IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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| SANDRA GALLO, CHRISTOPHER GALLO, Sandra Gallo as guardian ad litem and next friend of DOMINIC GALLO and ANTIONETTE GALLO, minor children, | ) | |
| Plaintiffs | ) | C.A. No. 04C-11-017 |
| v. | ) | TRIAL BY JURY TWELVE DEMANDED |
| BUCCINI/POLLIN GROUP, BPG HOTEL PARTNERS IV, LLC, BPG HOTEL PARTNERS IV HOLDINGS, LLC, HARRAH'S OPERATING COMPANY, INC., EMBASSY SUITES, INC., HILTON HOTELS, INC., and PM HOSPITALITY STRATEGIES, INC., | ) | |
| Defendants. | ) | |

Submitted: December 13, 2007
Decided: March 28, 2008

On Defendant P.M. Hospitality Strategies, Inc.'s Motion for Judgment as a Matter of Law and Motion for a New Trial. **DENIED**.

## OPINION AND ORDER

James F. Bailey, Jr., Esquire, Attorney for Plaintiffs

Nancy Chrissinger Cobb, Esquire, Attorney for Defendants

BRADY, J.

## I. INTRODUCTION

This is a premises liability action filed by Sandra Gallo[1] ("Plaintiff") against P.M. Hospitality Strategies, Inc.[2] ("Defendant"). After a three-day trial, a jury returned a $150,000 verdict in favor of Plaintiff on Aug. 16, 2006. On August 30, 2006, Defendant filed several post-trial motions including a Motion for a New Trial and a Motion for Judgment as Matter of Law. After delays related to the preparation of a trial transcript, the Court ordered additional briefing on all pending motions. The Court received the parties' final submissions on December 13, 2007. For the reasons that follow, Defendant's post-trial motions are hereby **DENIED**.

## II. FACTS AND PROCEDURAL HISTORY

On the weekend of November 22-24, 2002, Plaintiff and her family stayed at an Embassy Suites Hotel ("Hotel") in Newark, DE. At the time, Plaintiff was living in New York and her husband was living in Delaware due to a recent change in his employment. On the weekend in question, Plaintiff and her children traveled to Delaware so the family could spend the weekend together.

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[1] Plaintiff's Husband filed a loss of consortium claim, but there are no post-trial issues relevant to this claim.

[2] Plaintiff's original Complaint named seven other defendants, but they were all dismissed prior to the conclusion of trial.

The Hotel includes a pool and spa. A few days prior to Plaintiff's arrival, Hotel personnel drained the spa for routine cleaning and maintenance. After refilling the spa with regular tap water, workers attempted to turn it on, but one of the spa's two water pumps failed to operate. The malfunctioning pump is responsible for circulating water through the spa's filtration system, which also heats the water and adds chemicals such as chlorine. The pump is also used to drain the spa. Due to the malfunctioning pump, the spa contained untreated water when the Gallo family arrived at the Hotel.

Witnesses for the Defendant testified that signs printed on 8" x 11" sheets of paper were posted on the doors entering the pool area and by the spa's operating switch stating that the spa was out of order. Defendant could not produce these signs or locate the electronic file to reproduce the documents for trial.

Over the course of the weekend, Plaintiff and her children used the spa on at least two occasions. Plaintiff testified that she observed at least one other guest using the spa as well. According to Plaintiff and her husband, neither of them had any indication that the spa contained untreated water. Although they both noticed a small Post-it Note sized out-of-order sign over the spa's timer, they thought that the sign dealt only with the timer.

They both testified that the water was warm, not hot, but they did not suspect anything out of the ordinary.

On Tuesday, November 26, 2002 (two days after using the spa) Plaintiff noticed a rash on her body. She went to her family doctor, Dr. Hanna Habash, that same day and was diagnosed with hot-tub folliculitis. As the name implies, the condition is caused by an infection of the hair follicles by a species of bacteria that is frequently present in hot tubs, spas and swimming pools. Dr. Habash prescribed two antibiotics to treat the infection.

Plaintiff finished the course of antibiotics, and the rash eventually disappeared. However, sometime in early December 2002, Plaintiff began to suffer from frequent bouts of severe diarrhea and abdominal pain. At this point in time, Plaintiff had moved to Delaware to join her husband. Therefore, she saw a different family doctor, Dr. Catherine Willey. Dr. Willey prescribed another round of antibiotics.

By January 2003, Plaintiff's condition had not improved, and Dr. Willey referred her to a gastroenterologist, Dr. Harold Reilly, and an infectious disease specialist, Dr. Kirsten Hauer. Dr. Reilly performed a colonoscopy on Plaintiff and collected a stool sample. Based upon lab work performed on the stool sample, Dr. Reilly diagnosed Plaintiff with

*Clostridium difficile* colitis ("*C. diff.*"), a bacterial infection of the lower GI tract. *C. diff.* infections typically occur in patients who have taken antibiotics for some other condition. The antibiotics disrupt the balance of natural flora living in the digestive tract, thus allowing the *C. diff.* bacteria to thrive.

Due to Plaintiff's frequent diarrhea, Dr. Hauer was concerned that oral medication would not remain in Plaintiff's digestive tract long enough to properly digest and absorb into her system. Therefore, Dr. Hauer prescribed IV antibiotics which needed to be administered three times a day. In order to administer the IV medication, Plaintiff needed to have an IV catheter temporarily implanted in her arm.

Over the ensuing weeks and months, Plaintiff suffered several complications related to her treatment including a blood infection from the IV catheter. She needed to be hospitalized for the infection. She also had several relapses of chronic diarrhea and abdominal pain. However, she eventually recovered from her illness and its side effects and the majority of her symptoms subsided by August 2003.

On November 1, 2004 Plaintiff filed suit alleging that Defendant was negligent in, *inter alia*, failing to warn its guests that the spa contained untreated water. Plaintiff claimed the Hotel's negligence caused her to

contract hot tub folliculitis, the treatment of which caused *C. diff*. along with side-effects and other complications.

This Court presided over a three-day trial in this matter on August 14-16, 2006. During trial, Defendant made several motions upon which the Court reserved decision pending the conclusion of trial. Following the verdict, the Court advised the parties to renew any motion on which they wished a ruling. Accordingly, Defendant filed a Motion for Judgment Notwithstanding the Verdict and a Renewed Motion for Directed Verdict. Pursuant to the Superior Court Civil Rules, the Court will treat both motions as a Motion for Judgment as a Matter of Law.[3] Defendant also filed a Renewed Motion for a Mistrial. Since Defendant is seeking post-judgment relief, the Court will treat this Motion as a Motion for a New Trial.[4]

An official trial transcript was to be prepared in order to assist the Court with addressing the post-trial motions. The preparation of the transcript was significantly delayed for reasons that are not relevant here. On August 2, 2007 the transcript was completed. By correspondence dated

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[3] Super. Ct. Civ. R. 50; see *Dickens v. Costello*, 2004 WL 1731143 (Del. Super. July 20, 2004) quoting James W. Moore, *9 Moore's Federal Practice, 3rd* § 50.03 (2004) (Explaining that a Rule 50 motion for judgment as a matter of law encompasses both a motion for judgment notwithstanding the verdict and a motion for directed verdict.)

[4] Super. Ct. Civ. R. 59(a); See BLACK'S LAW DICTIONARY 1023 (8th ed. 2004) (A mistrial is defined as a "trial that the judge brings to an end, *without a determination on the merits,* because of a procedural error or serious misconduct occurring during the proceedings." (emphasis added)).

August 14, 2007, the Court ordered additional briefing on all pending motions in this matter. The Court received the parties' final submissions on Dec. 13, 2007.

After careful consideration of the parties' submissions and the record in this case, Defendant's Motion for Judgment as a Matter of Law and Motion for a New Trial are hereby DENIED.

## III. DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendant argues that Plaintiff failed to present sufficient evidence to support a *prima facie* negligence claim. The Court finds that after viewing the evidence in the light most favorable to the Plaintiff, a reasonable jury could have reached a verdict in favor of the Plaintiff. Therefore, Defendant's Motion must be DENIED.

### A. Legal Standard

Pursuant to Civil Rule 50(a), the Court may determine any issue as a matter of law if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Upon a party's post-trial motion for judgment as a matter of

law, "the Court must presume that the jury verdict is correct."[5] "In the face of any reasonable difference of opinion, courts will yield to the jury's decision."[6] "The factual findings of a jury should not to be disturbed if there is any competent evidence upon which the verdict could reasonably be based."[7] Thus, the Court will not disturb a jury's verdict unless after viewing the evidence in the light most favorable to the non-moving party, a reasonable jury could not have reached the result.[8]

B. Analysis

Under Delaware law a business owner has a duty to maintain the business's premises in a reasonably safe condition for the use of its patrons.[9] Attendant to this duty, is a "duty to warn its customers of any latent or concealed danger."[10] The scope of the owner's liability is well-settled:

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[5] *Luciani v. Adams*, 2003 WL 262500 at *3 (Del. Super. Feb. 26, 2003) aff'd, 846 A.2d 237; *Borns v. Coca-Cola Bottling Co*., 224 A.2d 255, 256 (Del. 1966).

[6] *Young v. Frase,* 702 A.2d 1234, 1236 (Del. 1997).

[7] *Mercedes-Benz of N. America, Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1362 (Del.1991).

[8] *Luciani,* 2003 WL 262500 at *3; *Storey v. Camper*, 401 A.2d 458, 465 (Del.1979).

[9] *Coker v. McDonald's Corp*., 537 A.2d 549, 550 (Del. Super. 1987).

[10] *Id.*

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
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> (a) knows or by the exercise of reasonable care would discover the condition, and should realize it involves an unreasonable risk of harm to such invitees, and
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger.[11]

In the instant case, Plaintiff alleged that the untreated spa constituted a known, dangerous condition on Defendant's premises, and Defendant failed to warn Plaintiff of the danger. Defendant argues that Plaintiff failed to produce sufficient evidence from which a jury could reasonably base a finding of negligence. The Court finds that there was sufficient evidence from which a jury could reasonably so find.

*Expert Testimony*

Defendant argues that Plaintiff was required to produce expert witness testimony to establish the applicable standard of care. Defendant explains this position accordingly:

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[11] *Ward v. Shoney's,* 817 A.2d 799, 802 (Del. 2003) citing Restatement (Second) Torts § 343 (1965).

> Plaintiffs argued that the hotel failed to meet the standard of care relative to the operation of a hotel spa or hot tub… The operation of an aquatics center and a hotel is not likely within the realm of experience of the lay person. Rather, evidence of the industry standards are necessary.[12]

Issues regarding mandatory standard-of-care expert testimony most commonly arise in the context of a professional negligence case. Since a professional's conduct and competency is evaluated against others who possess similar skills, expertise, training and knowledge, "the standard of care applicable to a professional can only be established through expert testimony."[13]

The instant case is a premises liability action and the standard of care is well-defined by the common-law.[14] Plaintiff did not allege that professional services rendered by the Defendant fell short of the standard set by others in the industry. Rather, Plaintiff has alleged that Defendant failed to warn her of a known danger on Defendant's premises.

Of course, expert testimony is not restricted to the realm of professional negligence cases. In every case, "[e]xpert opinions are

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[12] Def. Br. at 13.

[13] *Norfleet v. Mid-Atlantic Realty Co.*, 2001 WL 695547 at *4 (Del. Super. April 20, 2001) quoting *Weaver v. Lukoff*, 511 A.2d 1044 (Del. 1986).

[14] *Ward*, supra at 802.

appropriate where they will assist the jury in understanding the facts or the evidence."[15] However, there is an obvious distinction between expert testimony that is mandatory and that which is merely helpful.[16]

Defendant claims that the instant case required expert standard-of-care testimony. To support this contention, Defendant relies primarily on *Lee v. Choice Hotels Int'l Inc.*[17] In *Lee*, a child nearly drowned in a swimming pool at a hotel resort in Indonesia, and the child's parents brought suit against the hotel's U.S. franchisor. Plaintiffs retained an aquatic-safety expert who concluded that the pool's design and construction along with the facility's lack of trained lifeguards fell below international standards of care.[18] Upon the defendant's Motion to Strike, the Court excluded the expert testimony, finding that the expert was qualified as an expert on aquatic safety generally, but not qualified to offer an opinion on the standard of care specific to Indonesia.[19]

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[15] *Id*. at 803.

[16] *Norfleet*, supra at *4-*5 (distinguishing between expert testimony that is helpful and that which is necessary).

[17] *Lee v. Choice Hotels Int'l Inc*. 2006 WL 1148752 (Del. Super. March 24, 2006).

[18] *Id*. at *2.

[19] *Id*. at * 7.

While *Lee* did address a pool safety issue, this Court finds that the case bears little, if any, relevance upon the case at bar. Contrary to Defendant's position, the Court in *Lee* did not address in what scope of pool safety issues expert testimony was required, but, rather, the qualifications of a particular expert to testify as to specific opinions.

To the extent that *Lee* may arguably stand for the proposition submitted by Defendant, however, the facts, claims and circumstances are substantially dissimilar to the instant case. In *Lee,* the plaintiff claimed that the pool was negligently designed and constructed and that hotel personnel were negligently hired, supervised, and retained.[20] It is clear that expert testimony would assist the trier of fact determine the merits of such an allegation. Swimming pool construction and design and the proper training of lifeguards are not subjects within the common knowledge of the average juror.

In comparison, the case before this Court creates no issues that are particularly complicated or confusing. Plaintiff simply alleged that she was not fully apprised of the spa's dangerous condition. The Defendants did not hold out the spa as satisfactory for use, nor did they claim that their treatment of the water or use of chemicals was sufficient. Expert testimony

[20] *Lee*, 2006 WL 1148737 (Del. Super. March 21, 2006).

in the instant case would not have been particularly helpful and it certainly was not necessary to establish a *prima facie* case.

*Dangerous Condition*

Defendant claims that "Plaintiff failed to adduce any evidence that the hot tub was a dangerous condition… The fact that Mrs. Gallo claimed to have become ill from using it is not evidence that a dangerous condition existed."[21]

Defendant's position implies that the only evidence that Plaintiff put forth was her injury. This is clearly not the case. The evidence at trial demonstrated that Defendant's spa was filled with untreated water; Plaintiff used the spa and developed hot tub folliculitis two days later; hot tub folliculitis is caused by bacteria that are often found in spas, pools and hot tubs; hot tub folliculitis typically manifests itself within one to two days after exposure to contaminated water. Taken together, this evidence formed a sufficient basis upon which a jury could infer the existence of a dangerous condition.

Additionally, in this case Defendant's own evidence was that hotel personnel recognized the hazardous condition and posted notice to guests

[21] Def. Br. at 15.

not to use the spa. Certainly, in those cases in which a party acknowledges an unsafe or unsanitary condition, there is no need for the opposing party to prove the condition's existence by expert testimony or otherwise. It is simply not a fact in dispute.

Therefore, viewing the evidence in a light most favorable to the Plaintiff, the jury could have reasonably concluded that the untreated water contained a high level of bacteria that would not have been there if the water had been treated. The jury could further infer that a spa filled with this type of water created a risk of harm to guests staying at the Hotel and, based on the testimony of the medical expert and the consistency of Plaintiff's experience in developing symptoms to that testimony, the jury could reasonably find the exposure and illness were causally related.

*Defendant's Knowledge of a Dangerous Condition*

Defendant also claims that Plaintiff failed to produce evidence that the Defendant knew or should have known of the dangerous condition. This argument fails on the plain facts of the case and directly contradicts Defendant's contention that Plaintiff should not have used the spa because Hotel employees posted signs indicating that the spa was closed. The evidence shows that Hotel personnel knew that the spa was not treated with

any chemicals, such as chlorine, that control water quality. Viewing this evidence in a light most favorable to the Plaintiff, the jury could reasonably conclude that the Hotel staff knew or should have known that the untreated water was not safe for guests.

*Plaintiff's Alleged Knowledge of the Dangerous Condition*

Lastly, Defendant argues that "the unrebutted testimony was that the Hotel did warn Mrs. Gallo of the situation."[22] This argument centers on the fact that Plaintiff admitted to seeing an "out of order" sign posted above the spa's timer.

The duty to warn is grounded upon the property owner's superior knowledge of a dangerous condition.[23] "It is when this perilous condition is known to the owner and not to the invitee that recovery is permitted."[24] Accordingly, a property owner has no duty to warn an invitee of a known or obvious danger.[25]

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[22] Def. Br. at 16.

[23] *Niblett v. Pennsylvania Rail Road Co.*, 158 A.2d 580, 583 (Del. Super. 1960); 62 Am. Jur. 2d. *Premesis Liability* § 37 (2008).

[24] *Niblett,* 158 A.2d 580, 583.

[25] *McCarnan* 2008 WL 308468 at *2; *Coker*, 537 A.2d 549; *Niblett*, 158 A.2d 580, 583.

Here, Plaintiff claims that she read an out of order sign but thought the sign concerned the timer only.[26] She testified that she had no idea that the spa contained untreated water. Plaintiff testified that she saw no warnings other than the "Post-it" by the timer. Defendant did not produce the 8" x 11" out-of-order signs that were allegedly posted on the premises. The failure to produce this evidence could be concluded by the jury to discredit Defendant's claim that Plaintiff knew that the entire spa was not functioning. Viewing this evidence in a light most favorable to the Plaintiff, the jury could reasonably find that the Defendant knew the water was not treated and that the Plaintiff did not. The jury could further conclude that the out-of-order sign did not adequately warn Plaintiff of the full extent of the danger posed by the untreated water.[27]

[26] The presence of other warning signs was a point of much contention during the trial. Plaintiff and her husband testified that no signs were present, except for the Post-it Note sized sign over the timer that controlled the jets. Defendant's witnesses testified that there were two to three larger signs posted elsewhere in the facility. The jury was free to weigh the witnesses' credibility and accept the Plaintiff's version of the facts.

[27] Defendant claims that the warning's inadequacy must be established by expert testimony. Having already addressed Defendant's expert-testimony argument, the Court will not re-visit it here.

C. Conclusion Regarding Defendant's Motion for Judgment as a Matter of Law

After viewing the evidence in the light most favorable to the Plaintiff, the Court finds that the Plaintiff presented sufficient evidence from which a reasonable jury could have found in favor of the Plaintiff. Therefore, Defendant's Motion for Judgment as a Matter of Law is DENIED.

## IV. DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant claims that it was "incurably prejudiced"[28] by allegedly improper comments made by Plaintiff's counsel during opening and closing statements. At trial, Defendant twice moved for mistrials based upon these comments. The Court reserved judgment on these motions and Defendant renewed the motions post-trial. For the reasons that follow, Defendant's Motion for a New Trial is DENIED.

### A. Legal Standard

Pursuant to Superior Court Civil Rule 59, the Court may grant a new trial "for any of the reasons for which new trials have heretofore been granted in the Superior Court." A jury's verdict is entitled to "enormous

[28] Def. Br. at 11.

deference," and it should not be set aside unless it is clear that the verdict was the result of passion, prejudice, partiality or corruption.[29] "The denial of a motion for a new trial will constitute an abuse of discretion if the jury verdict was against the great weight of the evidence, no reasonable jury could have reached the result, and the denial was untenable and unreasonable."[30]

B. Analysis

Every improper comment made by counsel is not reversible error.[31] "The question is whether the comments caused sufficient prejudice to the complaining party to warrant reversal."[32] Delaware has adopted a three-part inquiry to "gauge the effect of improper comments made by counsel."[33]

(1) The closeness of the case,

(2) the centrality of the issue affected by the error, and

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[29] *Id.* at *5 quoting *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997); *Storey v. Castner,* 314 A.2d 187, 193 (Del. 1973).

[30] *Wilhelm v. Ryan*, 903 A.2d 745, 755 (Del. 2006).

[31] *Joseph v. Monroe*, 419 A.2d 927, 930 (Del. 1980).

[32] *Id.*

[33] *Adams v. Luciani*, 846 A. 2d 237 (Del. 2003).

(3) the steps taken to mitigate the error.[34]

Of course, before the Court can engage in such an analysis, it must first find that counsel's comments were improper or misleading. Defendant has alleged that Plaintiff's counsel made six improper comments during the course of the trial. The Court finds that only three of these comments were improper.[35] However, for the reasons that follow, the Court is satisfied that the improper comments did not cause sufficient prejudice to warrant a new trial.

*Comments Regarding Bacterial Content of the Spa*

On July 25, 2006 Defendant filed a pre-trial motion *in limine* to preclude Plaintiff from arguing that water in the Hotel spa was contaminated, dangerous or otherwise unfit. The crux of Defendant's Motion was that the water was never tested for the presence of harmful material. The Court granted the motion and precluded Plaintiff from presenting argument or evidence suggesting that the water was contaminated. At trial, the Court refined its Order, stating that Plaintiff's

[34] *Id.* citing *Hughes v. State*, 437 A.2d 559, 571 (Del. 1980); see *DeAngelis v. Harrison*, 628 A.2d 77 (Del. 1993) (extending the three-part inquiry to civil actions).

[35] The Court takes caution to note that this finding is not tantamount to concluding that Plaintiff's counsel acted in bad faith. The Court is satisfied that the offending comments were inadvertent.

expert witnesses could state that Plaintiff presented symptoms consistent with someone who had been exposed to contaminated water, but they were not permitted to comment on the actual quality of the water, as that fact was unknown.[36]

During opening statements, Plaintiff's counsel stated that Plaintiff's rash was caused by bacteria in the water that "shouldn't have been there."[37] Defendant argues that this comment is not supported by the evidence presented at trial and that it violated the Court's ruling on Defendant's motion *in limine*.

It is common knowledge that bacteria, viruses and other microbes exist in virtually any conceivable environment. However, there is obviously a line between acceptable and unacceptable levels and types of bacteria. The comment at issue suggested that the spa contained either an unacceptable level of bacteria or a species of bacteria that otherwise should not have been there. However, Plaintiff produced no evidence on standards of acceptable types or levels of bacteria or any direct evidence that the water in the spa exceeded acceptable public health standards. Therefore, counsel's remarks

[36] Tr. Trans. at 8-9 (Aug. 15, 2006).
[37] Tr. Trans. at 21 (Aug. 14, 2006).

were not supported by the evidence, were improper, and were in violation of the Court's pre-trial ruling.

After considering the factors enunciated above, the Court is satisfied that Defendant suffered no significant, incurable prejudice from the comment. Although there was no direct evidence that the spa contained unacceptable levels of bacteria, there was ample indirect evidence on this issue. Defendant's own expert conceded that Plaintiff most likely contracted hot tub folliculitis from her exposure to Defendant's spa,[38] and Defendant never argued that the condition was caused from anything other than the Hotel spa. Although the comment made by counsel was improper, it was still a reasonable inference that the jury could have drawn independent of counsel's suggestion. The Court did not issue a contemporaneous cautionary instruction after the comment was made. However, prior to jury deliberations, the Court issued the standard cautionary instruction regarding comments made by counsel.[39] The Court is satisfied that the standard instruction cured any prejudicial effect that the comment may have had.

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[38] Tr. Trans. at 104-105 (Aug. 15, 2006).

[39] Del. Super. P.J.I. Civ. § 3.3 (2000) "What the attorneys say is not evidence. Instead, whatever they say is intended to help you review the evidence presented. If you remember the evidence differently from the attorneys, you should rely on your own recollection… What an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any personal opinion or belief offered by an attorney concerning testimony or evidence."

*Comments Regarding Dr. Nieman's Testimony*

Due to a scheduling conflict, Plaintiff was unable to depose Defendant's expert witness, Dr. Roger Nieman. The parties agreed that Plaintiff's counsel could have an informal conversation with this witness in order to familiarize himself with the general substance the doctor's expected testimony. However, counsel agreed that the content of the conversation could not be used for impeachment purposes.

In opening statements, Plaintiff's counsel stated that Dr. Nieman would opine that Plaintiff never contracted *C. diff*. Counsel then described to the jury a brief summary of the conversation that he had with Dr. Nieman:

> So the question put to him… before we started today and which I will put to him again tomorrow will be: So, Doctor, what did she have? What was wrong with her? And based on what he's already said, the answer will be: Mr. Baily, I don't know. I can't tell you what's wrong with Sandy Gallo.[40]

Defendant claims that these comments were inappropriate because the conversation between Plaintiff and Dr. Nieman was "off the record."[41] The Court finds that the comments were improper, but since the substance of the

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[40] Tr. Trans. at 25 (Aug. 14, 2006).

[41] Def.'s Br. at 5.

comments did not differ from the substance of the witness's testimony, the comments had no prejudicial effect.

The purpose of the off-the-record conversation was to familiarize counsel with the scope and content of Dr. Nieman's testimony. The agreement between counsel prohibited Plaintiff from using the conversation as a basis for impeaching Dr. Nieman's trial testimony. At trial, Dr Nieman testified as follows:

> Q: Okay. And my last question, which is one I asked before and want to make sure I didn't miss, you're saying you don't know what she has, can't explain it. You're saying she didn't have *C. diff.*, but whatever it is, she didn't have it before the hot tub and now she does?
>
> A: As far as I know, yes.[42]

It is clear that Dr. Nieman's testimony was wholly consistent with counsel's representation during opening statements. Therefore, counsel did not use the conversation to impeach the witness's credibility. However, the manner in which counsel phrased his comment was improper, because counsel commented on his own personal knowledge of the witness's prior statement. This prior statement could not have been admitted into evidence, and therefore, counsel should not have referenced it. However, since the

[42] Tr. Trans. at 112 (Aug. 15, 2006).

witness's testimony was practically identical to counsel's representations, the Court finds that the improper statement was not prejudicial.

*Comments Regarding Alternative Courses of Action that Defendant Could Have Taken*

During opening statements, Counsel listed a series of acts that Defendant could have undertaken in order to prevent guests from entering the Hotel spa. These acts included erecting a barricade, putting up yellow caution tape, draining the spa, *etc*. Defendant claims that these comments were improper in the absence of expert testimony establishing the applicable standard-of-care in operating a hotel spa.

The Court has already established that expert testimony was not necessary in this case. Therefore, expert testimony was not needed to support Plaintiff's contention that Defendant did not adequately prevent guests from entering the spa. Further, Defendant acknowledged that the spa was shut down because it was not working properly and acknowledged that signs were posted to inform guests of the spa's unsafe condition. Defendant argued that these steps were adequate to prevent guests from using the spa but no expert witness was offered to support this position. Under such circumstances, it is not unreasonable for Plaintiff to make common sense suggestions to rebut Defendant's contention that the Hotel instituted

adequate safety precautions. Therefore, the Court is satisfied that counsel's comments were proper.

*Comments Regarding Brad Wenger's Testimony*

Brad Wenger was the Hotel Manager when the Gallo family stayed at the Hotel. He testified that before he left work on Friday Nov. 22, 2002, he noticed at least two 8" x 11" signs indicating that the spa was out of order. In Plaintiff's rebuttal closing argument, counsel suggested that Mr. Wenger's testimony was inconsistent from his deposition, because Mr. Wenger previously testified that he could not recall the exact wording.

The Court finds that counsel misrepresented the testimony. Mr. Wenger's trial and deposition testimony both indicated that he did not know the exact wording but he knew generally that the signs said "out of order" or something to that effect.

Plaintiff's counsel attempted to impeach Mr. Wenger's credibility by stressing a rather minor – yet nonexistent – inconsistency. Assuming the jury believed that the testimony was inconsistent on such a small detail, the Court finds that the inconsistency was unlikely to weigh very heavily on their deliberations. The Court is satisfied that the standard cautionary instruction discussed above cured any prejudicial effect.

*Comments Regarding Justin Bakeoven's Testimony*

Justin Bakeoven was the facilities manager when the Gallo family stayed at the Hotel. He testified that there were three 8" x 11" signs indicating that the spa was out of order. In Plaintiff's rebuttal closing argument, counsel suggested that Mr. Bakeoven's testimony was inconsistent from a memo that he wrote regarding a phone conversation that he had with Plaintiff shortly after her stay. The memo states, in part, that Plaintiff "disregarded the out of order sign."[43] Plaintiff's counsel pointed out the fact that the memo mentioned only one sign and that Mr. Bakeoven likely would have noted the existence of other signs if they, in fact, existed.

Counsel is permitted to argue any reasonable inference from the evidence presented at trial. The Court finds that the inference argued by Plaintiff's counsel was reasonable. Therefore, the Court finds nothing improper about these comments.

*Comments Regarding Plaintiff's Medical Records*

As stated earlier, Plaintiff was prescribed IV antibiotics, and she later developed a blood infection from the IV catheter. Plaintiff's doctor

[43] Pl. Resp. Br. at 14.

prescribed the IV treatment because she thought that pills would not remain in Plaintiff's system long enough to be effective. During closing arguments, Defendant's counsel stated that Plaintiff's medical records do not indicate that oral medication was passing through her system undigested. In rebuttal, Plaintiff's counsel made reference to a portion of the medical records in which Dr. Hauer states, "Patient describes consuming some corn and having a transit time of less than a half hour."[44] Defendant claims that Plaintiff's counsel misrepresented the evidence because this statement deals with food, not pills.

The Court finds nothing improper or inaccurate about counsel's representation of the medical records. The Court is of the opinion that the jury would place little if any significance upon this alleged discrepancy. The issue was whether or not substances were rapidly passing through Plaintiff's digestive system, and the medical records referenced by Plaintiff's counsel supported Dr. Hauer's decision to prescribe IV antibiotics.

C. Conclusion on Defendant's Motion for a New Trial

For the reasons set forth above the Court finds that the challenged comments made by Plaintiff's counsel during trial did not cause sufficient

[44] Pl. Resp. Br. at 11 (Nov. 16, 2007).

prejudice to warrant a new trial. The standard cautionary instruction was adequate to cure any prejudicial effect.

V. CONCLUSION

For the forgoing reasons, Defendant's Motion for Judgment as a Matter of Law for a New Trial are **DENIED**.

**IT IS SO ORDERED.**

**/s/**
M. Jane Brady
Superior Court Judge