THE ESTATE OF LLOYD GORCEY, by its Administratrix Ad Prosequendum, ELIZABETH GORCEY, ELIZABETH GORCEY, Individually, HILARY GORCEY and BERNARD GORCEY, Plaintiffs-Appellants, v. JERSEY SHORE MEDICAL CENTER, DAVID SILVERSTEIN, M.D., KATHY NAPOLITAN, R.N., MAGGIE GATTO, R.N., Defendants-Respondents.

DOCKET NO. A-3539-03T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2006 N.J. Super. Unpub. LEXIS 314

February 8, 2006, Argued
March 6, 2006, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, MON-L-6098-98.

COUNSEL: Adam M. Slater argued the cause for appellants (Nagel Rice & Mazie, attorneys; Mr. Slater, of counsel; Mr. Slater and Bruce H. Nagel, on the brief).

Michael E. McGann argued the cause for respondents (Amdur, Maggs & McGann, attorneys; Richard A. Amdur, of counsel, Colleen L. Brandt, on the brief).

JUDGES: Before Judges Conley, Weissbard and Winkelstein.

OPINION

PER CURIAM

In this medical malpractice action arising out of the death of thirty-nine-year-old Lloyd Gorcey (decedent), plaintiffs, decedent's estate, his sister and parents, appeal from a jury verdict in favor of defendants following a six-day trial in January 2004. Because of the multiple trial errors that individually and together denied plaintiff a fair trial, we reverse.

In the early morning hours of December 8, 1996, decedent suffered severe injuries in an automobile accident. After he was extricated from his vehicle, emergency personnel transported him to Jersey Shore Medical Center (the medical center or hospital). At the scene, they were unable to record a blood pressure. The paramedics started an intravenous line and administered crystalloid fluids. [*2] En route to the hospital, they obtained a blood pressure reading of

146/50.

Decedent was brought to the hospital at approximately 1:07 a.m. Defendants Dr. David Silverstein, Nurse Marguerite Gatto, and Nurse Kathleen Napolitan were among those who attended to him. Dr. Silverstein ordered blood work including a "type and screen," but did not initially request a "type and cross-match." "Type and screen" is used to determine the patient's blood type; "type and cross-match" links the patient's blood type with blood that can be transfused without significant risk of transfusion reaction. The order was later changed, and typed and cross-matched blood was available approximately twenty to twenty-five minutes after decedent arrived at the hospital. Dr. Silverstein also directed that decedent be x-rayed, which revealed a fracture of the left pelvis. His blood pressure fluctuated as he was administered fluids, but he was not initially given blood.

At approximately 2:00 a.m., decedent was taken to the CAT scan room, where scans of his head, spine, chest, abdomen and pelvis were planned to rule out internal injuries. The head scan revealed no signs of injury. As the abdominal scan was being prepared, [*3] decedent suddenly cried out, became nauseous, and had trouble breathing. He vomited, lost consciousness, and went into cardiac arrest. It was at that time, approximately 2:49 a.m., when Dr. Silverstein ordered, for the first time, that blood be rapidly infused into decedent; nearly four full units of blood were given within minutes. Despite these measures and resuscitation efforts, decedent's vital signs did not return and he was pronounced dead at 3:03 a.m. No autopsy was performed because decedent's family objected for religious reasons.

On January 5, 2004, the day prior to jury selection, defense counsel requested an adjournment because Dr. Silverstein was unable to attend the trial due to emotional problems. The trial court denied the motion because the case was six years old, plaintiffs had flown in from Arizona and California, and, according to the judge, "there has never been any indication that Dr. Silverstein needed any type of accommodation prior to today."

At trial, which began the next day, Dr. Gerald Brody, plaintiffs' expert, testified that decedent died from internal bleeding; that Dr. Silverstein deviated from the standard of care and the hospital's fluid resuscitation [*4] policy by failing to administer blood to decedent upon his arrival at the hospital, given decedent's clinical picture. Dr. Brody rendered an opinion that if blood had been given to decedent at 1:11 a.m., after decedent experienced a drop in blood pressure, it would have saved his life. Dr. Brody opined that Nurse Gatto deviated from the standard of care by failing to take decedent's vital signs at least every ten minutes, "probably every five minutes."

The defense expert, Dr. Jeffrey Hammond, disagreed with Dr. Brody's opinion that internal bleeding caused decedent's death. Dr. Hammond opined that decedent's vital signs and the medical records were not consistent with internal bleeding. He testified that no standard existed as to how often vital signs should be taken; and, taking more frequent vital signs here was not required.

On January 13, 2004, the fifth day of trial and the last day of plaintiffs' case, after their expert had testified and after the defense doctor had been taken out of turn, defense counsel requested

that he be allowed to read Dr. Silverstein's deposition to the jury because his client was not available to appear at trial. Counsel submitted a letter from Dr. Philip [*5] Wilson, dated the day before, which said that Dr. Silverstein was under his care for depression and "his having to testify in a jury trial may destabilize his condition."

The trial judge spoke with Dr. Wilson on the telephone. Based on their conversation, the judge, over objection, ruled that Dr. Silverstein was unavailable to testify. The judge considered himself to be "bound" by what Dr. Wilson said. The trial court then permitted defense counsel to read Dr. Silverstein's deposition to the jury.

I.

DR. SILVERSTEIN'S AVAILABILITY

We first address plaintiffs' claim that there was insufficient evidence of Dr. Silverstein's infirmity for the court to conclude that he was unavailable, and consequently defense counsel should not have been permitted to read the doctor's deposition to the jury.

The letter from Dr. Wilson, addressed to defense counsel, said:
David Silverstein, M.D. is presently under my care for treatment of depression. I am concerned that his having to testify in a jury trial may destabilize his condition.

In his telephone conversation with the judge, Dr. Wilson said he was a physician licensed to practice in Georgia, specializing in internal medicine, addiction medicine and pain [*6] medicine. Dr. Silverstein was under his care for depression; being treated with antidepressant medications. He had been treating Dr. Silverstein approximately seven to eight months and last saw him two to three weeks earlier. Dr. Silverstein had a low threshold for anxiety. Having to testify in the trial "could" affect his depression. Attending the trial "may affect [Dr. Silverstein's] progress in treatment."

Plaintiffs' counsel expressed concern that Dr. Wilson had rendered a net opinion that was not based on a reasonable degree of medical probability. In response to these concerns, the trial judge posed the following question to Dr. Wilson: "[a]nd it's your opinion within a reasonable degree of medical certainty that requiring Dr. Silverstein to testify in this jury trial would have a deleterious effect on his health, is that correct?" Dr. Wilson responded "yes," and the telephone call was concluded.

During the telephone call, the judge did not place Dr. Wilson under oath. The court also limited plaintiffs' counsel's questions. For example, counsel wanted to know whether a psychologist or psychiatrist was treating Dr. Silverstein, and he wanted to explore the types of medications Dr. [*7] Silverstein was taking, and what effect those medications would have on his ability to testify. The court precluded that line of questions.

The New Jersey court rules address the circumstances that permit the use of a witness's deposition at trial.

[T]he deposition of a witness, whether or not a party, may be used by any party for any purpose, against any other party who was present or represented at the taking of the deposition or who had reasonable notice thereof if the court finds that the appearance of the witness cannot be obtained because of death or other inability to attend or testify, such as age, illness, infirmity or imprisonment. . . .

[*R.* 4:16-1(c).]

Deposition testimony is permitted "so far as admissible under the rules of evidence applied as though the witness were then present and testifying. . . ." *R.* 4:16-1. The evidence rules provide, Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:

(4) is absent from the hearing because of death, physical or mental illness or infirmity, [*8] or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial. . . .

[*N.J.R.E.* 804(a).]

If a party disputes the claimed unavailability of a witness, the trial court should conduct a preliminary evidentiary hearing pursuant to *N.J.R.E.* 104(a) to resolve the issue. Biunno, *Current N.J. Rules of Evidence*, comment 1 on *N.J.R.E.* 804 (2005) (citing *United States v. Faison*, 564 F. Supp. 514 (D.N.J.), *aff'd without opinion*, 725 *F.*2d 667 (3d Cir. 1983)); *see also United States v. Faison*, 679 *F.*2d 292 (3d Cir. 1982).

In *Faison, supra*, 679 *F.*2d 292, the issue was whether the trial should go forward in the witness's absence. The Third Circuit evaluated the factors to determine a witness's unavailability to appear at trial. It said:

The trial judge's discretion in granting an adjournment for witnesses unavailable due to illness must be guided on the one hand by the policy of favoring live testimony and confrontation in the presence of the factfinder and, on the other, by the policy . . . of prompt disposition of criminal trials. . . . [S]ince witness availability affects the court's ability to manage its cases, the trial [*9] court's decision to refuse an adjournment and to admit prior testimony must be treated with respectful deference. In exercising discretion a trial judge must consider all relevant circumstances, including: the importance of the absent witness for the case; the nature and extent of cross-examination in the earlier testimony; the nature of the illness; the expected time of recovery; the reliability of the evidence of the probable duration of the illness; and any special circumstances counselling against delay.

[*Id.* at 297.]

Consideration of such a preliminary question is generally conducted without the application of the formal evidence rules and may be conducted on the basis of affidavits. *Faison, supra*, 564 F. Supp. at 518; *Howard v. Sigler*, 454 *F.*2d 115, 120-21 (8th Cir. 1972) (finding sworn affidavit of medical officer on physical condition of witness sufficient to authorize trial judge to permit former testimony of witness on basis of unavailability), *cert. denied*, 409 U.S. 854, 93 S. Ct. 188,

34 L. Ed. 2d 98 (1972).

Here, Dr. Wilson's cryptic letter and the judge's brief telephone conversation with him did not provide a sufficient basis from which to conclude that Dr. Silverstein [*10] was unavailable. First, Dr. Wilson should have been placed under oath. Next, and significantly, the information provided was not sufficient to support a conclusion that Dr. Silverstein was not available. Dr. Wilson's letter, and his responses to the court's questions, couched Dr. Silverstein's unavailability in terms of possibilities. The letter said a jury trial "may" destabilize Dr. Silverstein's condition; having to testify "could" affect his depression, and "may" affect his progress and treatment. It was not until Dr. Wilson was asked a leading question by the judge, which mischaracterized the doctor's prior statements, that he responded that Dr. Silverstein's appearance at trial "would" adversely affect his health.

Nor did Dr. Wilson provide any details of what effect Dr. Silverstein's appearance in court could have upon his health. For example, Dr. Wilson did not provide any information as to how Dr. Silverstein's depression affects his daily functioning, what his particular health risks would be, what medication he was taking, or what effect the medication may have on his ability to testify. Aside from generalities, the doctor gave no specifics of how testifying would affect [*11] Dr. Silverstein's condition. Under these circumstances, the trial judge was not, as he seemed to think, "bound" to accept Dr. Wilson's opinion.

It is also notable that defendants' application to use Dr. Silverstein's deposition was not made until after both plaintiffs' and defendants' experts had testified. Had plaintiffs known that Dr. Silverstein would not be available at trial, and his deposition would be read, they certainly may have presented their proofs differently.

There is a significant difference between reading the cold deposition transcript of a witness as opposed to having a jury see and hear a witness's live testimony. Live testimony is favored. *Faison, supra*, 679 *F.*2d at 297. Plaintiffs' counsel was essentially denied the opportunity to cross-examine Dr. Silverstein.

It is also noteworthy that the deposition defense counsel was permitted to read to the jury was not a deposition taken in this lawsuit. It was taken in the personal injury action before Dr. Silverstein was named a defendant. A safe assumption is that plaintiffs' questions to Dr. Silverstein at trial would have been different from the questions asked at his deposition in the other case.

Simply put, the proofs [*12] did not support the court's conclusion that Dr. Silverstein was unavailable so as to permit defense counsel to read his deposition. That, plus the timing of defense counsel's request, made the use of Dr. Silverstein's deposition highly prejudicial and sufficient to warrant a new trial.

II

NURSE GATTO'S TESTIMONY CONCERNING HER LOST NOTES

Nurse Gatto took decedent's vital signs during his hospitalization. Under plaintiff's theory of the case, decedent's vital signs should have been taken every five, or at the most, every ten minutes, and if that had been done, medical personnel would have known that he was bleeding internally and administered transfusions. In her deposition, Gatto did not mention that she had taken decedent's vital signs every ten minutes, recorded them on scraps of paper, but then lost those notes. The hospital records obtained by plaintiffs during discovery likewise did not mention omitted or lost notes.

At trial she gave a different story. She was the last witness to testify. During her testimony, she revealed for the first time that she had taken another set of vital signs while preparing decedent for the CAT scan, at approximately 2:08 or 2:09. Although it was her [*13] intention to incorporate those vital signs into decedent's chart, she did not get a chance to do so before he went into arrest, and the scrap of paper was apparently lost during the cleanup after he coded. Gatto testified that she had taken decedent's vitals "about every ten minutes" and that all readings were stable up until the last set, taken at 2:15. That they were elevated, she attributed to the fact that decedent had a pelvic fracture and had just been moved onto a table.

Plaintiffs claim they were shocked by this new testimony. They suggest that this testimony was intended to undercut the factual basis of their expert's opinion that Nurse Gatto's failure to monitor decedent's vitals every five to ten minutes was negligence and contributed to decedent's death.

To impeach Nurse Gatto's testimony, during cross-examination plaintiffs' counsel sought to question her about a conversation that occurred during her deposition in which defense counsel represented that all of decedent's medical records had been produced. Plaintiffs' counsel suggested that the jury could infer from Gatto's silence during this conversation between counsel that the missing piece of scrap paper did not actually [*14] exist. The trial court barred this line of questioning.

We agree with plaintiffs that under the circumstances, defendants' failure to disclose to plaintiffs the change in Gatto's testimony warrants a new trial. Defense counsel has a continuing obligation to disclose to the court and plaintiff's counsel any anticipated material changes in a defendant's or a material witness's deposition testimony. *McKenney v. Jersey City Med. Ctr.*, 167 N.J. 359, 371-72, 375-76, 771 A.2d 1153 (2001). In *McKenney, supra*, the Supreme Court adopted our discussion in *McKenney v. Jersey City Med. Ctr.*, 330 N.J. Super. 568, 588, 750 A.2d 189 (App. Div. 2000), *rev'd*, 167 N.J. 359, 771 A.2d 1153 (2001), regarding a lawyer's duty of disclosure in such a situation:

Our procedures for discovery are designed to eliminate the element of surprise at trial by requiring a litigant to disclose the facts upon which a cause of action or defense is based. The search for truth in furtherance of justice is paramount. This basic principle is designed to ensure that the outcome of litigation shall depend on its merits in the light of all of the available facts,

rather than on the craftiness of the parties or the guile of their counsel.

[167 N.J. at 370 [*15] (citations omitted).]

Gatto provided substantively different information at trial than she did at her deposition. That information was directly related to plaintiffs' theory of the case; that had decedent's vital signs been monitored every five to ten minutes, he may still be alive. The timing of the information, at the close of defendants' case, left plaintiffs without a reasonable opportunity to challenge Gatto's testimony. Defendants' failure to advise plaintiffs' counsel of Gatto's proposed testimony was clearly capable of producing an unjust result.

III

DEFENSE EXPERT'S TESTIMONY AS TO POSSIBLE ALTERNATIVE CAUSES FOR PLAINTIFF'S DEATH

Dr. Jeffrey Hammond testified as defendants' expert. In his report, he concluded that "Dr. Silverstein and the trauma team performed within the standards of medical care." The report did not offer an opinion on the cause of decedent's death. At trial, however, the court permitted defense counsel on direct examination to question Dr. Hammond about the possible causes of decedent's death. As he did so, he listed them on a chart that was subsequently admitted into evidence. Some of the pertinent testimony is as follows:
Q. What other potential causes? We [*16] know he died and you said that he didn't die of in your opinion of internal bleeding, what other potential causes of his death?

A. As you mentioned, there was no autopsy so we do not know what the cause of death is. But potentially you could say that there's mechanism such as myocardial contusion, a blow to the heart itself.

Q. If you would turn that sheet over, we're going to do that, I'm going to ask you to write down the other potential causes and you said heart contusion?

A. Yes.

Q. Put potential causes of death. And itemize, that's one. Two?

A. It's basically a very bad bruise to the heart which gives myocardial dysfunction and the heart can't beat, can't create a cardiac input, can't push the blood around, much like a heart attack and this is a pulmonary contusion which is a bad bruise, if you will, to the lungs and the patient can't oxygenate.

So these are both from blood trauma or plausible alternative causes. Myocardial infarction which is a fancy word for heart attack where actually the heart muscle dies. Could be coincident with, in fact, the stress of the crash, of the accident itself.

It may or may not be related to contusion or it may or may not be related to some preexisting

[*17] problem.

Q. You said just the stress of this automobile accident, could have caused a heart attack.

A. That's correct. In some studies, up to 7 percent of trauma patients have heart attacks associated with the trauma.

Q. Okay. Next?

A. Part of the major blood vessel that comes out of the heart, the aorta, the major artery and it feeds off of arteries along the way, but one of the things we see with deceleration injuries, rapid stopping of a car in a crash is that the aorta can actually be severed and people don't immediately die from that.

You think that that's a bad thing and people die right away. But actually about 20 percent of the patients who have this, will survive, to reach the hospital and then have a catastrophe once they get there.

And in the absence of an autopsy or any further studies, the CAT scan for example, we don't know whether that might not have been the cause of death.

A. He could have just had arrhythmia, a sudden arrhythmia that was, may or may not have been related to the trauma; that's an abnormal heart rate. I'm not here to remind everybody for that long word. You have to remember there are a lot of other solid organs around, the liver, the spleen, kidney, [*18] those all could have been injured, may or may not have contributed to the overall pattern as a theoretical cause of death.

I think these are, you know, five or six good ones and we know from at least you got the head CAT scan that that would have been ruled out but before they got that, was a potential problem as well. Even though he was awake and alert when he arrived, that doesn't rule out a significant head injury.

Dr. Hammond conceded on cross-examination that all of his testimony concerning the potential causes of decedent's death was speculation.

Before Dr. Hammond testified, plaintiffs' counsel had objected to any testimony offered by defendants relating to other possible causes of decedent's death. Plaintiffs' counsel raised the issue in his objection to defense counsel's opening, which included a statement that decedent had a heart attack; that "there are several theories as to what caused [decedent's] heart attack. One of them is that he had a myocardial infarction." Plaintiffs' counsel moved for a mistrial, or alternatively a curative instruction; the trial judge denied those requests. The judge stated that if defense counsel failed to present evidence on causes of death, plaintiff's [*19] counsel could address that lack of proof in his closing.

Before closing arguments, plaintiffs' counsel asked the court to strike Dr. Hammond's testimony

about other possible causes of death because it was admittedly speculation. The court denied the request, indicating again that counsel could address that in his closing.

For a number of reasons, it was reversible error to permit Dr. Hammond to speculate as to alternative causes of decedent's death. First, while an expert may testify about the "logical predicates for and conclusions from" statements made in his or her report, *McCalla v. Harnischfeger Corp.*, 215 N.J. Super. 160, 171, 521 A.2d 851 (App. Div.), *certif. denied*, 108 N.J. 219, 528 A.2d 36 (1987), here, Dr. Hammond's testimony went well beyond any logical predicates for or conclusions to be drawn from his report. His report dealt solely with whether defendants deviated from the standard of care. He did not offer an opinion as to causation. The court abused its discretion by permitting testimony on that issue. *See Nicholl v. Reagan*, 208 N.J. Super. 644, 652, 506 A.2d 805 (App. Div. 1986) (whether testimony exceeds the scope of expert's report falls within the sound discretion of the trial court).

Even if Dr. Hammond's [*20] causation testimony was in theory permissible, it was in fact mere speculation. Dr. Hammond admitted he was speculating about potential causes of decedent's death. While a defendant is under no obligation to provide a medical opinion on causation to a reasonable degree of medical certainty, and the test of admissibility is one of "possibility" rather than "probability," the expert's opinion must nevertheless be based on competent proof. *Paxton v. Misiuk*, 34 N.J. 453, 460-61, 170 A.2d 16 (1961). Expert testimony is not permissible "if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." *Vuocolo v. Diamond Shamrock Chems. Co.*, 240 N.J. Super. 289, 299, 573 A.2d 196 (App. Div.) (quoting *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 *N.W.*2d 236, 241 (Neb. 1979)), *certif. denied*, 122 N.J. 333, 585 A.2d 349 (1990). Though a cross-examiner is not limited to his adversary's hypothesis, a defense expert's theory must be founded in fact. *Taylor v. Reo Motors, Inc.*, 275 *F.*2d 699, 702 (10th Cir. 1960). That did not happen here. Dr. Hammond's testimony about possible causes of decedent's death had the capacity to confuse and [*21] mislead the jury. The court only compounded this problem by admitting the written list of those possible causes of death into evidence for the jury to review during its deliberations. These errors were egregious and warrant a new trial.

IV

DID THE TRIAL JUDGE ERR BY ALLOWING THE JURY TO HEAR THAT DECEDENT'S PARENTS REFUSED AN AUTOPSY

Plaintiffs argue that the defense's multiple references to plaintiffs' refusal to permit an autopsy require a new trial. They contend that the defense was essentially permitted to argue to the jury that the cause of death could not be determined because decedent's family prevented the autopsy, effectively placing blame on the family.

In his opening, defense counsel argued, over objection:
[Y]ou might wonder, well, you would say an autopsy, postmortem, what we call an autopsy, would show the cause of death, wouldn't it? It would show whether there was any internal bleeding.

The fact of the matter is, the parents, the family refused an autopsy. There was no autopsy. There is no proof of what caused his death, other than his heart stopped. He had a heart attack.
The trial judge overruled plaintiffs' objection; he ruled that plaintiffs' counsel could explain to the [*22] jury that the family's objection was based on religious grounds. Thus, during the trial, plaintiffs explained to the jury that an autopsy was not performed based on the religious advice of the Gorceys' rabbi, who told the family it was against the Jewish religion to have an autopsy.

During cross-examination of plaintiffs' expert, defense counsel again said that an autopsy was not performed because the family refused. Defense counsel repeated his remarks in summation.

The family's refusal to permit an autopsy was simply not relevant to the issues in dispute. "'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." *N.J.R.E.* 401. Though the lack of an autopsy may have been relevant to a determination of the cause of decedent's death, that decedent's parents refused an autopsy was not relevant. Defendant's brief fails to point to any fact of consequence that would be proved or disproved by evidence of decedent's parents refusal to have an autopsy performed. At oral argument before this court, defense counsel stated that it was relevant because the jury would want to know why an autopsy was not performed. [*23] Simply because the jury may have been curious about why an autopsy was not performed does not make the reason it was not performed relevant. That the family refused the autopsy had no tendency to prove or disprove a fact of consequence. Permitting the jury to hear that decedent's parents refused an autopsy opened the door for the jury to speculate that perhaps an autopsy would not have substantiated plaintiffs' claim as to the cause of death. In other words, the jury could have thought, "what are plaintiffs hiding?" Allowing the witnesses to explain that they refused an autopsy for religious reasons merely compounded the error by inserting religion into a case in which it was not relevant to any issue in dispute.

Even if we were to find, which we do not, some relevance in allowing a jury to hear that decedent's parents refused an autopsy, under an *N.J.R.E.* 403 analysis, the evidence's probative value was far outweighed by the risk of undue prejudice. Consequently, we conclude that permitting the jury to hear that evidence was clearly capable of producing an unjust result.

V

THE USE OF DR. SILVERSTEIN'S MEDICAL SUMMARY AT TRIAL

During discovery, Dr. Silverstein prepared a two-page medical [*24] summary along with his interrogatory answers, which detailed his version of decedent's treatment and death. Defense counsel was permitted to utilize this medical summary during cross-examination of plaintiffs' expert, Dr. Brody. Plaintiffs' counsel objected on the basis that Dr. Silverstein was not present, preventing cross-examination, and the summary contained information not reflected in the medical records. The trial court overruled the objection and permitted defense counsel to use the summary.

Defense counsel proceeded to essentially read large portions of the summary word-for-word to the jury. We agree with plaintiff that permitting defense counsel to read Dr. Silverstein's two-

page medical summary was error. The summary was rank hearsay. *See* N.J.R.E. 801(c). Even if it could be argued that the information was of a type reasonably relied upon by experts in forming opinions, N.J.R.E. 703, the testimony would not be admissible for the truth, but only for the "limited purpose of apprising the jury of the basis of the opinion." *State v. Vandeweaghe*, 351 N.J. Super. 467, 480, 799 A.2d 1 (App. Div. 2002), *aff'd*, 177 N.J. 229, 827 A.2d 1028 (2003) (citing *State v. Farthing*, 331 N.J. Super. 58, 77, 751 A.2d 123 (App. Div.), [*25] *certif. denied*, 165 N.J. 530, 760 A.2d 784 (2000)). Here, it was used substantively.

Following a lunch recess, the trial judge realized he had erred and gave the jury a limiting instruction on the use of the summary. By that time, however, it was too late. The jury had been exposed to extensive readings from the summary without knowing the context of its proper use.

Notably, some of the statements contained in the summary that had been read to the jury were inconsistent with the medical records. For instance, defense counsel was permitted to read a portion of the summary that said that decedent "was typed and cross-matched with six units of blood. And because of the significance of the pelvic fracture, two units were ordered to be transferred as soon as they became available." That is not what the medical records say. They reflect that Dr. Silverstein did not order the blood to be transferred until the patient was already in the CAT scan room. When Dr. Brody was asked if he would "criticize" Silverstein for the above-quoted statement, he replied that the decision was not documented in the medical records. At defense counsel's request, the trial judge agreed to strike the answer as not responsive.

Thus, [*26] the use of the medical records effectively allowed the jury to hear Dr. Silverstein's version of the facts, without subjecting him to cross-examination. This was reversible error warranting a new trial.

VI

DID THE TRIAL COURT ERR BY PERMITTING DEFENSE COUNSEL TO CROSS-EXAMINE PLAINTIFFS WITH REGARD TO THEIR FAMILY BUSINESS

Plaintiffs argue the trial judge committed error by allowing, during cross-examination, a line of questioning related to profits from the family's real estate business and that the business sometimes involves evictions of families from their homes. Because we are remanding for a new trial, we need not address that issue. It may be, depending on plaintiffs' proofs as to wrongful death damages, that the families business profits are relevant. They may not be. That will depend on the proofs in the new trial. While we question the probative value of permitting a jury to hear that the business involves evicting people from their homes, we leave that to the sound discretion of the trial judge, who we assume will perform a N.J.R.E. 403 analysis if the evidence is relevant in the first instance.

VII

OTHER ISSUES

While plaintiffs have raised a number of additional issues, with [*27] the exception of plaintiffs'

request for sanctions, which we deny, we do not find it necessary to address them because a new trial is warranted.

Reversed and remanded for further proceedings consistent with this opinion. We direct that the case be assigned to a different judge on remand. We do not retain jurisdiction.