

STATE OF MICHIGAN
COURT OF APPEALS

THEODORE A. HENDON, Personal
Representative of the ESTATE OF
CHRISTOPHER M. HENDON, Deceased,

UNPUBLISHED
May 28, 1996

Plaintiff- Appellant,

v

No. 176168
LC No. 91-415840-NH

WILLIAM BEAUMONT HOSPITAL,
KENNETH WOLOK, M.D., and TRI COUNTY
MEDICAL CLINIC,

Defendants- Appellees..

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

FITZGERALD, P.J. (concurring in part and dissenting in part).

I respectfully dissent from the majority's conclusion that evidence that plaintiff had suffered a gunshot injury to the head that caused him to have seizures was properly admitted.

Plaintiff moved in limine to prevent defendants from introducing evidence regarding the gunshot injury on the ground that plaintiff only suffers memory lapses when he experiences a grand mal seizure, which he clearly did not have on the night in question. Defendants argued that plaintiff admitted in his deposition that he had memory problems arising from petit mal seizures. Plaintiff explained that his petit mal seizures did not begin until after the death of his son. Defense counsel then argued that a person can have petit mal seizures for years before a diagnosis is made and that whether a petit mal seizure was the cause of plaintiff's failure to remember the discussion regarding a "do not resuscitate" order was a question of fact for the jury. The trial court agreed with defendant, stating that "[w]e really don't know, but there's certainly—in my opinion, it's a possibility that he could have had ah [sic] petit mal seizure at that time. And I think it's relevant and I think that's something the jury has to take into consideration."

* Circuit judge, sitting on the Court of Appeals by assignment.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Defendant's theory that plaintiff had a petit mal seizure during his conversation with the emergency room doctor was pure speculation and had no probative value. Absolutely no evidence was presented to support a conclusion that plaintiff had a petit mal seizure during his conversation with the emergency room doctor.¹ To the contrary, the doctor testified, as he must in order to show that he obtained informed consent, that plaintiff was lucid, competent, asked some questions, and nodded during the discussion. The doctor testified that in speaking to plaintiff, his main goal was "to make sure that he understands in real basic terms the decision that he's going to have to make." The doctor further testified that "[i]t's real important, as part of getting a DNR, to assess the competency of the person that you're talking with and he was – had communicated with me very effectively with the history and he was listening actively and is a bright man and you have to – I feel no problem with communicating the DNR here."

The evidence was also extremely prejudicial. It allowed the jury to resolve a credibility question without having to find that one of the parties lied. It also gave the jury a reason to question plaintiff's credibility in general. In my opinion, the meager probative value of this evidence was substantially outweighed by the danger of unfair prejudice and should have been excluded. Because this particular credibility dispute was the backbone of plaintiff's lawsuit, the error was not harmless.

I would reverse and remand for a new trial.

/s/ E. Thomas Fitzgerald

¹ Plaintiff testified that in his experiences with petit mal seizures since the death of his son, he will begin "daydreaming" during conversations. He also "stares" and occasionally his eyes roll back in his head. While such symptoms may not be readily apparent when defendant is merely listening to a conversation, here the doctors testified that defendant actively participated in the conversation.