COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-385

THOMAS WARD, personal representative,[1]

vs.

C AND R SERVICES, INC., & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff appeals from the order denying his motion for a new trial in this wrongful death action. We discern no cause to disturb the order, and affirm.

1. Expert testimony. The trial judge did not abuse her discretion in striking one sentence of the expert witness's testimony. "A trial judge has broad discretion with respect to the admission of expert testimony." Commonwealth v. Dockham, 405 Mass. 618, 628 (1989). A judge's discretionary decision constitutes an abuse of discretion only if "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

[1] Of the estate of Jesse Ryan Brown.

[2] Jeffrey S. Peterson.

reasonable alternatives" (quotation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The general rule is that an expert's conclusion is not necessarily objectionable "merely because [it] reaches or approaches the ultimate issue before the jury." Commonwealth v. Colin C., 419 Mass. 54, 59 (1994). See Mass. G. Evid. § 704 (2019). However, the general rule is not without exception; in particular, experts may not opine on issues that "impermissibly . . . intrude upon the jury's vital factfinding function." Colin C., supra at 60. Experts are also "foreclosed from expressing an opinion on commonplace conclusions that juries may reach without expert assistance." Matteo v. Livingstone, 40 Mass. App. Ct. 658, 663 (1996). Specifically, an expert "should not testify to whether a defendant was negligent or to other such matters which touch[] on reasonable care, an issue properly left for the jury" (quotation and citation omitted). Puopolo v. Honda Motor Co., 41 Mass. App. Ct. 96, 98 (1996).

Here, upon direct examination, the plaintiff's expert testified: "My opinion is that the cause of the collision was the failure of the operator of the truck to observe the motorcycle approaching as he entered the roadway." Transcript vol. III, p. 402. Prior to that answer, the judge repeatedly had discussed with counsel the permissible scope of the expert's testimony, and in particular had specifically advised that the

expert would not be allowed to testify that the cause of the accident was the failure of the truck driver to look. See transcript vol. I, pp. 28-32; vol. II, pp. 313-325; vol. III, pp. 337-341. When the expert offered precisely that testimony despite those multiple preemptive warnings, the judge again explained her rationale: "He can testify as to sight lines, he can testify on . . . calculations . . . but he can't testify to the ultimate issue of . . . whether or not there was a failure by the driver. . . . We went over and over this." Transcript vol. III, p. 403. We agree; this sentence of the expert's opinion went directly to causation, an element of negligence that in this case was properly left to the jury to decide. The trial judge was within her discretion to strike that sentence of the testimony, and therefore a new trial was not warranted.

2. Inconsistent verdict. "A party must object to inconsistent answers to special questions before the jury is discharged." Adams v. United States Steel Corp., 24 Mass. App. Ct. 102, 104 (1987). Otherwise, any claim of error is waived, and the complaining party may not raise the issue by way of a motion for new trial. Id.[3]

[3] We also note that objections to the form of a special question cannot be raised for the first time on appeal. Shafnacker v. Raymond James & Assocs., 425 Mass. 724, 731 (1997).

Here, the plaintiff raised no objections -- and in fact expressed his consent -- regarding the jury slip before it was submitted to the jury. See transcript vol. IV, p. 561, lines 20 to 25. Moreover, plaintiff's counsel did not object to the alleged inconsistency before the jury were discharged. See transcript vol. IV, p. 566, lines 5 to 25. Therefore, the plaintiff's argument that the jury slip returned irreconcilable answers is waived.[4]

Order denying motion for new trial affirmed.

By the Court (Green, C.J., Milkey & Wendlandt, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: October 28, 2019.

[4] Even if the issue were not waived, the jury's answers to the two questions readily may be harmonized. The plaintiff contends that because the jury answered, "Yes" to the question, "Was the defendant, [Jeffrey] Peterson, negligent?," the jury answer of "No" to the question, "Was the negligence of [Jeffrey] Peterson a substantial contributing factor in causing Jesse Brown's death?" is logically incompatible. However, it is possible for a party to act negligently but not be a legal cause of the other's injuries. See Restatement (Second) of Torts §§ 430, 431, and comments (1965).

[5] The panelists are listed in order of seniority.