

Circuit Court for Baltimore City
Case No.: 24-C-13-000820

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1683

September Term, 2017

ESTATE OF NANCY V. PUPPOLO BY ITS
PERSONAL REPRESENTATIVE, CELESTE
A. PUPPOLO

v.

SINAI HOSPITAL OF BALTIMORE, INC.,
ET AL.

Leahy,
Beachley,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: December 31, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this case, we are asked by Celeste Puppolo, Personal Representative of the Estate of Nancy Puppolo, to consider whether a trial judge’s admonishment of her for various behaviors in court during medical malpractice litigation initiated by the Estate so prejudiced the Estate’s case that a mistrial was required, although the trial judge had denied such. Whether the trial judge abused her discretion has been queued up by the Appellant,¹ but we will not address that issue and dismiss the appeal, because the

¹ The Appellant, the Estate, raises the following questions on appeal:

1. Did Judge Heard abuse her discretion when she failed to grant the Estate’s Motion for a Mistrial that was based on the judge’s prejudicial mistreatment of the plaintiff by castigation and vitriolic remarks in front of the jury?
2. Did Judge Heard commit error when she ruled on the Estate’s motion without considering the physical evidence that the Court itself urged the plaintiff to procure and by which its decision on plaintiff’s Motion for a Mistrial could have been aided, as the evidence was antithetical to the judge’s determination?
3. Did Judge Heard bring irrevocable prejudice to the jury by her actions, and without any curative or cautionary instruction to the jury, depart from precedents set by Maryland law?
4. Did Judge Heard commit error when she deliberated on Plaintiff’s Motion for a Mistrial with the jury attending, and without citing justification for having no rational connection between the available evidence and the decision she made?
5. Did Judge Heard violate the Estate’s Personal Representative’s due process rights by ruling on Appellant’s Motion for a Mistrial without considering the evidence that would have led to grant of a mistrial and the right to a fair trial?
6. Did Judge Heard, after denying Appellees/Cross-Appellants’ Motion in Limine to allow into trial a medical malpractice case of the Estate that had nothing to do with the Estate’s case against Sinai Hospital, err when she then permitted defense counsel to admit the court trial transcript of Holy Cross Hospital?

The Appellees/Cross-Appellants, Sinai Hospital, LifeBridge Health Inc., and Dr.

(continued)

(continued)

decision of the Appellant to refrain from further presenting a case when the judge denied the motion for a mistrial was an acquiescence in, or consent to, the adverse judgment subsequently entered against her.

A medical malpractice action was filed in the Circuit Court for Baltimore City for the Estate of Nancy V. Puppolo, by its Personal Representative, Celeste A. Puppolo, Appellant/Cross-Appellee, against Sinai Hospital, Inc., LifeBridge Health, Inc., and Dr. Christine Kajubi, M.D., (collectively, the “Hospital”), Appellees/Cross-Appellants, seeking damages allegedly caused by the Hospital in the care and treatment of Nancy Puppolo, Celeste Puppolo’s mother.²

(continued)

Christine Kajubi, M.D., raise the following question: “Whether the trial court abused its discretion by failing to analyze the proper rule of evidence and ruling that the Appellees/Cross-Appellants were not permitted to establish a pattern or practice of substantially similar allegations made by Appellant’s personal representative in prior litigation to attack the witness’ credibility?”

We also need not address the issue raised by the Appellees/Cross-Appellants because of the dismissal of the appeal.

² This is the second time the parties have been before this Court. In *Norman v. Sinai Hospital of Baltimore, Inc., et al.*, 225 Md. App. 390 (2015), after being recently retained by the Estate, Elton Norman, Esq. filed a Motion to Modify a Scheduling Order, seeking to postpone the trial date to conduct further discovery and obtain additional time to prepare for trial. 225 Md. at 392. The Circuit Court denied Norman’s motion, and the parties were scheduled to appear before a trial judge for a continued pretrial conference at a later date. *Id.* at 393. During that pretrial conference, Norman argued a Motion for Reconsideration of the denial of his previous Motion to Modify the Scheduling Order and orally moved to withdraw his appearance, both of which were denied. *Id.* Norman, thereafter, filed a Notice of Appeal of the court’s denial of his motions. *Id.* We, however, dismissed his appeal because the interlocutory order from the trial court did not fall within the collateral order doctrine. *Id.* at 399–400.

The Hospital, prior to trial, filed a Motion in Limine to Prohibit Plaintiff from Using Photographs of Nancy Puppolo’s Skin Wounds as evidence during the Estate’s case in chief. The photographs, according to the Hospital’s motion, included “graphic images of skin wounds on Nancy Puppolo’s heel and images of Nancy Puppolo lying in a hospital bed.” The Hospital argued that the photographs were “undated and there [was] no identifying information” on them to establish when they were taken, where they were taken, who took them or, “more importantly, that the body part being photographed [was] actually that of [Nancy] Puppolo.” The Hospital also averred that the photographs would only serve to “incite and enflame the jury, [] garner sympathy and to cast an unfavorable light upon the Defendants.” After the Estate responded, and at the close of a hearing, Judge Wanda Keyes Heard of the Circuit Court for Baltimore City, announced to both parties “that no photographs could be shown to the jury without being properly identified, a proper foundation [provided] and admitted into evidence.”

On the first day of trial, counsel for the Estate informed Judge Heard that Dr. Ann Gordon, the Estate’s sole expert witness, might not be available “when she need[ed] to be.” Judge Heard, in response, indicated that she wanted to move forward and suggested that counsel for the Estate rearrange the order in which he was going to call witnesses to account for Dr. Gordon’s fluid availability. Judge Heard advised the Estate that failure to call Dr. Gordon before the close of its case would likely result in the Hospital making a motion for judgment. R. Peter Decato, then sole trial counsel for the Estate, after original

trial counsel, Norman, withdrew,³ cited difficulties in securing Dr. Gordon’s attendance, but announced to the Court that Dr. Gordon would “be subpoenaed by the end of the day” and that he was “ready to proceed” with the Estate’s case.

During the lunch recess that day, outside the presence of the jury, counsel for the Hospital informed Judge Heard that he had observed Celeste Puppolo display photographs of her mother that were not admitted into evidence by holding them out on the trial table in such a way that the jurors could potentially view them as they returned from lunch. Prior to bringing the jury back into the courtroom, Judge Heard warned the parties that nothing was to be shown to the jury that was not previously entered into evidence and that she would view a failure to comply with this instruction as intentional. Judge Heard also specifically directed that Celeste Puppolo not “display anything that might be or is visible to the jury” and informed her that if she did not follow this directive, she would be held in contempt.

After the jury returned to the courtroom, and sometime after the direct examination of the Estate’s second witness began, at a bench conference, counsel for the Hospital and Judge Heard observed Celeste Puppolo shuffling documents around at the trial table, potentially making them visible to the jury. Judge Heard then stopped the bench conference and instructed Celeste Puppolo to sit in the front row of the gallery, away from any papers. Judge Heard proceeded to inform the jury regarding the purpose

³ Judge Heard allowed Norman to withdraw from his representation of the Estate due to health-related issues, after the first appeal was dismissed. *See Norman v. Sinai Hospital of Baltimore, Inc., et al.*, *supra* note 2, 225 Md. App. 390.

of her actions, again explaining that they were not to see any document or picture not entered into evidence. Judge Heard also directly addressed Celeste Puppolo in the gallery, saying “Ms. Puppolo, I’m sorry if I had to move you back. But I want to make sure that you don’t inadvertently show anything to the jury that’s not yet into evidence.”

As the bench conference resumed, Judge Heard received a note from her judicial intern, recounting essentially that which had already happened—that Celeste Puppolo “had a picture of [her mother’s] heel out on the table & the old lady juror closest to her was looking at the table but I don’t know if she saw it clearly.” Judge Heard, after reading the note, then warned Estate’s counsel that Celeste Puppolo might be asked to leave the courtroom if she continued the prohibited conduct. Counsel for the Hospital requested “some type of curative instruction,” but Judge Heard responded that she provided sufficient instruction to the jury by informing it that it could not consider anything it may have been shown by Celeste Puppolo. After the jury was dismissed for the day, Judge Heard, once again, addressed Celeste Puppolo regarding her earlier conduct, instructing her to not “blatantly disregard” her orders again.

On the next day of the trial, counsel for the Estate moved for a mistrial, arguing that the Estate’s right to a fair trial had been prejudiced by Judge Heard’s “castigation” of Celeste Puppolo in the presence of the jury. In the motion, the Estate contended that, as a result of Judge Heard’s admonishment of Celeste Puppolo’s conduct, the jury was irreparably influenced against her and the Estate’s case. Judge Heard listened to arguments on the motion, received testimony from the judicial intern who witnessed

Celeste Puppolo holding a photograph of her mother's heel at the trial table and also questioned counsel for the Hospital as to what he witnessed during the bench conference.

Judge Heard decided, thereupon, that she could not definitively determine whether the steps she “took to ensure fairness and justice” were not “perceived in any negative way,” but decided that individually questioning the jurors could help. She proceeded to bring in each juror to ask whether they saw anything on the trial table of the Estate while the lawyers were at the bench on the previous day of trial. Judge Heard also asked whether anything she did or said could have interfered with the jurors' ability to be fair to either the Estate or the Hospital. All jurors, with the exception of Juror No. 1, indicated that they could remain fair and impartial.⁴ In an abundance of caution, Judge Heard replaced Juror No. 1 with an alternate and proceeded with the trial. In then ultimately denying the motion for a mistrial, Judge Heard found that, “I don't think that I could do anything more than what I have done to be fair both to the Plaintiff and Defense.”

Counsel for the Estate then informed the court, that “in light of the Court's ruling on the motion, we are not going to present any further evidence.” When asked by Judge Heard if he was resting his case, he replied, “[w]e're not going to produce any further evidence, so I assume that means we rest. And it's based upon the Court's ruling on the motion. We have no further evidence that we're going to present.”

⁴ Furthermore, only Juror No. 4 responded that he/she noticed the photographs being shown by Celeste Puppolo. Juror No. 4, however, could only see that the photograph was of “a person lying in bed,” but otherwise stated that there was nothing about the photograph that would affect his/her ability to be fair and impartial.

(continued)

The Hospital moved for a motion for judgment pursuant to Rule 2-519,⁵ stating, that “this is a medical malpractice case where [we] have yet to hear any evidence other than an opening statement of a breach of the standard of care[,] of causation or damages.” When asked for a response, counsel for the Estate replied, “I don’t believe I’ve had any response to the motion. I’m making it clear that in the light of the Court’s ruling on the Motion for Mistrial, we’re choosing not to introduce further evidence on the motion and ha[ve] nothing further to say.” As such, Judge Heard granted the Hospital’s motion for judgment.

The Estate filed a timely notice of appeal.

It is the decision of the Estate in taking no further steps to forward its case that mandates a dismissal of the instant action, pursuant to *Osztreicher v. Juanteguy*, 338 Md. 528 (1995). In *Osztreicher v. Juanteguy*, also a medical malpractice case, the Court of Appeals dismissed Osztreicher’s appeal because he chose not to present a case following an adverse judgment in light of his failed motion to quash a subpoena and motion for a mistrial. 338 Md. 532–33. In that case, one of Osztreicher’s medical experts, Dr. Battle, withdrew from the case because the trial court had compelled him to turn over financial

⁵ Rule 2-519, in pertinent part, provides:

(a) Generally. A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party’s case.

documents which included details as to his compensation as a witness. *Id.* at 531–32. In response, counsel for Osztreicher objected to the court’s ruling and moved for a mistrial, stating, “effectively—effectively—I’m not able to put on this case and that’s tantamount because Dr. Battle has told [me] this morning if his and his wife’s privacy are infringed upon, he will not testify in this case.” *Id.* at 532. He further argued, that “unless you grant a mistrial, . . . you’ll be granting a summary judgment for failure of going forward. Without Dr. Battle, I cannot present this case.” *Id.* In deciding not to present any evidence, counsel for Osztreicher explained, “I don’t have a case to present. My case has been decimated by the witness’ refusal under the terms that the Court has set to go forward as a matter of personal principle of the witness and his view that his rights are violated.”⁶ *Id.* at 533.

⁶ In expanding on his decision not to move forward, counsel for Osztreicher added:

It would be folly of the highest degree for me to believe that I have any chance of properly representing the plaintiff with one witness who is retired from surgery at the present time.

I have to deal with the reality of some 30 years’ experience in trial, most of it in medical malpractice, to know that I’m not going to help my client. I’m going to spend a lot of time and money for naught.

There is no way in this world I can go forward with one expert in this case and he, that one expert, retired from active surgical practice.

So your Honor will simply have to, as I’m sure you will anyway, take whatever or make whatever ruling you want and this is going to be—and I suppose it was inevitable that the Court of Appeals would have to deal with this issue sooner or later.

Osztreicher v. Juanteguy, 338 Md. 528, 533 (1995).

In dismissing the appeal, the Court recognized that, “the effect of the appellant’s not presenting a case was that a final judgment was entered against him, thus, clearing the way for him to challenge the trial court’s adverse ruling on appeal.” *Id.* at 535. By doing so, however, Osztreicher “acquiesced in, if not consented to, the entry of that judgment [and] may not now appeal and obtain review of those rulings.” *Id.*

In this regard, the Court relied on jurisprudence defining acquiescence as a waiver: a voluntary act of a party, an act that “is inconsistent with the assignment of errors on appeal,” and which “normally precludes that party from obtaining appellate review.” *Bd. of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 200 (1999). The Court further stated, that the right to appeal “may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal.” *Osztreicher*, 338 Md. at 535 (quoting *Rockus v. Brosius*, 241 Md. 612, 630 (1966)). A litigant “cannot, knowing the facts, both voluntarily accept the benefits of a judgment or decree and then later be heard to question its validity on appeal.” *Suburban Dev. Corp. v. Perryman*, 281 Md. 168, 171 (1977). Acquiescence “implies consent” to a judgment, although that consent may not be explicit. *Osztreicher*, 338 Md. at 534 (citation omitted). In so holding, the Court additionally observed “that a litigant who acquiesces in a ruling is completely deprived of the right to complain about that ruling.” *Id.* at 535 (citations omitted). Essentially, Osztreicher could not consent to the entry of judgment and then appeal from it. *Id.*

In the present case, the Estate, like Osztreicher, “acquiesced in, if not consented to,” the adverse judgment entered against it. Judge Heard’s denial of the Estate’s motion

for a mistrial provided a path for the Estate to continue its case but the Estate chose not to and rested instead. The Estate’s decision at trial served as a waiver of appellate review and is inconsistent with the position it maintains on appeal. Pursuant to the jurisprudence, the Estate cannot “question [the judgment’s] validity on appeal,” or otherwise “complain about that ruling,” because it consented to the judgment entered against it when it chose not to proffer evidence or otherwise advance its case.

**APPEAL DISMISSED. COSTS TO BE
PAID BY THE APPELLANT.**