowed or required consideration when confronted with the issue at hand. *Pennypack* itself, as well as its progeny, show that the *Pennypack* factors were never intended to foreclose consideration of the importance of the evidence subject to exclusion. The Pennypack court noted that in this context the case law requires court to "consider the importance of the excluded testimony."[20] Thus the very source of the rule adopted by our Supreme Court recognizes the importance of considering the significance of evidence subject to exclusion. Since *Pennypack* the federal courts within the Third Circuit have consistently acknowledged the importance of assessing the significance of the evidence subject to exclusion when applying the *Pennypack* factors.[21] Indeed at least one district court has simply added the importance of the evidence as a new first factor in the Pennypack analysis.[22] Other federal courts have followed suit, requiring or allowing consideration of "the importance of the testimony of the witness,"[23] whether the evidence goes "to the crux of the case,"[24] and whether there would be a "manifest injustice in the absence of modification."[25] The Second Circuit has held that "[t]his

[20] *Pennypack*, 559 F.2d at 904.
[21] *Allen v. Parkland Sch. Dist.*, U.S. App. LEXIS, 9671, at *13 (3d Cir., Apr. 23, 2007) ("We also consider the importance of the excluded testimony); *Quinn v. Consolidated Freightways Corp.*, 283 F.3d 572, 577 (3d Cir. 2002).
[22] *ESA Mgmt, Inc. v. Kendall/Virginia, Inc.*, 2006 WL 5347764, at *2 (E.D. Pa. Feb 7, 2006).
[23] *Murphy v. Magnolia Elec. Power Ass'n*, 639 F.2d 232, 235 (5th Cir. 1981).
[24] *Citizens Bank of Batesville, Ark. v. Ford Motor Co.*, 16 F.3d 965, 967 (8th Cir. 1994).
[25] *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1108 (10th Cir. 1998).

analysis [functionally the same as Pennypack] requires the district court to consider the importance of the testimony to the case."[26] One treatise observed, in the analogous context of exclusion of expert testimony that courts should consider:

> "the explanation, if any, for the failure to name the witness, the importance of the testimony of the witness, the need for time to prepare to meet the testimony, and the possibility of a continuance."[27]

In sum, most, if not all jurisdictions which have considered the issue either allow or require trial courts to consider the importance of the evidence to be excluded when applying the *Pennypack* factors.

The conclusion is, in the Court's view, undeniable that not only does *Cuonzo* not prohibit trial courts from considering the importance of evidence subject to conclusion but also that the lower courts are required to take that into consideration in order to fulfill their obligation under *Wright.*

C. *Application of the factors to the facts of this case*

The criteria are easily satisfied here. The proposes testimony of Mr. Wright is directly related to what is perhaps the central factual issue in this case. Mr. Ness testified in his deposition that he told Dr. Graybeal about the pain in his neck whereas Dr. Graybeal denies being given any such information. It appears that at least some of the expert testimony

[26] *Outley v. City of New York*, 837 F.2d 587, 590 (2d Cir. 1988).
[27] 8 C. Wright & A. Miller, *Federal Practice and Procedure* §2050 at 327 (1970).

on the standard of care hinges upon which version the jury accepts. The trial judge who presided over the first two trials underscored the significance of this factual dispute, writing:

> The issue of neck pain is central to the medical negligence claim in this case, and has always been a matter of fact dispute.[28]

It goes almost without saying that Mr. Ness's complaints of neck pain to his son corroborates his deposition testimony that he made the same complaint to Dr. Graybeal. The Court concludes that this evidence goes to the crux of the matter and is likely critical to plaintiff' theory of the case.

Turning to the factors applied in *Cuonzo*, the Court finds that none of them militate in favor of exclusion:

(1) *Prejudice or surprise*

Mr. Wright's existence was well known to defendant through earlier discovery in this case. Further, the audio tape of Mr. Wright's call to 911, which was produced during discovery, provides detailed information on the conversation between Mr. Ness and Mr. Wright which took place during Mr. Wright's call.[29] Thus, there is no surprise to Dr. Graybeal. Likewise there is no prejudice to defendant if Mr. Wright is allowed to testify. Because of an illness of one of the parties, the third trial of this matter is scheduled to begin June 15, 2009. There is therefore ample

[28] D.I. 214, 10/30/07 ltr opinion.

[29] It is not entirely clear from the voluminous record in this case, but it appears that the audio tape of this phone call was excluded by this Court on heresay grounds. Upon proper motion the Court will reconsider its ruling in light of Mr. Wright's availability.

time for defendant to conduct whatever discovery is necessitated by allowing Mr. Wright to testify. Dr. Graybeal asserts that he will be prejudiced because he will need to incur the cost of deposing Mr. Wright. This Court questions whether the cost of deposing a witness in Delaware can ever amount to legally cognizable prejudice. However it need not reach this issue. The late designation of Mr. Wright as a witness will result in no additional cost to defendants because if Mr. Wright had been listed as a witness in the pretrial order, defendant would have presumably incurred this cost anyway albeit at an earlier stage of the proceedings.

(2) *Dr. Graybeal's ability to cure any prejudice*

As noted above, Dr. Graybeal has ample opportunity to cure any conceivable prejudice occurring as a result of allowing Mr. Wright to testify.

(3) *The effect on the administration of justice*

Allowing Mr. Wright to testify will not delay the trial and has no effect on the Court's administration of its docket.

(4) Bad faith and willfulness by plaintiffs

The Court is not faced here with the old hidden ball trick. The existence of, and knowledge possessed by, Mr. Wright was fully disclosed to defendant early in the case. Plaintiffs explain, and the Court accepts,

that Mr. Wright moved away and his whereabouts were unknown to the family. The Court, therefore, does not ascribe any bad faith to plaintiffs.

Conclusion

Mr. Wright's testimony relates to a key factual dispute in this case. When balanced against the virtual absence of prejudice to the defendant and considering the *Pennypack* factors as set forth by the Supreme Court in *Cuonzo*, the Court concludes that in order to prevent a manifest injustice the pretrial order will be modified to permit Mr. Wright to testify.[30] **SO ORDERED**.

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John A. Parkins, Jr.
Superior Court Judge

cc: Prothonotary

[30] Nothing in this opinion is intended to foreclose any objections defendants may have to all or parts of Mr. Wright's testimony under the Delaware Rules of Evidence.