

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NANCY PANARO , Executrix of the)	
ESTATE OF SYLVIA E. NEPA ,)	
)	
Plaintiff,)	
)	CIVIL ACTION NUMBER
v.)	
)	01C-02-010-JOH
J. C. PENNEY COMPANY, INC. ,)	
)	
Defendant.)	

Submitted: September 6, 2001

Argued: September 28, 2001

Decided: January 11, 2002

O P I N I O N

*Upon Defendant J. C. Penney Company, Inc. 's
Motion to In Limine - **DENIED***

Martin D. Haverly, Esq., (argued) of Martin D. Haverly, Attorney at Law, Wilmington, Delaware, attorney for plaintiff

Joseph M. Jachetti, Esq., (argued) of Law Office of Joseph Jachetti, Media, Pennsylvania, attorney for defendant

HERLIHY, Judge

Defendant J. C. Penney Co., Inc. has moved to exclude from use at trial the videotaped direct examination and partial discovery deposition of Sylvia E. Nepa, now deceased.¹ Trial of this case is scheduled for February 4, 2002.

Nepa was injured in a slip and fall incident in Penney's Prices Corner store. Shortly prior to the incident, she had been diagnosed with lung cancer. Apparently, as a result of the fall, she broke her hip and became bedridden. Prompt arrangements were made to take her deposition and, by agreement, her direct testimony was taken for trial purposes. Prior to cross-examination being done for trial purposes, counsel agreed the defense would be allowed a discovery session which would immediately follow. Subsequent to that, cross-examination for trial purposes was to be taken. All of this was apparently to be accomplished in one session.

Before the defense discovery deposition was completed, however, Nepa became physically unable to continue. Efforts to reschedule were unsuccessful. She died several weeks later without the discovery deposition being completed and without trial cross-examination testimony being recorded. The issue is whether, without cross-examination being completed, her direct testimony trial deposition is admissible. The Court holds that it is and Penney's motion is **DENIED**.

FACTS

On February 2, 2001, Nepa, then 78, filed a complaint for a slip and fall that occurred October 16, 2000 in the hair salon in Penney's store. At the time of the fall, Nepa

¹Nancy Panaro, Nepa's daughter, is now pursuing this action.

had terminal lung cancer. Following the fall, Nepa was taken by ambulance to Christiana Hospital where she underwent surgery and some physical rehabilitation. After a period of time (not in the record at this point), she was taken to Churchman's Village, a nursing home. She was bedridden from the October 16th incident to her death.

The complaint alleges the fall was due to freshly cut hair on the floor. The asserted defenses include comparative negligence, the lack of proximate cause of the injuries, assumption of risk and failure to mitigate. Because her physical condition was worsening, a deposition of Nepa was originally scheduled for March 16, 2001 but was rescheduled because new defense counsel had entered the case and did not have adequate time to prepare. The rescheduled deposition took place on March 23, 2001 at Churchman's Village.

In advance, counsel agreed the deposition would be conducted as follows: plaintiff's counsel was to conduct a videotaped deposition to be used as direct examination at trial. Following that, Penney's counsel was to conduct a discovery deposition followed by a videotaped deposition that was to be used as cross-examination at trial. The videotaped direct examination was completed covering the circumstances of Nepa's fall, her medical situation since and effect on her life. It lasted about twenty minutes. It was followed by Penney's oral discovery deposition that was not completed. Before defense counsel completed his questioning, Nepa became physically unable to continue. At that time, defense counsel had undertaken about 1½ hours of the discovery deposition. He covered in detail circumstances of her fall and other conditions in the hair salon, some of her health history and other matters. A lot of time was consumed going over names of treating doctors.

Defense counsel reserved the right to continue the examination at a future date at a time to be scheduled.

Nepa's deposition was scheduled to resume April 6, 2001. It was canceled the night before because she was not well enough to testify and she died April 8, 2001. Penney was unable to complete Nepa's oral deposition or conduct any videotaped cross-examination.

DISCUSSION

The civil rules of this Court provide that a deposition of a party may be used for trial:

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds (A) That the witness is dead; . . .²

Since Nepa is deceased, her deposition qualifies under this rule. Further, the rules of evidence provide that a deposition of a deceased witness can be used at trial:

(a) *Definition of unavailability.* Unavailability of a witness includes situations in which the declarant:

* * *

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity;

* * *

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a

²Superior Court Civil Rule 32(a)(3).

predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.³

The issue raised is whether the depositions, particularly the direct testimony taken for trial purposes, should be barred since the discovery cross-examination was not completed and since there is no cross-examination testimony taken for trial purposes. While not complete, there is no question that Penney's counsel had the motive and opportunity to cross-examine Nepa. He did so for nearly an hour and a half.

D.R.E. 804(b)(1) tracks F.R.E. 804(b)(1). F.R.E. 804(b)(1) allows deposition testimony to be admitted at trial if the opponent had an opportunity and motive to develop the testimony by direct, cross, or redirect examination. The federal rules also allow the testimony if there was an opportunity to develop, not necessarily complete, the testimony. Comment 1 of F.R.E. 804(b) states that any conflict should be resolved in favor of admissibility. Comment 2 states that only opportunity is required; there need not be actual examination. Comment 2 goes on to state that it need not have been an opportunity for cross-examination; direct examination suffices. Since the use of the Nepa trial deposition is permitted by D.R.E. and Superior Court Civil Rule 32, an issue remains whether the depositions are barred since Penney's right of confrontation or cross-examination was foreshortened by Nepa's death.

The plaintiff cites *Derewecki v. Pennsylvania Railroad Co.*,⁴ as support for the proposition that the diminution of cross-examination, as here, does not bar use of the

³D.R.E. 804.

⁴3rd Cir., 353 F.2d 436 (1965).

deposition. In that case, the court weighed the right of cross-examination against the right of the estate to maintain the suit since the sole direct evidence of how the accident occurred was contained in the deceased plaintiff's deposition.⁵ The Court found that it was not error to admit the deposition under the circumstances. It held that the right of cross-examination was not infringed to the degree which would bar the use of the depositions at trial. Essentially, the Court noted, the deceased plaintiff had provided enough information about where the accident occurred that little else could be gained by further cross-examination. One of the problems in *Derebecki* was that the railroad had no record of the incident and was unaware of it until sued and there may have been only one living witness to the incident.

The situation here is more favorable to the Nepa. There is a record of the incident. There were other witnesses present in the hair salon, some of whom may contradict her version. Other witnesses will apparently offer some support for her claim that hair was left on the floor. Nepa herself was examined in detail in her direct trial testimony about the circumstances of her fall. She was examined in greater detail about those circumstances during the defense's discovery deposition.

As to her injuries and general medical condition before and after the fall, plenty of medical records admissible under D.R.E. 803(b) exist. She was institutionalized at either Christiana Hospital or Churchman's Village from October 16, 2000 to April 8, 2001, when she died. Enough information exists to obtain medical records prior to her fall. In short,

⁵In that case, the plaintiff could not complete a discovery deposition due to illness and died before the Railroad finished questioning him. The deposition was admitted at trial over its objections. Fed. R. Civ. P. 26(d)(3), relied on by this Court, is identical to Superior Court Civil Rule 32(a)(3)(A).

Penney's right to cross-examination would not be infringed to an improper degree by use of the deposition(s).

In another case, Judge Seitz for the Third Circuit addressed the issue of the loss of the right of cross-examination in a civil case. The defendant in *Treharne v. Callahan*,⁶ was involved in a two-car accident. Prior to trial, the defendant answered interrogatories about how the accident occurred. But, before further discovery was undertaken, the defendant died. He and the plaintiff were the only two witnesses able to describe how the accident occurred. The Court of Appeals affirmed the District Court's decision to admit the answers to the interrogatories. Among other objections the plaintiff raised was the loss of the right of cross-examination, of which, unlike here, there was no cross-examination. In addressing the issue of the right of cross-examination, the court said:

Although plaintiffs propounded the questions, it is clear to us that they were not thereby afforded adequate cross-examination. Thus, the situation here is analogous to that presented when a party testifies on direct examination at trial but dies before the opposing party can cross-examine him. The evidence question in such situations is whether the direct testimony should be stricken.

At the outset of our analysis of this issue, we recognize the legal and practical importance of the right of cross-examination. Wisely employed it is perhaps the most powerful weapon in the arsenal of the lawyer in pursuit of the whole truth. Nevertheless, we think that at least in civil cases the right is not so all pervasive that it automatically forecloses the possibility that competing considerations may be of equal magnitude. For example, the loss of plaintiffs [sic] right of cross-examination in

⁶3rd Cir., 426 F.2d 58 (1970).

our case must be weighed against the loss of defendant's day in court.⁷

Wigmore addresses circumstances where the witness' death or illness intervenes to prevent or to curtail cross-examination.

Where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judges to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult issue; except that, by general concession, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished.

Where, however, the failure to obtain cross-examination is in any sense attributable to the *cross-examiner's own consent or fault*, the lack of cross-examination is of course no objection - according to the general principle that an opportunity, though waived, suffices.⁸

McCormick also discusses the admissibility of testimony of a witness who dies before the cross-examination is conducted.

Here again it is usually said that the party denied cross-examination is entitled to have the direct testimony stricken, unless presumably, the death occurred during a postponement of the cross-examination consented to or procured by that party. In the case of death, there is no adequate reason for striking the direct testimony, except that exclusion may well be constitutionally compelled if the witness was a state's witness in a criminal case. It has been suggested that striking the direct should be discretionary. That suggestion has merit. No matter

⁷*Id.* at 62 [Citations omitted].

⁸5 Wigmore, Evidence §1390 at 134-36 (Chabourne rev. 1974).

how valuable cross-examination may be, common sense tells us that the half-loaf of direct testimony is better than no bread at all.⁹

Defense counsel was unable to videotape, for trial purposes, a cross-examination of Nepa before her testimony was discontinued. The inability of Nepa to continue with questioning, however, was not due to any fault of her own or her counsel. Although a cross-examination was not videotaped for the jury, defense counsel was able to conduct nearly one and a half hours of cross-examination questions in the discovery deposition. This examination substantially accomplished Penney's goals in that it thoroughly examined the liability aspect and some of the damages issues in the case.¹⁰

It is true that Penney's lost the chance to ask each and every question desired. However, this is not a material loss. It still has the ability to put on an adequate defense. Penney can attack the credibility of Nepa's testimony. It can put on a variety of other lay and expert witnesses to contradict both liability and damages. And, an appropriate jury instruction can be given at trial.

Weighing the consideration that Penney's has the adequate means to defend this lawsuit against the fact that exclusion of the direct and partial discovery deposition would lead to a judgment against Nepa, the testimony will be allowed and an appropriate cautionary instruction will be given at trial.

⁹5 McCormick, Evidence, 5th Ed., §19 at 90 (Strong 1999).

¹⁰Defense counsel was able to ask detailed questions about Nepa's medical history of the ten years before the accident, the step-by-step events of the day in question and the circumstances of the fall.

CONCLUSION

Based on the foregoing, the motion *in limine* of defendant J. C. Penney Company, Inc. to exclude the deposition of Sylvia Neap is **DENIED**. The parties are hereby ordered to submit this matter to mediation.