VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 21st *day of* November, 2014.

Gary Allen Ayers, Administrator
of the Estate of Florence Gunter Ayers, Appellant,

against Record No. 140288
Circuit Court No. CL12-21

AFS of Hot Springs, Inc., Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Bath County.

Upon consideration of the record, briefs, and argument of counsel, the Court finds no reversible error in the judgment of the circuit court. Therefore, the judgment is affirmed.

AFS of Hot Springs, Inc. ("AFS") operates The Springs Nursing Center ("the nursing home"), in which the decedent was a resident from July through September of 2010. On August 21, 2010, an employee of AFS attempted to transfer the decedent from her bed to a wheelchair using a Hoyer lift. The employee negligently operated the lift causing the decedent to fall to the floor and fracture her ribs and lacerate her spleen. The decedent's health deteriorated and she ultimately died.

On April 23, 2012, Gary Allen Ayers ("Ayers"), as the administrator of the decedent's estate, filed suit against AFS alleging wrongful death, negligence, and negligence per se. Prior to trial, Ayers filed a motion in limine to exclude "any reference to collateral sources, including health insurance, Medicare, Medicaid, 'write-offs,' 'write-downs' or any other reference to disallowance of medical expenses," and AFS agreed that such

evidence was not admissible. The court entered an order to that effect.

At trial, Rhonda Plumley, an employee of the nursing home, was called by Ayers as a witness. Upon questioning by Ayers, she testified that nursing facilities conduct Minimum Data Set ("MDS") assessments of each patient receiving Medicare benefits. She responded affirmatively when lead counsel for Ayers asked her if the "purpose of the MDS is to communicate to . . . the federal government 'this is what my patient is like,'" but stated that the MDS is also a tool used within the facilities. Lead counsel for Ayers also offered the decedent's MDS report into evidence as exhibit 9, and directed Plumley's attention to the certification of the report required by the federal government and asked Plumley to read it into the record. The certification read in part:

> I understand that this information is used as a basis for ensuring that residents receive appropriate and quality care, and as a basis for payment of funds. I further understand that payment of funds as used for thc patient is conditioned on the accuracy and truthfulness of this information[.]

The decedent's MDS report offered into evidence by Ayers indicated that her stay at the nursing home was being paid for by "Medicaid per diem." Moreover, the MDS report that Ayers entered into evidence included the statement that "the information was collected in accordance with applicable Medicare and Medicaid requirements."

On cross-examination, counsel for AFS asked

> Q: And the purpose of the signature is that this document has to go to the federal government, right?

A: Correct.

Q: Because you can't get paid under Medicare unless it is submitted?

A: Correct.

Q: Because Ms. Ayers, all of her medical bills were being paid for by the federal government, correct?

A: Correct.

At that point, lead counsel for Ayers objected, arguing that this subject had been addressed by a motion in limine in which it was agreed that the information would not come in. Counsel for AFS responded that lead counsel for Ayers had opened the door "by printing Medicare and Medicaid several feet high on the wall." Lead counsel for Ayers responded that

> [w]e have . . . a pretrial motion keeping out collateral sources, Medicare, Medicaid, et cetera. This document doesn't mean that my client was receiving care by Medicare or Medicaid. In fact, I believe that Ms. Plumley said every single nursing home patient has this document.
>
> . . . .
>
> So, if you are private pay, or if you are Medicaid, this document has to be done. In fact, it has more to do with whether a facility is Medicare certified than if the patient is Medicare certified. And, I'm afraid that question was so - I'm just really afraid of what happened, saying to Ms. Plumley, "Isn't it true that the decedent was being paid for by Medicare?"

Counsel for AFS responded

> Well, Judge, and I apologize if I went too far, but when I agreed to that motion in limine, as I always do, generally, when plaintiff counsel submits records, they redact any references to insurance, they redact any references to collateral sources.

The court held

> I'm not going to grant a mistrial, but I don't want any reference to Medicare or Medicaid. I mean, she didn't bring that up -- and I knew why she was bringing it up. She went through it line by line, so that when she gets to her closing, she can say they certified, they had to certify, that this was her condition on July 10th, when she got there. She didn't have this, she didn't have that, and look where we are after you-all had dropped her.

Counsel for Ayers expressed concern that the jury visibly reacted when counsel for AFS asked about the decedent's insurance and asked for a curative instruction. The court responded, "I can go out there and tell them that they need to ignore any reference to Medicare or Medicaid, because it does not play a part in this case, but if I do that, it's a two-edged sword." The lead counsel for Ayers stated, "[i]t's not going to help us." The court reiterated, "I'm not going to declare a mistrial. I will do it either way you want. We'll leave it alone, and you are not to touch it."

Counsel for AFS agreed not to mention the subject in closing argument. Counsel for Ayers asked the court if it could order counsel for AFS to tell the witness that he misspoke and that

"[t]here is no evidence in this case that Ms. Ayers had that kind of insurance," but the court refused to order counsel for AFS to do that. Again, the court reiterated that

> I am either going to say that Medicare/Medicaid doesn't play a part in it, or I'm going to leave it alone. It's as simple as that. That's my position. Name your poison.
>
> [Counsel for Ayers]: I think just leave it alone and move on.
>
> [Lead Counsel for Ayers]: Yes.

At the start of the second day of the trial, counsel for Ayers asked for a mistrial and the court responded that the question asked by counsel for AFS was not egregious and counsel for Ayers was offered the opportunity to

> correct it with a curative or an instruction telling the jury to ignore it. I gave counsel that option, and counsel elected - since it was only mentioned one time, and never mentioned again, counsel elected not to.
>
> The other thing I would say is the same thing I said yesterday, and I didn't press any with remembering what I said, but in the grand scheme of things in this case, and by the time we get done with both of your experts today, that's going to be so far down the river, they're not going to remember that for a minute. So your motion is overruled.

At trial, the plaintiff claimed damages in the amount of $148,219. The jury ultimately found AFS liable and awarded Ayers $75,000.

Ayers filed a motion to set aside the verdict, in which he argued that the jurors' reactions necessitated a mistrial. The court responded by stating that

> I watched the jury pretty carefully during all of this trial. I must have missed something because I didn't see any reaction out of the jury at all. [Counsel for AFS] posed the question, you objected, and I said it's improper, and I didn't see him give it another thought.

When asked by the court about its offer of a curative instruction, lead counsel for Ayers responded that it would not have been sufficient. Counsel for AFS argued again that lead counsel for Ayers opened the door through introducing exhibit 9 without redacting the fact that the decedent's care was being paid by "Medicaid per diem." Lead counsel for Ayers contended that

> [o]ne point of clarification that I think is necessary for the record, an MDS report, if read in great detail, which of course the jury did not have the opportunity to do - we had put small portions of it before them as demonstrative. But all it says is that our client was Medicare and Medicaid eligible.

Lead counsel for Ayers further argued that the law states that if there may have been an effect, a mistrial is appropriate. The trial court denied the motion.

On appeal, Ayers argued that the circuit court abused its discretion by denying its request for a mistrial where a question asked by AFS about collateral source funding was irrelevant, deliberate, and prejudicial. We disagree.

"The decision whether to grant a motion for a mistrial is a matter submitted to the trial court's sound discretion." Lowe v. Cunningham, 268 Va. 268, 272, 601 S.E.2d 628, 630 (2004).

> "An abuse of discretion . . . can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment."

Landrum v. Chippenham & Johnston-Willis Hosps., Inc., 282 Va. 346, 352 (Va. 2011)(quoting Kern v. TXO Production Corp., 738 F.2d 968, 970 (8th Cir. 1984)).

"The general rule in this Commonwealth is that absent a manifest probability of prejudice to an adverse party, a new trial is not required when a court sustains an objection to an improper remark or question by counsel" and offers to give a cautionary instruction to the jury. Lowe, 268 Va. at 272, 601 S.E.2d at 630.

> The trial court's determination whether a statement or question of counsel is so inherently prejudicial that the prejudice cannot be cured by a cautionary instruction must be guided by a consideration of several factors. These factors include the relevance and content of the improper reference, and whether the reference was deliberate or inadvertent in nature. The court also must consider the probable effect of the improper reference by counsel. All these factors must be considered because not every irrelevant statement or question will result in prejudice to an opposing party. See Virginia-Lincoln Furniture Corp. v. Southern Factories & Stores

> Corp., 162 Va. 767, 781, 174 S.E. 848, 854 (1934). To justify a new trial, the nature of counsel's improper reference must be "likely to inflame the passion or instill a prejudice in the minds of the jury." Id.; see also Kitze [v. Commonwealth], 246 Va. [283,] 288, 435 S.E.2d [583,] 585 [(1993)]; Meade v. Belcher, 212 Va. 796, 799, 188 S.E.2d 211, 213 (1972).

Id. at 273, 601 S.E.2d at 631.

Here, it is not disputed that counsel for AFS asked a question about collateral source funding in violation of the terms of the agreed upon motion in limine. Based on the questions lead counsel for Ayers asked Plumley about the MDS sheet and the entry of an unredacted sheet into evidence, counsel for AFS could have reasonably believed that lead counsel for Ayers had opened the door to questions on collateral source funding. Again, because of the Plaintiff's questions and introduction of the document, Ayers cannot demonstrate prejudice. Moreover, it is clear that the court considered the probable effect of the reference including the questions asked by Plaintiff's counsel and the reaction or lack thereof by the jurors and concluded that AFS' question was not so egregious and not likely to be a focal point for the jury. As such, it cannot be said as a matter of law that the trial court erred in denying Ayers' request for a mistrial. Therefore, the judgment of the circuit court is affirmed. The appellant shall pay to the appellee two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

JUSTICE MILLETTE and SENIOR JUSTICE KOONTZ dissent.

A Copy,

Teste:

Patricia L Harrington

Clerk