COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Suffolk, SS. A.C. No. 2018-P-0374

LESLIE HEDBERG AND PETER HEDBERG, M.D., Appellants

v.

MAY WAKAMATSU, M.D., Appellee

On Appeal From A Judgment of the

Suffolk County Superior Court

Brief for the Plaintiffs-Appellants Leslie Hedberg and Peter Hedberg, M.D.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGLUATIONS

OTHER AUTHORITIES

RULES

STATEMENT OF ISSUES

Whether the Superior Court properly excluded testimony and evidence at trial regarding statements made to the Plaintiff-Appellant Leslie Hedberg (hereinafter "Mrs. Hedberg") by a medical student, Davis "Mac" Stephen (hereinafter "Mr. or Dr. Stephen"), following and relating to her surgery on May 16, 2012 by the Defendant-Appellee, May Wakamatsu, M.D. (hereinafter "Dr. Wakamatsu").

STATEMENT OF THE CASE

This is a medical malpractice claim relating to a vaginal hysterectomy performed on Mrs. Hedberg, a registered nurse, by Dr. Wakamatsu on May 16, 2012, resulting in severe, ongoing and permanent injury to Mrs. Hedberg. (Record Appendix ("R.A.") I at 11-14). Plaintiffs-Appellants (hereinafter "The Hedbergs") alleged that Dr. Wakamatsu failed to ensure that Mrs. Hedberg's legs were properly placed in the dorsal lithotomy position for the duration of the surgery, and that no excess pressure was placed on Mrs. Hedberg's left leg during surgery. (R.A. I at 314). They alleged that this negligence caused an over-flexion of Mrs. Hedberg's left hip and stretching of her sciatic nerve during the procedure resulting in a

severe and permanent injury to her sciatic nerve.[1] (R.A. I at 297, 305-306, 313, 316). As a result of Dr. Wakamatsu's negligence and Mrs. Hedberg's resulting nerve injuries, the Hedbergs alleged that Mrs. Hedberg suffered significant ongoing pain and disability and development of complex regional pain syndrome. (R.A. I at 263-264).

The Hedbergs filed their Complaint on March 31, 2015. (R.A. I at 11-14). A jury trial was conducted beginning on December 5, 2017. (R.A. I at 185). On December 15, 2017, the jury found that Dr. Wakamatsu was not negligent in her care and treatment of Mrs. Hedberg. (R.A. II at 262) This appeal arises out of a judgment entered against the Hedbergs on January 8, 2018 following that verdict. (R.A. II at 264)

Prior to trial, Dr. Wakamatsu moved in limine to exclude testimony and related evidence regarding statements made to Mrs. Hedberg by Mr. Stephen. (R.A. I at 15-34). Dr. Wakamatsu filed supplemental briefs in support of this motion. (R.A. I at 144-167, 182-

[1] Additionally, the Hedbergs alleged that Dr. Wakamatsu negligently placed uterosacral sutures during surgery causing direct injury to Mrs. Hedberg's pudendal nerve, and negligently failed to timely recognize and remove the left suspension sutures to decrease further injury. (R.A. I at 265-266). That allegation is not relevant to the specific issues in this appeal.

184; II at 145-149).[2] The statements at issue related to the cause of Mrs. Hedberg's injury during the surgery, and that the medical student may have been leaning against her leg during the procedure. (Id.). Dr. Wakamatsu argued that the statements were hearsay. (Id.). The Hedbergs opposed the motions to exclude this evidence and argued that the statements were not hearsay pursuant to Mass. G. Evid. §801(d)(2)(D)(2018) as a statement made by the party's agent within the scope of that relationship and while it existed. (R.A. I at 52-90, 126-141, 168-181; II at 142-144); (Addendum("Add.")at 24). The Hedbergs also argued that the statements were probative of central issues in the case and exclusion of that evidence would be unfairly prejudicial. (Id.).

After multiple hearings, the Superior Court (Brieger, J.) allowed the motions to exclude and/or to

[2] Dr. Wakamatsu initially filed a motion in limine to preclude the testimony on November 16, 2017. (R.A. I at 15-51). After Mr. Stephen's audiovisual trial testimony was taken on November 21, 2017, Dr. Wakamatsu also filed a separate motion to strike portions of that testimony on November 28, 2017 arguing that the testimony made reference to the hearsay statements and that certain questions were improperly leading. (R.A. I at 35-51). Appellants opposed both of the motions for the reasons stated above and on the grounds that the questions were proper. (R.A. I at 91-97, 142-143).

strike the evidence. (R.A. I at 7-8). The Court held that the medical student was not an agent of Dr. Wakamatsu and that the statements he made to Mrs. Hedberg were not authorized by Dr. Wakamatsu.[3] (R.A. I at 294-295). The Court held that the statements, therefore, were hearsay and precluded the testimony relating to the statements by Mrs. Hedberg and questions to the medical student regarding such statements. (R.A. I at 186-187, 295). The Court also held that the specific questions in Mr. Stephens' trial deposition were based on these out of court statements and were not admissible. (R.A. I at 186, 295).

The Hedbergs filed a motion for reconsideration of these decisions on December 11, 2017 and argued again that the statements were not hearsay and also that they were admissible as statements against interest.[4] (R.A. II at 109-113). Dr. Wakamatsu opposed

[3] These were the arguments set forth by Dr. Wakamatsu in response to the Hedberg's position.

[4] The Plaintiffs-Appellants made additional arguments which are not raised in this appeal relating to the admissibility of the statements, including that they were admissible as prior inconsistent statements because Mr. Stephen feigned a lack of memory about making the statements, and that they were additionally admissible pursuant to M.G.L. ch. 233, §79L (Mass. G.

the motion for reconsideration. (R.A. II at 114-118).

On December 13, 2017, the Court denied the motion for reconsideration and held as follows:

> "I think the first issue here is whether the medical student, Dr. Stephen, is or was an agent of Dr. Wakamatsu for the purposes of the hearsay rule, and I think that the case law just does not convince me that that's the case. I don't think that the medical student who is perhaps operating under the supervision of Dr. Wakamatsu during the surgery rises to the level of a legal agent with respect to her statements later - - his statements later, which I don't think even if he were an agent were authorized by Dr. Wakamatsu. So I don't see under 801(d)(2)(D) that those statements come in as admissions.

(R.A. II at 152); (Add. at 24). In its holding, the Court further noted in the context of Mass. G. Evid. §409(c):

> "… I think what happened here, from what I can tell, is that a very upset and a very well educated patient who claims to have obsessively recreated a surgery during which she was under anesthesia by recounting instruments and replaying the surgery repeatedly has a view in her mind of what happened to her, and that has merged with her reality, and it seems to me that that statement does not have any indicia of reliability to me. Now, I cannot find a way to suggest that her having

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Evid. §409(c)), the Massachusetts law governing statements and expressions of apology by a healthcare provider. (R.A. II at 109-113).

> thought he made it unrecorded, unwitnessed is sufficient to overcome the failure to recall it at all by the medical student."

(R.A. II at 153-154).

Before returning the verdict in the case, the jury had one question for the Court. (R.A. II at 263). That question was as follows: "Can we have equipment to review and play testimony ~~of Mac~~."[5] (Id.). Immediately following the Court's denial of this request, the jury returned a verdict for Dr. Wakamatsu on December 15, 2017. (R.A. II at 262). The Hedbergs filed their Notice of Appeal on January 8, 2018 and then filed an Amended Notice of Appeal on February 7, 2018. (R.A. I at 10).

STATEMENT OF FACTS

On May 16, 2012, Mrs. Hedberg was admitted to Massachusetts General Hospital ("MGH") where she underwent surgery by Dr. Wakamatsu, including a vaginal hysterectomy. (R.A. I at 196). A resident, Jessica Opoku-Anane, M.D., and a medical student, Mr. Stephen, assisted with the surgery. (R.A. I at 196, 199). Mrs. Hedberg was placed in stirrups in the dorsal lithotomy position for the duration of the

[5] The reference to "Mac" was to Mr. Stephen's nickname. (R.A. II at 68).

procedure, which lasted approximately three hours and forty-five minutes. (R.A. I at 196, 199-201).

Following the procedure, Mrs. Hedberg immediately complained of pain, numbness and tingling in her left leg/foot. (R.A. I at 204). On May 17, 2012, Dr. Wakamatsu examined Mrs. Hedberg. (R.A. I at 207). She noted left leg/foot pain and ordered a neurology consult. (Id.). On that same day, a neurologist assessed the symptoms as "likely partial injury to sciatic nerve, either by stretching (positional) or possibly due to superficial stitching." (R.A. I at 211-212). Neurological examination findings were discussed with Dr. Wakamatsu and an MRI was ordered to assess the sciatic nerve. (R.A. I at 212-213). Dr. Wakamatsu then documented that it was "more common for patients to experience paresthesias from nerve stretch/ischemia so [symptoms] should resolve [with] time." (R.A. I at 213).

On May 17, 2012, Mrs. Hedberg was seen by Mr. Stephen and Dr. Opoku-Anane. (R.A. I at 209). Mr. Stephen documented that Mrs. Hedberg reported tingling/pain in her left lower extremity and that she had 9/10 pain in the dorsum of her foot and 9/10 pain in the pelvic region. (Id.). Mr. Stephen documented,

and Dr. Opoku-Anane agreed, that there was "paresthesia prominent in left lower extremity and bicep femoris with pain to palpation consistent with neuropathy likely in setting of position during vaginal surgery." (Id.).

Mrs. Hedberg submitted an Affidavit during the litigation, which was dated May 9, 2016, and testified at deposition on January 25, 2017 that Mr. Stephen came to check on her the day after surgery, on May 17, 2012, because he heard she complained of leg pain post-operatively. (R.A. I at 75-76, 79). Mrs. Hedberg stated that, "After I told him that I had a horrible night in the hospital with the leg pain, he said 'I am awfully sorry, we had a hard time positioning that leg.' He said he was holding retractors and may have been leaning against my leg. He then said, 'I am so sorry Mrs. Hedberg, I am so sorry.'" (R.A. I at 75, 79).

At trial, as part of an Offer of Proof, Mrs. Hedberg testified on December 7, 2017 as follows:

Q: Do you recall being seen by the medical student?
A: Yes.
Q: Were you alone with him?
A: Yes.
Q: Do you remember his name?

A: Yes. Davis Mac Stephens, but he said to call me Mac.
Q: And do you recall if he during that meeting said anything to you about what happened during the surgery?
A: Yes.
Q: What did he say?
A: He said that they had difficulty positioning my leg and that he may have been leaning on my leg.
Q: And did he say that to you as he was assessing your complaints of pain?
A: Yeah, I told him what a horrible night of pain that I had –
THE COURT REPORTER: I told him –
THE WITNESS: I told him what a horrible night of pain that I had and that's when he said, well, I'm really sorry, Mrs. Hedberg, but we had a tough time positioning the left leg, and I may have been leaning on it.
Q: Did he say anything to you about praying for you or apologizing?
A: Yeah. Yes. And – and when he was leaving he said, I'll pray for you. I said, oh, wait, that's so unusual because I lived in Oklahoma for 15 years and that would have been normal, and he said he was from the next state over in Arkansas.
And so we laughed about it. And I said thank you. I appreciate that.

(R.A. II at 44-46).

Mr. Stephen testified in this case by deposition on April 13, 2017 and his audiovisual trial testimony was taken on November 21, 2017, prior to trial.[6] (R.A. I at 22, 26). Mr. Stephen testified that he was a third year medical student at Harvard Medical School

[6] Mr. Stephen is now a licensed physician and resides in Tennessee. He was not available to appear at the time of trial. (R.A. I at 23-24; II at 68).

at the time of the surgery and was on his first rotation at the hospital. (R.A. I at 23, 67). This was one of his first surgeries and was unique in that the patient had an adverse outcome. (R.A. I at 23-24, 204-234). Although Dr. Wakamatsu and Dr. Opoku-Anane both testified that they had an independent memory of their care and treatment of Mrs. Hedberg, Mr. Stephen testified that he remembered nothing about the surgery or the events after the surgery, other than a vague recollection of a conversation with Dr. Opoku-Anane regarding the neurology consult. (R.A. I at 24-29, 30-34; II at 14-38, 68, 70, 72-74, 89-96). He testified that he did not recall one way or the other discussing with Mrs. Hedberg that they had a difficult time positioning her leg, or that he was leaning against her leg during surgery. (R.A. I at 30-31, 34; II at 72-74). Significantly, he did not deny that this conversation took place or that he in fact leaned against her leg. (Id.).

Dr. Wakamatsu testified at trial that Mr. Stephen would have been positioned at Mrs. Hedberg's left lower extremity, where the sciatic injury occurred, and that he would have helped to retract the vaginal canal. (R.A. I at 70; II at 15, 17, 28-29). Dr.

Wakamatsu testified that she did not recall asking the medical student or resident to correct their positions during the procedure, and that this might have occurred, but she did not recall in this case. (R.A. II at 18-21, 23-27).

Dr. Wakamatsu admitted that an injury to the sciatic nerve can occur during the procedure in question when assistant surgeons unknowingly lean against the inner thigh of patients placing undue tension and stretch forces on the sciatic nerve. (R.A. II at 6, 8-11). She admitted that as the attending surgeon, she was responsible to make sure that this event did not occur. (R.A. II at 15, 17, 19, 32, 136-137). She testified that it would have been appropriate for this medical student to be with Mrs. Hedberg the day after surgery to take her subjective complaints, to make objective observations and to make an assessment of her condition. (R.A. II at 28-29). She testified that he would do this as "part of her team." (R.A. II at 17, 29). When asked if the medical student had her authority to do this, Dr. Wakamatsu testified that Mr. Stephen was involved in Mrs. Hedberg's care and so he rounded on her the next morning. (R.A. II at 29-30). She testified that as

part of the training of medical students, they round on patients and create notes. (R.A. II at 30-31, 33).

Mrs. Hedberg's recollection of the conversation with Mr. Stephen is corroborated by contemporaneous notes she created at and around the time of surgery. (R.A. I at 81-83). On June 19, 2012, just one month after surgery, Mrs. Hedberg documented "I don't know who to be mad at… Who was leaning on my leg or who stitched my nerve bundle???" (R.A. I at 82-83). On July 9, 2012, she documented, "[my sister] asked me what my dream was about and I told her that I was in Dr. W's office screaming at her asking her why she did this and how could she let a 3 Rd yr med student hold my retractors… So careless. I imagine him leaning his back into my L leg… Stretching my nerve without anyone noticing his mistake." (R.A. I at 83).

In the Offer of Proof at the time of trial, Mrs. Hedberg testified about these notes as follows:

Q: And about a month after that did you have an occasion to – strike that . Let me start that over again.
During this time period after the surgery did you keep notes or a diary?
A: I – you know, I wrote stuff down in my telephone. I did.
Q: And in – in those notes about a month after on June 19th, do you recall writing that you were angry and disgusted at how this has taken the quality of your life and you don't

know who to be mad at, who was leaning on your leg or who stitched your nerve bundle?
A: Yes.
Q: And that was on June 19th of 2012?
A: Yes.
Q: And do you recall on July 9, 2012, in those notes also making reference to the same conversation and saying that you had spoken to your sister about a dream you had, and you told her that you were in Dr. Wakamatsu's office screaming at her asking her why she did this and how could she let a third year medical student hold my retractors. So careless. I imagined him leaning his back into my left leg stretching my nerve without anyone noticing his mistake.
Do you recall writing that?
A: Yes, I do.
Q: And that was – and that was on July 9 of 2012?
A: If you say so. I don't recall the exact date.
Q: Well, I can show you that portion of your diary, just so we can have it accurate.
A: Yes. Yes.

(R.A. II at 46-47).

Mr. Stephen's notations in the medical record also corroborate Mrs. Hedberg's recollection of this discussion, and indicate, as he described to her, that he believed her post-operative pain to be caused by the position of her leg during surgery. (R.A. I at 209). On May 18, 2012, Mr. Stephen documented that the pain in her left lower extremity was "likely self-resolving stretch neuropathy of sciatic nerve from vaginal surgery positioning." (R.A. I at 216).

On December 14, 2012, an MRI of the pelvis at the Hospital for Special Surgery in NY revealed an injury to the left sciatic nerve and it was noted in the report that the findings "may be seen in the setting of ischemic, compressive or traction injury to the nerve." (R.A. I at 235).

Appellants alleged that Mrs. Hedberg's severe pain never improved following her May 2012 despite multiple medications, therapies and procedures over the past six years. (R.A. I at 263-264). They alleged that her condition is permanent, ongoing and debilitating. (R.A. I at 297, 305-306, 313, 316). Appellants also alleged that Mrs. Hedberg suffers from mental health conditions as a result of her pain condition, including depression and post-traumatic stress disorder.[7] (R.A. II at 80-84).

As part of their case at trial, the Hedbergs offered expert testimony on the standard of care by Richard Bercik, M.D., a physician Board Certified in Obstetrics and Gynecology and in Female Pelvic

[7] Lloyd Price, M.D., a physician Board Certified in psychiatry and called by the Plaintiffs-Appellants, testified at trial regarding Mrs. Hedberg's mental health conditions that she suffers as a result of her pain condition following her May 2012 surgery. (R.A. II at 80-84).

Medicine and an Assistant Professor in Obstetrics and Gynecology at Yale School of Medicine and a full-time clinician. (R.A. I at 271-274). Dr. Bercik opined, among other things, that Dr. Wakamatsu breached the standard of care in the positioning of Mrs. Hedberg either at the beginning of the surgery or during the surgery by failing to recognize that the position of her legs changed, including failing to ensure that no excess pressure was placed on the legs. (R.A. I at 314). He testified that the sciatic nerve stretch injury in this case, which was confirmed by MRI, would not have occurred in the absence of either excess or improper hyperflexing or somebody positioning the legs in the wrong way. (R.A. I at 305-306, 309-310, 313, 316-318).

At trial, as part of the Offer of Proof by the Hedbergs, Dr. Bercik testified that in preparing to give his opinions, he considered Mrs. Hedberg's deposition testimony, including her testimony about the medical student's statements to her after the surgery. (R.A. I at 327-329). He testified that the activity that the medical student described of leaning against her leg was the type of activity that the surgeon was required to stop. (R.A. I at 328). He

testified that this statement would have been one of the significant reasons for his conclusions that malpractice occurred in this case. (R.A. I at 329).

STANDARD OF REVIEW

The appellate court reviews a trial judge's evidentiary decisions under an abuse of discretion standard. N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 363 (2013). In applying that standard, the court looks for decisions based on whimsy, caprice, or arbitrary or idiosyncratic notions. Figgs v. Bos. Hous. Auth., 469 Mass. 354, 368 (2014). A finding of abuse of discretion is not a finding that the trial judge failed to act conscientiously, or failed to act with honesty or intelligence. L.L. v. Com., 470 Mass. 169, 185 n.27 (2014). A judge's discretionary decision constitutes an abuse of discretion where the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives. Id.; see Com. v. McCray, 40 Mass. App. Ct. 936, 937 (1996) (trial court abused its discretion in excluding as hearsay testimony by the defendant regarding statements made by victim where statements were admissible as verbal

acts and under the hearsay exception for statements of mental condition); Com v. Dentin, 477 Mass. 248, 252 (2017) (holding that trial court's admission of evidence of prior bad acts was abuse of discretion even where judge gave the issue of admissibility "careful consideration").

SUMMARY OF THE ARGUMENT

The Superior Court abused its discretion and improperly excluded as hearsay evidence the statements made to Leslie Hedberg by the medical student, Mr. Stephen, following and relating to Mrs. Hedberg's surgery on May 16, 2012.

The statements by Mr. Stephen were admissible nonhearsay pursuant to Mass. G. Evid. §801(d)(2)(D) as statements by a party's agent within the scope of the agency relationship and while it existed. (Add. at 24). At the time the statements were made, Mr. Stephen was an agent of Dr. Wakamatsu. Mr. Stephen was a medical student who, under Massachusetts law, was permitted to practice medicine only under the direction and control of his attending physician, Dr. Wakamatsu. His statements were made within the scope of the agency relationship and while it existed. The lower court abused its discretion by improperly

concluding, contrary to Massachusetts law, that Mr. Stephen was not agent of Dr. Wakamatsu and that, pursuant to Mass. G. Evid. §801(d)(2)(C), his statements were not specifically authorized by Dr. Wakamatsu. (Add. at 24). This ruling ignored Mass. G. Evid. §801(d)(2)(D), which does not require evidence that Dr. Wakamatsu authorized the specific statements at issue, but only that they were made within the scope of the agency relationship. (Add. at 24).

Further, Mr. Stephen's statements were relevant and probative of the central issue in this case – whether Dr. Wakamatsu negligently malpositioned Mrs. Hedberg during surgery by failing to prevent Dr. Stephen from leaning against Mrs. Hedberg's leg and causing a stretch injury to the sciatic nerve. The probative value of the statements far outweighed any prejudicial effect on Dr. Wakamatsu.

Additionally, in considering Mrs. Hedberg's credibility, the Court made assumptions and conclusions regarding Mrs. Hedberg's mental health that were not based in evidence. The Court's finding that the testimony by Mrs. Hedberg was not credible was an abuse of discretion.

Finally, Mr. Stephen's statements should be admissible as statements against interest, and this Court should adopt the position set forth in the Federal Rules of Evidence 804(a)(3), which provides that a declarant is "unavailable" for the purpose the statements' admissibility when the declarant testifies to not remembering the subject matter. (Add. at 26).

ARGUMENT

I. The Testimony Regarding Mr. Stephen's Statements was not Hearsay and was Admissible as a Statement by an Opposing Party's Agent.

At all relevant times, Mr. Stephen was an agent of Dr. Wakamatsu, and his statements to Mrs. Hedberg were not hearsay and were admissible at trial as an opposing party's statement "made by the party's agent or employee on a matter within the scope of that relationship while it existed." Mass. G. Evid. §801(d)(2)(D). (Add. at 24). Pursuant to §801(d)(2), statements are not hearsay and are admissible at trial when they were made:

> (C) … by a person whom the party authorized to make a statement on the subject… [***OR***]
>
> (D) … **by the party's agent or employee on a matter within the scope of that relationship and while it existed.**

Mass. G. Evid. §801(d)(2)(C), (D); see Ruszcyk v. Secretary of Public Safety, 401 Mass. 418, 424 (1988) (adopting 801(d)(2)(D) and holding that hearsay statements are admissible when made by an agent within the scope of his agency or employment). (Add. at 24). If the court finds that the statement is not hearsay pursuant to this Rule, the court must then decide whether the probative value of the statement substantially outweighs its potential for unfair prejudice. Ruszyck, 401 Mass. at 422-423; Mass. G. Evid. §801(d)(2); Mass. G. Evid. §403. (Add. at 23, 24). This determination must take into account "the particular circumstances of each case, including the credibility of the witness; the proponent's need for the evidence, e.g., whether the declarant is available to testify; and the reliability of the evidence offered, including consideration of whether the statement was made on firsthand knowledge and of any other circumstances bearing on the credibility of the declarant." Ruszyck, 401 Mass. 422-423.

A. Mr. Stephen was an Agent of Dr. Wakamatsu and Acted Under her Authority, Direction and Control at all Relevant Times.

The lower court improperly concluded that Mr. Stephen was not an agent of Dr. Wakamatsu. "Agency is

the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency §1.01. (Add. at 23). The agency relationship between Dr. Wakamatsu and Mr. Stephen is established by Massachusetts statute, M.G.L. ch. 112, §9A, which provides as follows:

> Section 9A. **A student of medicine** who has creditably completed not less than two years of study in a legally chartered medical school wherever located **may practice medicine, but only under the supervision of an instructor in a legally chartered medical school, which instructor shall be a registered physician in the commonwealth** and a duly appointed staff physician in the duly licensed hospital of not less than twenty-five beds, or an associated clinic, to which the student may be assigned. The board may, in its discretion from time to time, designate other facilities or locations in which said student may practice medicine under the conditions described above. Said students of medicine shall not sign certificates of births or deaths, nor prescribe or dispense narcotic drugs as defined in section one of chapter ninety-four C.

M.G.L. ch. 112, §9A. (Add. At 21). Massachusetts law further provides in 243 Mass. Code Regs. 2.07 as follows:

> (3) Standards Pertaining to the Practice of Medicine by Medical Students. **A full licensee may permit a medical student to practice medicine under his or her supervision** and subject to the provisions of M.G.L. ch. 112, §9A. The full licensee's supervision of the medical student's activities must meet the following requirements:
>
> (a) The full licensee requires that the medical student is identified as a medical student to each patient and informs patients that they have a right to refuse examination or treatment by the medical student.
>
> **(b) The full licensee assures that the medical student practices medicine in accordance with accepted medical standards.**
>
> (4) Delegation of Medical Services. A full licensee may permit a skilled professional or non-professional assistant to perform services in a manner consistent with accepted medical standards and appropriate to the assistant's skill. **The full licensee is responsible for the medical services delegated to a skilled professional or nonprofessional assistant.** Nothing in 243 CMR 2.07(4) shall be construed as permitting an unauthorized person to perform activities requiring a license to practice medicine. A full licensee shall not knowingly permit, aid or abet the unlawful practice of medicine by an unauthorized person, pursuant to M.G.L. ch. 112, §9A, M.G.L. ch. 112, §61, and 243 CMR 1.05(6).

243 Mass. Code Regs. 2.07. (Add. at 22).

Pursuant to Massachusetts law, Mr. Stephen, a then third-year medical student, was permitted to practice medicine with respect to Mrs. Hedberg only

under the direction and authority of Dr. Wakamatsu. M.G.L. 112, §9A; 243 Mass. Code Regs. 2.07. (Add. at 21, 22). Dr. Wakamatsu was the attending physician for Mrs. Hedberg and was a fully licensed physician who also held academic appointments at Harvard Medical School and taught students from that school in rotations at MGH in her clinic and in the operating room. (R.A. II at 125). As such, in teaching Mr. Stephen and allowing him to treat Mrs. Hedberg under her supervision, Dr. Wakamatsu was responsible for his conduct and manifested her assent to Mr. Stephen acting on her behalf. Mr. Stephen, as a student and through the rotation in which he was participating, manifested his assent to act on behalf of Dr. Wakamatsu in treating Mrs. Hedberg. As such, pursuant to Massachusetts law, Mr. Stephen was Dr. Wakamatsu's agent in his treatment of Mrs. Hedberg.

Further, the testimony by Dr. Wakamatsu and Mr. Stephen overwhelmingly supports the conclusion that Mr. Stephen was an agent of Dr. Wakamatsu. Mr. Stephen testified that he was under the direction and supervision of Dr. Wakamatsu at all relevant times in his treatment of Mrs. Hedberg. (R.A. I at 24-25; II at 68). He testified that he, as a student, was not

employed by any person or entity, including MGH, at the time. (R.A. I at 24). Dr. Wakamatsu admitted that Mr. Stephen was "part of her team" when he provided care and treatment to Mrs. Hedberg in May 2012, including on May 17, 2012 when the alleged statements were made. (R.A. II at 17, 29). Dr. Wakamatsu admitted that she was the person ultimately responsible to ensure that Mrs. Hedberg was safely positioned during surgery and that nobody assisting with the surgery interfered with patient positioning. (R.A. II at 17, 19, 32, 136-137). She testified that if a medical student was leaning against a patient's leg inappropriately during surgery, she would be expected to observe it and that it would be her obligation to instruct the medical student to stop. (Id.).

The relationship between Mr. Stephen and Dr. Wakamatsu with respect to the issues in this case is a classic agency relationship. Both manifested their assent to this relationship. Both understood that Mr. Stephen acted on behalf of Dr. Wakamatsu. Mr. Stephen was not a licensed physician and could not provide care unless he was acting as an agent of another. (R.A. II at 38). Massachusetts law makes clear that a fully licensed physician, not any other person or

entity, such as the hospital, is ultimately responsible for the medical student's care and treatment of a patient.[8] M.G.L. c. 112, §9A; 243 Mass. Code Regs. 2.07. (Add. at 21, 22). Dr. Wakamatsu directed, controlled and supervised Mr. Stephen in his care of Mrs. Hedberg. (R.A. I at 24-25; II at 17, 32, 29-30). This is the cornerstone of the agency relationship.[9]

Consistent with this analysis, at the Final Trial Conference, the Superior Court agreed with this position and held that, "… **a medical student is a puppet of the supervising physician. And I can't think of a better way to describe an agent … I am reasonably comfortable in exercising my discretion to read a**

[8]Even if Mr. Stephen were an agent of the hospital, it would not preclude him from also serving as an agent of Dr. Wakamatsu. Hohenleitner v. Quorum Health Resources, Inc., 435 Mass. 424, n.8 (2001) (noting that a person may be the servant of two masters).

[9] Dr. Wakamatsu argued in her motions to the lower court that a medical student is analogous to a resident physician in this context and, as such, not an agent of a physician. (R.A. I at 146-147). This argument is specious. Unlike a medical student, a resident has a limited license to practice medicine, is employed by the hospital in which he/she works, is a servant of that hospital, and is independently required to follow the standard of care. See M.G.L. c. 112 §9 (Add. at 20); Kelly v. Rossi, 395 Mass. 659, 662 (1985); St. Germain v. Pfeifer, 418 Mass. 511, 519 (1994).

medical student to be an agent under the rules of evidence." (R.A. I at 112-115). During trial, however, the court reversed its view on this issue. (R.A. I at 294-295; II at 152). The Court's reversal on this issue and exclusion of Mr. Stephen's statements was arbitrary and was an abuse of discretion.

B. Mr. Stephen's Statements are Admissible Because They Were Made on a Matter Within the Scope of his Agency Relationship and While it Existed.

The statements made by Mr. Stephen to Mrs. Hedberg were made on a matter within the scope of his agency relationship with Dr. Wakamatsu and while it existed. See Mass. G. Evid. §801(d)(2)(D). (Add. at 24). The lower court abused its discretion and improperly analyzed only §801(d)(2)(C) and did not consider §801(d)(2)(D), which squarely applied to the facts of this case. (R.A. I at 294-295; II at 152); (Add. at 24).

First, the statements were made on or about a matter within the scope of the agency. The statements concern the cause of Mrs. Hedberg's post-operative pain. (R.A. I at 75, 79; II at 46-47). Mr. Stephen's statements offer an explanation for the cause of that pain and specifically relate to his own conduct during

the surgery as the cause. (Id.). As explained above, Mr. Stephen was an agent of Dr. Wakamatsu in his care and treatment of Mrs. Hedberg, including during the surgery and in his post-operative examination and assessment of her. During the surgery, Dr. Wakamatsu admitted that Mr. Stephen would have been holding retractors and would have been positioned on Mrs. Hedberg's left side at her lower extremity. (R.A. II at 15, 17). Dr. Wakamatsu, and Massachusetts law, confirm that she was responsible for his care during that surgery and thereafter. M.G.L. c. 112, §9A; 243 Mass. Code Regs. 2.07. (R.A. I at 24-25; II at 17, 19, 32, 29-30, 136-137); (Add. at 21, 22). As such, statements relating to events during the surgery and Mr. Stephen's conduct during the surgery that caused or may have caused Mrs. Hedberg's injury were "made on a matter within the scope of the agency relationship." Mass. G. Evid. §801(d)(2)(D). (Add. at 24).

Second, the statements were made while the agency relationship still existed. The statements by Mr. Stephen that he may have been leaning against Mrs. Hedberg's leg were made during his post-operative exam of her and related to his diagnosis as to the cause of her post-operative pain, specifically, the position of

her left leg during surgery. (R.A. I at 75, 79, 209, 216; II at 44-46). Dr. Wakamatsu testified that when Mr. Stephen saw the patient on May 17, 2012 (and May 18, 2012), he was part of her team. (R.A. II at 17, 29). Indeed, Mr. Stephen was providing medical services to Mrs. Hedberg at the time he made the statements and he could do so under Massachusetts law only at the direction and control of a fully licensed physician, Dr. Wakamatsu. (R.A. II at 17, 29-31).

Despite these facts, the lower court ruled that "I don't think even if [Mr. Stephen] were an agent [his statements] were authorized by Dr. Wakamatsu." (R.A. I at 294-295; II at 152). Contrary to this ruling, the law plainly does not require evidence that Dr. Wakamatsu authorized the specific statements at issue, but only that they were made within the scope of the agency relationship. Mass. G. Evid. §801(d)(2)(D); Ruszcyk, 401 Mass. at 422-424. (Add. at 24). While §801(d)(2)(C) may require such a finding, §801(d)(2)(D) does not. (Add. at 24); See Thorell v. ADAP, Inc., 58 Mass. App. Ct. 334, 339 (2003) (commenting that the proper inquiry is "whether the declarant was authorized to act on the matters about which he spoke."). Therefore, the lower court's

exclusion of the statements on the basis that the statements were not authorized by Dr. Wakamatsu was an abuse of discretion because the Court did not consider and ignored §801(d)(2)(D). (Add. at 24).

According to well-established Massachusetts law, it does not matter if Dr. Wakamatsu specifically authorized Mr. Stephen to admit to the patient what he did during the patient's surgery while he was the doctor's agent or that mistakes were made during her surgery. Mass. G. Evid. §801(d)(2)(D); Ruszcyk v. Secretary of Public Safety, 401 Mass. 418, 424 (1988). (Add. at 24). If that were the standard, then any time agents or employees admitted wrongdoing, the principals or employers could say they did not authorize the disclosure of the truth and, therefore, the statements could not be admitted at trial. Such a result would be unjust. Mr. Stephen's statements about what he admitted he did during the surgery were admissible because they were made on matters within the scope of the agency relationship and while it existed, and it was an abuse of discretion to exclude them.

C. The Probative Value of the Statements Substantially Outweighed the Danger of Unfair Prejudice.

The probative value of Mr. Stephen's statements at issue substantially outweighed any danger of unfair prejudice to Dr. Wakamatsu. The particular circumstances of this case, including the credibility of witnesses and the proponents' need for the evidence overwhelmingly supported the admissibility of Mr. Stephen's statements at trial.

The positioning of Mrs. Hedberg during the surgery was a central issue in this case. Any evidence relating to that positioning and the pressure placed on her legs during the procedure is relevant and highly probative. The Court's exclusion of the statements prevented the Hedbergs from offering evidence to the jury related directly to their theory of liability: that unnecessary and inappropriate pressure was applied to her left leg during the surgery causing overflexion of her hip and the stretch injury to her sciatic nerve.

Dr. Wakamatsu admitted that excess pressure should not be applied to the legs, that she was responsible to ensure that it did not occur, including that Mr. Stephen or any others did not lean against

Mrs. Hedberg's legs during the procedure. (R.A. II at 15, 17, 19, 136-137). Dr. Bercik, the Hedbergs' expert on liability, also explained the standard of care with respect to positioning and that assistants can cause excess pressure on the patient's legs during surgery, which is a breach of the standard of care of the attending surgeon. (R.A. I at 280-282, 288-291, 313). Indeed, he testified that the statements made to Mrs. Hedberg were significant to his opinions and consistent with the type of activity that could cause the injury here. (R.A. I at 328). Moreover, Mrs. Hedberg's sciatic nerve injury was on her left side, the side on which it is undisputed that Mr. Stephen was positioned during the procedure. (R.A. II at 15, 17).

In addition, Mr. Stephen provided post-operative care to Mrs. Hedberg, and made entries in her medical record regarding the existence and severity of Mrs. Hedberg's postoperative symptoms, including severe pain in her left leg and foot. (R.A. I at 209, 216). He then assessed and diagnosed the condition and the cause, which he determined to be a stretch injury to her sciatic nerve. (Id.). Based on this factual background, the statements by Mr. Stephen relating to

the cause of Mrs. Hedberg's injury, especially statements relating to his direct involvement and that he may have contributed to causing those symptoms by leaning against her left leg during surgery, are relevant and highly probative of the central issues in the case.

The statements also were sufficiently reliable for consideration by a jury. The statements were made on firsthand knowledge by Mr. Stephen regarding his own conduct during the surgery, not the conduct of another. (R.A. I at 75, 79; II at 44-46). As stated above, Mrs. Hedberg made notes referencing the statements within one to two months of the events themselves. (R.A. I at 81-83). She also testified consistently as to these statements throughout the litigation and at trial. (R.A. I at 75, 79; II at 44-46). Mr. Stephen did not deny making the statements and testified that he cannot recall whether he made the statements. (R.A. I at 30-31, 34; II at 72-74). His own treatment notes for Mrs. Hedberg are consistent with the statements as he concluded in those notes that Mrs. Hedberg suffered a stretch injury to her sciatic nerve from positioning during the surgery. (R.A. I at 209, 216). While it is for a

jury to weigh the credibility of the witnesses regarding these statements, there was sufficient evidence to find that Mr. Stephen was credible when making the statements.

In considering these issues, this Court has made clear that there is great concern in excluding statements of a party's agent, such as the statements in this case: "We think. . . . that by far the greater vice is the exclusion of relevant evidence where the circumstances of the case indicate its trustworthiness. Admission of evidence does not guarantee its acceptance by a jury, and counsel are free to argue that the jury should not give credence to the evidence." Ruszcyk v. Secretary of Public Safety, 401 Mass. 418, 424 (1988). Indeed, admitting testimony regarding statements made by Mr. Stephen would not have prejudiced Dr. Wakamatsu, who had the opportunity to question and cross-examine Mrs. Hedberg and Mr. Stephen on all relevant issues during the litigation and at trial. For these reasons, the probative value of the statements and evidence relating to those statements far outweighed any prejudice.

II. The Trial Judge's Rulings Regarding Mrs. Hedberg's Credibility Were Not Supported by the Evidence.

The trial judge abused her discretion in considering Mrs. Hedberg's credibility and made conclusions regarding Mrs. Hedberg's mental health that were not supported by the evidence in this case.[10] As discussed in Section I.C., *supra*, the testimony by Mrs. Hedberg was sufficiently credible to be considered by the jury. The jury, rather than the judge, should evaluate the credibility of the witnesses. See Com v. Drew, 397 Mass. 65, 75-76 (1986). Opposing counsel can cross-examine the witness which enables the jury to evaluate the witness's demeanor and credibility. Id. Indeed, the jury in this matter was specifically instructed that they were "the sole judges of the credibility of the witnesses." (R.A. II at 215).

In this case, the Court concluded that Mrs. Hedberg's testimony regarding the statements by Mr. Stephen was not credible because, in the Court's opinion, Mrs. Hedberg had imagined the entire interaction. The Court noted:

[10] The Court weighed these issues with respect to Mass. G. Evid. §409(c), which is not addressed in this appeal.

> … I think what happened here, from what I can tell, is that a very upset and very well educated patient who claims to have obsessively recreated a surgery during which she was under anesthesia by recounting instruments and replaying the surgery repeatedly has a view in her mind of what happened to her, and that has merged with her reality, and it seems to me that that statement does not have any indicia of reliability to me.

(R.A. II at 153-154).

This conclusion is not supported by the facts of this case. Generally, the Plaintiff's expert psychiatrist, Dr. Lloyd Price, testified that Mrs. Hedberg suffers from depression and post-traumatic stress disorder ("PTSD") related to her chronic and unremitting pain following the surgery by Dr. Wakamatsu in May 2012. (R.A. II at 80-84). Dr. Price testified that Mrs. Hedberg's PTSD is characterized by dreams and thoughts of the surgery, including watching the surgery or counting the instruments used in the surgery. (Id.). From this testimony, the Superior Court made the improper leap that Mrs. Hedberg imagined the statements by Mr. Stephen. (R.A. II at 153-154).

There was simply no evidence adduced at trial to support the conclusion that because Mrs. Hedberg suffered from post-traumatic thoughts about surgery, that she imagined the interaction with Mr. Stephen. Indeed, Dr. Wakamatsu contested that Mrs. Hedberg suffered from PTSD and never argued or offered evidence that she invented the conversation. Moreover, Mrs. Hedberg's recollection of the conversation with Mr. Stephen is corroborated by contemporaneous notes she created at and around the time of surgery. (R.A. I at 81-83). Her recollections are also corroborated by Mr. Stephen's notations in the medical record which indicate, as he described to her, that he believed her post-operative pain to be caused by the position of her leg during surgery. (R.A. I at 209, 216).

Further, the facts of the surgery itself belies any suggestion that Mrs. Hedberg imagined or invented the statements. Mrs. Hedberg was under general anesthesia at the time of the surgery and would not have known where the medical student stood throughout the procedure. (R.A. I at 196, 199). She would not have known that he was on her left side at her left lower extremity. (Id.). Therefore, she would not have known that he could have been leaning against her left

leg causing her sciatic nerve injury, unless Mr. Stephen made the statements to her.

In addition, Mrs. Hedberg's recollections about other aspects of the conversation with Mr. Stephen are consistent with the facts, which makes her testimony on the conversation reliable. For instance, Mr. Hedberg explained that Mr. Stephen said he went by the name "Mac" and that he was from Arkansas. (R.A. I at 75, 79; II at 44-46). These facts are accurate, according to Mr. Stephen's own testimony. (R.A. II at 67-68).

The Superior Court's conclusion that Mrs. Hedberg invented the conversation with Mr. Stephen and further that she was unable to perceive that it was not real, was arbitrary, was not reasonable, and was not based in fact.

III. Mr. Stephen's Statements are Admissible as Statements Against Interest.

Under Massachusetts law, a statement against interest is admissible and will not be excluded as hearsay when the declarant is unavailable. Mass. G. Evid. §804(b)(3). (Add. at 25) A statement against interest is defined as a statement that a reasonable person in the declarant's position would have made

only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else, or to expose the declarant to civil or criminal liability. Id. (Add. at 25).

The Federal Court recognizes that when a declarant testifies to not remembering the subject matter of a statement, he or she is considered to be unavailable as a witness. Fed. R. Evid. 804(a)(3). (Add. at 26). Several states have adopted this rule as well. See e.g. N.H. R. Evid. 804(a)(3); Vt. R. Evid. 804(a)(3); R.I. R. Evid. 804(a)(3); Me. R. Evid. 804(a)(3). (Add. at 27-30). Massachusetts, however, does not recognize this rule of evidence relating to unavailability of a declarant. See Commonwealth v. Bray, 19 Mass. App. Ct. 751, 758 (1985); Mass. G. Evid. §804(a)(3). (Add. at 24). This Court's position results in the practical effect of preventing such evidence from being presented at the time of trial and permits any witness to avoid previous statements that are harmful by claiming a lack of memory. See Notes of Advisory Committee on Fed. Rules Evid. Rule 804(a)(3). The rule followed by the federal courts and many state

courts guards against this concern and this Appellate Court should reconsider its previous decision and determine that if a witness lacks memory of a prior statement, that witness should be considered unavailable. In explaining the practicality of the rule, the U.S. Supreme Court stated: "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." Williamson v. United States, 512 U.S. 594, 599 (1994).

Presuming that Mr. Stephen is considered unavailable based on the above, his statements made to Mrs. Hedberg are statements against interest and fall under this exception to the hearsay rule and should be admitted. Mr. Stephen's statements to Mrs. Hedberg were contrary to his proprietary or pecuniary interest and could have even exposed him to civil liability. The statements were made when Mr. Stephen was a third year medical student, and indicated that his improper conduct and medical treatment may have been the cause of Mrs. Hedberg's harm. (R.A. I at 75, 79). In making such statements, Dr. Stephen knew that it would be harmful to an attending physician at a well-respected

hospital where he trained, which may further pose a detriment to him. Therefore, the statements by Mr. Stephen to Mrs. Hedberg were admissible as statements against interest and should not have been excluded.

IV. Mr. Stephen's Statements to Mrs. Hedberg Were Admissible, Therefore, All Questions and Other Evidence Relating to Those Statements Were Also Admissible.

The Superior Court improperly excluded not only testimony by Mrs. Hedberg regarding the statements by Mr. Stephen, but also all other evidence relating to such statements. Specifically, the Court also excluded questions to Mr. Stephen regarding these statements, testimony by the Plaintiffs-Appellants' expert, Dr. Bercik, as well as admission of the diary or note entries by Mrs. Hedberg relating to these statements and any cross examination of the Defendant-Appellee's witnesses regarding the statements. (R.A. I at 186-187, 294-295; II at 152). All of this evidence is admissible for the reasons stated in this brief.

With respect to the audiovisual trial deposition of Mr. Stephen, which was taken in advance of trial, the Court excluded questions relating to the statements at issue as recalled by Mrs. Hedberg. (R.A. I at 186-187). The Court commented:

> The question, Mr. Jones, that you sought to ask in the video testimony of Mr. Stephens … I will not allow you to pose that question to the witness. You are asking the witness to comment on another witness's testimony. You are not refreshing his recollection. You are not presenting him with some other past recollection recorded. There is no basis for your question other than to get before the jury the statement you wish him to comment on, so I'm not going to let you do that.

(R.A. I at 186-187).

For the sake of completeness, the Hedbergs contend that if the statements which underlie the questions at issue at Mr. Stephen's deposition were admissible, the questions posed at deposition were appropriate. (R.A. I at 91-97, 142-143). In addition, the questions, which set forth the statements made by Mr. Stephen, were necessarily leading to refresh his memory and because his lack of memory made him a hostile witness. See DiMarzo v. S. & P. Realty Corp., 364 Mass. 510, 512 (1974) (permitting leading questions on direct examination regarding the plaintiff's memory of a conversation with the defendant, where plaintiff failed to recall the details of the conversation); Com v. Greene, 9 Mass. App. Ct. 688, 693 (1980) (judge did not abuse his discretion in declaring witnesses to be hostile and

allowing prosecutor to ask leading questions "in light of their incredible failures of memory.").[11]

CONCLUSION

For the reasons stated above, the lower court improperly excluded at trial statements by the medical student to Mrs. Hedberg relating to her sciatic nerve injury, and evidence relating to those statements. This evidence was admissible at the time of trial. This Court should reverse that decision, vacate the judgment and remand the case to the Superior Court for a new trial.

Respectfully submitted,

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Date: June 1, 2018

[11] Moreover, at the time of the testimony, defense counsel did not object to one of the relevant questions at the time of the audiovisual trial deposition. (R.A. II at 72).

ADDENDUM

Table of Contents

45

JUDGMENT ON JURY VERDICT

Trial Court of Massachusetts
The Superior Court

Michael Joseph Donovan, Clerk of Court

DOCKET NUMBER
1584CV00927

COURT NAME & ADDRESS
Suffolk County Superior Court - Civil
Suffolk County Courthouse, 12th Floor
Three Pemberton Square
Boston, MA 02108

CASE NAME
Leslie Hedberg et al
vs.
May Wakamatsu MD

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
May Wakamatsu MD

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Hedberg, Leslie
Peter Hedberg MD

This action came on for a jury trial before the Court, Hon. Heidi Brieger, presiding, the issues having been duly tried and the jury having rendered its verdict,

It is **ORDERED AND ADJUDGED:**

That the above named plaintiff(s) take nothing, that the action be dismissed on the merits, and that the defendant(s) named above will recover statutory costs.

JUDGMENT ENTERED ON DOCKET Jan 8 2018
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P.58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

DATE JUDGMENT ENTERED	~~CLERK OF COURT~~ S/ ASST. CLERK
12/15/2017	X

Date/Time Printed: 12-15-2017 15:38:45

SCV085: 06/2016

Volume: I
Pages: 1-20
Exhibits: See Index

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * * * * * * * * * *
LESLIE HEDBERG and *
PETER HEDBERG, M.D., *
Plaintiffs, *
* Civil Action
v. * No. 15-0927F
*
MAY WAKAMATSU, M.D., *
Defendant. *
* * * * * * * * * * * * *

EXCERPT JURY TRIAL DAY I
BEFORE THE HONORABLE HEIDI BRIEGER

APPEARANCES:

For the Plaintiffs:
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By: Richard W. Paterniti, Esquire
Patrick T. Jones, Esquire

For the Defendants:
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Three Center Plaza
Boston, Massachusetts 02108
By: Brian H. Sullivan, Esquire
Rebecca A. Cobbs, Esquire

3 Pemberton Square
Room 1006
Boston, Massachusetts
December 5, 2017

Court Reporter: Lisa Marie Phipps, CSR, RPR, CRR

And I make that ruling simply based on Rule 26, because I think that's what the defendant is entitled to. I note your objection for the record, Mr. Paterniti.

With respect to the question of agency, again, I -- that is a complicated question.

The defendant's briefs, I think, have cast a different light on the issue, and I haven't read the cases that were cited in that supplemental brief, so I'm not ruling on that right now because I do want to read the cases.

But I think coming at this in a different way, the issue really is whether the statements that were alleged to have been made by the medical student are admissible. That's the issue.

The question, Mr. Jones, that you sought to ask in the video testimony of Dr. Stephens [sic], I'm allowing Mr. Sullivan's objection to that question and I will not allow you to pose that question to the witness.

You are asking the witness to comment on another witness's testimony. You are not refreshing his recollection. You are not presenting him with some other past recollection recorded.

There is no basis for your question other than to get before the jury the statement that you wish him to comment on, so I'm not going to let you do that.

So that objection is sustained. That means the video has to be redacted in whatever appropriate manner.

Then we come to the question of whether the statement that was alleged to have been made by the medical student to the patient in the patient's room and recorded in some version in the medical record is admissible because it's in the medical record.

MS. COBBS: Your Honor, that's not --

THE COURT: It's not --

MS. COBBS: It's not in the medical record.

THE COURT: It's not in the medical record?

MS. COBBS: Correct. There's no reference to the statement anywhere --

THE COURT: Oh.

MS. COBBS: -- in any medical record --

THE COURT: Oh.

MS. COBBS: -- from any medical provider in this case.

THE COURT: Okay. I was confused. I thought

that it was in the medical record because that was what, Mr. Paterniti, your argument was, I thought.

MR. PATERNITI: No. It was Mr. Jones's argument.

MR. JONES: No, it was not. It was an explanation for what was in the record, which was left lower extremity pain assessment was secondary to positioning in vaginal surgery.

THE COURT: I see. All right.

MR. JONES: The fact -- the fact issue "I may have been leaning against" --

THE COURT: Okay.

MR. JONES: -- is the conduct that this doctor was supposed to prevent; it will be all of her testimony at trial.

THE COURT: No, I understand. I get that. I thought it was in the record, though. Could I see the record that is at issue?

MR. JONES: Mine is all marked up. I'm happy to hand it up to you.

MS. COBBS: I believe I have a copy of it.

MR. SULLIVAN: Which one is it?

MS. COBBS: This is the May 17 --

MR. JONES: It's page 25.

THE COURT: So this really does boil down

then to whether this is an admission by a party deponent or an agent, so that is why the agency issue seems to be front and center.

MR. JONES: Yes. As to words and conduct.

THE COURT: All right.

MS. COBBS: Sorry, your Honor, I guess I just got confused there. With response directly to whether the alleged statement of the medical student explains the note, that is briefed; that Dr. Stephen, while he can't remember many things, did testify on two occasions, both his trial depo and his regular depo, that that note does not mean that anybody was leaning on the leg.

And then other -- putting that issue aside, yes, your Honor, I agree that the critical issue then would be whether he is an agent, which, of course --

THE COURT: Okay. Because I think that's the critical legal question, whether or not a medical student is an agent of a physician in surgery, according to the test for agency -- and I am going to go back and carefully read that test and look at the cases -- I do not want you to refer to that, Mr. Jones, in your opening statement or, I assume you wouldn't, either, in your opening

statement.

MR. SULLIVAN: Yes.

THE COURT: And I will make a decision about that, but not right now.

So if -- if the medical student is not an agent of Dr. Wakamatsu, that statement is hearsay and doesn't come in.

I don't see any other way it comes in, other than as an agent, so I will take a look at that again, yes.

MR. JONES: May I make one brief point? Again, the statement refers to words as well as conduct, which takes us back to the surgery where the medical student was right there.

THE COURT: I understand the issue. I do.

MR. JONES: And then the other issue, going back to the decision you've already made on my questioning, if you allow Leslie Hedberg to talk about that statement, I then, I believe, respectfully have the basis for the question that I asked.

THE COURT: We disagree. And I did rule on that. So I will not permit you to ask your -- ask the witness to comment on your client's testimony.

MR. JONES: But will you let me make a record

at the appropriate time on that, your Honor, because that's a very important issue?

THE COURT: You may make a record.

MR. JONES: Thank you.

MS. COBBS: Your Honor, if I could just add -- I understand the issue is well briefed, and your Honor is going to take a look at that.

I would make two brief points, which is I think the question isn't just whether he is an agent of an attending physician during the surgery.

It is more specific than that. It's whether a statement made after the surgery, without the attending's knowledge, without the attending present, whether he's acting as an agent at --

THE COURT: Was authorized. I do understand the question.

MS. COBBS: Sure.

THE COURT: I'm going to go through the test, and I have to say that on Friday I was -- it was the end of a long week, and it was all somewhat sort of coming at me, so to speak, and so I have had the chance to think about it, and I will now read the cases to make sure that I have the right ruling in the end.

as Mr. Sullivan is so quick to tell me about my medical student --

THE COURT: All right. So I'm going to --

MR. JONES: -- a third-year resident.

MR. SULLIVAN: With a medical degree.

MR. JONES: Yes.

THE COURT: I understand that.

MR. JONES: It's an opinion, by the way, too, not a fact --

THE COURT: I understand.

MR. JONES: -- which is all the medical student is trying to get in.

THE COURT: Right. I am going to allow the motion to strike the first answer that goes beyond the "yes," but I am going to deny the motion to strike the second answer because I think that goes right to her role in the surgery as well as her testimony as a treating physician. All right.

MR. JONES: Can I ask you sort of an editing -- a filmmaker's question? When we go to edit --

THE COURT: I have zero ability to do film editing. Let me make that clear.

MR. JONES: I don't think it is that complicated. When we go to Mac Stephen's video,

which we are going to play on Friday, you have ordered, as I understand it, us to remove all three of the questions that were objected to --

THE COURT: Correct.

MR. JONES: -- including the one -- including one that wasn't objected to, the first one, which came in without any objection.

MR. PATERNITI: No.

THE COURT: Well, I am ruling on the motion in limine period. I am not weighing in beyond what was asked of me.

MR. JONES: The motion in limine asks you specifically to disallow the answers to three questions.

THE COURT: I allowed that motion.

MR. JONES: Okay. So those are the only three questions that are coming out of Mac Davis's video.

THE COURT: All right. Are there any other motions that affect that video testimony?

MR. JONES: Well, there was --

MR. SULLIVAN: No.

MR. JONES: Well, there was --

THE COURT: All right. So the answer to that is yes?

MR. JONES: Well, in fairness, there was. There was the big one that we started, which was to strike all his testimony because it was totally irrelevant because he had lost his memory.

MR. SULLIVAN: That's true. And that was done prophylactically because we had not yet had the video deposition.

I would concede that as someone in the room --

THE COURT: He's a relevant witness.

MR. SULLIVAN: -- he's a relevant witness, so --

THE COURT: Yes.

MR. SULLIVAN: -- the second motion was really to --

THE COURT: It's withdrawn.

MR. SULLIVAN: That's correct.

THE COURT: All right.

MR. JONES: Okay. So we are going to knock all three out, even the question that wasn't objected to.

THE COURT: That's correct. Anything else? All right. Officer Carr, where are we with our jurors?

THE COURT OFFICER: Your Honor, I haven't

Volume: VII
Pages: 1 - 92
Exhibits: See Index

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

* * * * * * * * * * * * *
LESLIE HEDBERG and *
PETER HEDBERG, M.D., *
Plaintiffs, *
* Civil Action
v. * No. 15-0927F
*
MAY WAKAMATSU, M.D., *
Defendant. *
* * * * * * * * * * * * *

JURY TRIAL
BEFORE THE HONORABLE HEIDI BRIEGER

APPEARANCES:

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December 13, 2017

Court Reporter: Julie Thomson Riley, RDR, CRR

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Heidi Brieger Suffolk Superior Court, 3 Pemberton Square Boston, Massachusetts, on December 13, 2017 at 9:02 a.m.)

THE CLERK: Court.

COURT OFFICER: Court. All rise. The Honorable Heidi Brieger presiding. This Court's now open. You may be seated.

THE CLERK: And, your Honor, we're back before the case on trial, the Hedberg vs. Wakamatsu matter.

THE COURT: Thank you, Mr. Powers.

(Sidebar as follows:

THE COURT: And good morning, Counsel.

COUNSEL: Good morning, Your Honor.

THE COURT: I have had the opportunity to read the 233 Section 79L memoranda that were filed, one last night and one this morning. Thank you for filing those because now I feel enlightened about that statute.

I have obviously spent some time on this. I have a little bit of an Alice in Wonderland view of what we're dealing with here because it's kind of interesting, but I am going to refuse to

reconsider my rulings, but I want to put on the record my reasoning, so it's clear.

I think the first issue here is whether the medical student, Dr. Stephen, is or was an agent of Dr. Wakamatsu for the purposes of the hearsay rule, and I think that the case law just does not convince me that that's the case.

I don't think that the medical student who was perhaps operating under the supervision of Dr. Wakamatsu during the surgery rises to the level of a legal agent with respect to her statements later -- his statements later, which I don't think even if he were an agent were authorized by Dr. Wakamatsu. So I don't see under 801(d)(2)(D) that those statements come in as admissions.

With respect to the question of whether or not under (d)(1)(A), Dr. Stephen was feigning a lack of memory, first of all, the substantive admission of the statement that is inconsistent with the prior statement because of a feigned lack of memory has to be a statement, in my view, under oath like prior grand jury testimony, prior deposition testimony, trial testimony, so on, where there is some indicia of reliability of the

earlier statement, so that the later statement, which pretends not to know anything about it can be judged. In other words, there has to be some comparative analysis; so, that's why that usually applies to grand jury testimony, and it's relatively easy to see when somebody's feigning a lack of memory.

Now, I understand, for impeachment under 613 that statements that are inconsistent can be admitted for impeachment purposes, and I did read the cases about that, and so just to make it clear on the issue of feigning lack of memory, I watched carefully his demeanor and his face as he was making those statements in response to your questions, Mr. Jones, during that trial testimony. I come out at a completely different place with respect to my experience watching people testify that I do not think he was feigning lack of memory. I think that his demeanor during the entire testimony was essentially the same, and I didn't find that he was somehow defensive or in any way deceitful in his responses to the questions. So I don't find that he feigned lack of memory.

Now, finally on the 401(c) issue, first of

all, I did not focus on the definition of healthcare provider, and I think that it is accurate, based on the statute, that medical students are not covered by that statute because they're not listed in the definitional section, and I didn't see any cases that included medical students as healthcare providers.

I think from the public policy standpoint, it's clear in a City like Boston where you're educating every generation of healthcare providers, that if medical students were encapsulated in every statute, we wouldn't have an educational system, because nobody would take medical students into surgery with them, and nobody would give them any authority whatsoever; so I think the statute probably does not apply to a medical student.

Even if it did, I think what happened here, from what I can tell, is that a very upset and a very well-educated patient who claims to have obsessively recreated a surgery during which she was under anesthesia by recounting instruments and replaying the surgery repeatedly has a view in her mind of what happened to her, and that has merged with her reality, and it seems to me that

that statement does not have any indicia of reliability to me. Now, I cannot find a way to suggest that her having thought he made it unrecorded, unwitnessed is sufficient to overcome the failure to recall it at all by the medical student.

So even if it had been said, I think it would not be admissible, because it was said, if it was said, in a posture of trying to commiserate, and in that vein, his failure to remember it is not inconsistent or contradictory. It's just a failure of recollection, and that is not covered by what I read the statute to require. So I read it differently than what you suggested in your memorandum.

But that being said, I just wanted the record to be clear, and I appreciate all the extra effort that I put you through to come to this decision that maybe you know was right all along.

MR. JONES: Judge, thank you, first of all, for your careful attention, and thank you most of all for doing this at sidebar.

THE COURT: Yeah. Right.

MR. JONES: I think we've made all the arguments that need to be made.

THE COURT: I think you have.

MR. JONES: And I believe in efficiency; so, I'd like to get on to the rest of the show.

THE COURT: Let's go. All right.

MR. JONES: Thank you, your Honor.

MS. COBBS: Thank you, your Honor.

... end of sidebar.)

THE COURT: We'll be in a brief recess.

COURT OFFICER: All rise. Court will stand in a brief recess.

(Recess from 9:10 a.m. to 9:15 a.m.)

COURT OFFICER: Jurors entering. All rise.

(At 9:16 a.m., the jury entered the courtroom.)

COURT OFFICER: Hear ye, hear ye, hear ye, all persons having anything to do before the Honorable Heidi Brieger, Associate Justice of the Superior Court, now sitting in the County of Suffolk for the transaction of civil business draw near, give your attendance, and you shall be heard.

God save the Commonwealth of Massachusetts and this Honorable Court.

Court is now open.

You all may be seated, and good morning,

M.G.L. c. 112 § 9: Limited registration; fees; qualifications; revocation

An applicant for limited registration under this section may, upon payment of a fee to be determined annually by the commissioner of administration under the provision of section three B of chapter seven, be registered by the board as an intern, fellow or medical officer for such time as it may subscribe if he furnishes the board with satisfactory proof of the following:

. . .

Such limited registration shall entitle the said applicant to practice medicine only in the hospital, institution, clinic or program designated on his certificate of limited registration, or outside such hospital, institution, clinic or program for the treatment, under supervision of one of its medical officers who is a duly registered physician, of persons accepted by it as patients, or in any hospital, institution, clinic or program affiliated for training purposes with the hospital, institution, clinic or program designated on such certificate, which affiliation is approved by the board and in any case under regulations established by such hospital,

institution, clinic or program. The name of any hospital, institution, clinic or program so affiliated and so approved shall also be indicated on such certificate. Limited registration under this section may be revoked at any time by the board.

M.G.L. c. 112 § 9A: Medical students; limited practice of medicine under supervision

A student of medicine who has creditably completed not less than two years of study in a legally chartered medical school wherever located may practice medicine, but only under the supervision of an instructor in a legally chartered medical school, which instructor shall be a registered physician in the commonwealth and a duly appointed staff physician in the duly licensed hospital of not less than twenty-five beds, or an associated clinic, to which the student may be assigned. The board may, in its discretion from time to time, designate other facilities or locations in which said student may practice medicine under the conditions described above. Said students of medicine shall not sign certificates of births or deaths, nor prescribe or dispense narcotic drugs as defined in section one of chapter ninety-four C.

243 Mass. Code Regs. 2.07: General Provisions Governing the Practice of Medicine

(3) Standards Pertaining to the Practice of Medicine by Medical Students. A full licensee may permit a medical student to practice medicine under his or her supervision and subject to the provisions of M.G.L. c. 112, § 9A. The full licensee's supervision of the medical student's activities must meet the following requirements:

(a) The full licensee requires that the medical student is identified as a medical student to each patient and informs patients that they have a right to refuse examination or treatment by the medical student.

(b) The full licensee assures that the medical student practices medicine in accordance with accepted medical standards.

(4) Delegation of Medical Services. A full licensee may permit a skilled professional or non-professional assistant to perform services in a manner consistent with accepted medical standards and appropriate to the assistant's skill. The full licensee is responsible for the medical services delegated to a skilled professional or nonprofessional assistant. Nothing in

243 CMR 2.07(4) shall be construed as permitting an unauthorized person to perform activities requiring a license to practice medicine. A full licensee shall not knowingly permit, aid or abet the unlawful practice of medicine by an unauthorized person, pursuant to M.G.L. c. 112, § 9A, M.G.L. c. 112, § 61, and 243 CMR 1.05(6).

Restatement (Third) Of Agency § 1.01: Agency Defined

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Mass. G. Evid. § 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Mass. G. Evid. §801(d)(2): An Opposing Party's Statement

The statement is offered against an opposing party and

(A) was made by the party;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject, or who was authorized to make true statements on the party's behalf concerning the subject matter;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator or joint venturer during the cooperative effort and in furtherance of its goal, if the existence of the conspiracy or joint venture is shown by evidence independent of the statement.

Mass. G. Evid. §804(a): Hearsay Exceptions; Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify [this criterion not recognized];

(3) testifies to not remembering the subject matter [this criterion not recognized];

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able to procure the declarant's attendance by process or other reasonable means.

But this Subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

Mass. G. Evid. §804(b)(3): Statement Against Interest.

A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to

invalidate the declarant's claim against someone else, or to expose the declarant to civil or criminal liability. In a criminal case, the exception does not apply to a statement that tends to expose the declarant to criminal liability and is offered to exculpate the defendant, or is offered by the Commonwealth to inculpate the defendant, unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Fed. R. Evid. Rule 804: Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

Me. R. Evid. Rule 804: Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness

(a) Criteria for being unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) Is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) Refuses to testify about the subject matter despite a court order to do so;

(3) Testifies to not remembering the subject matter;

(4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

N.H. R. of Evid. Rule 804: Exceptions to the Rule Against Hearsay – When the Declarant is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

R.I. R. Evid. Rule 804: Hearsay Exceptions; Declarant Unavailable

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his or her statement; or

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

(5) is absent from the hearing and the proponent of his or her statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

Vt. R. Evid. Rule 804: Hearsay Exceptions: Declarant Unavailable

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

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

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on June 1, 2018, I have made service of this Brief and Record Appendix Volumes I and II upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by e-mail and the Electronic Filing System on:

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CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a)(6) (pertinent findings or memorandum of decision);

Rule 16(e) (references to the record);

Rule 16(f) (reproduction of statutes, rules, regulations);

Rule 16(h) (length of briefs);

Rule 18 (appendix to the briefs); and

Rule 20 (typesize, margins, and form of briefs and appendices).

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