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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Janis M. ERGA and Rolf Erga,[1] her husband,
Plaintiffs–Appellants,
v.
William L. CHALMERS, Defendant–Respondent.

Submitted Feb. 26, 2014. | Decided July 16, 2014.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L–3337–11.

Attorneys and Law Firms

Epstein Arlen, LLC, attorneys for appellants (Geoffrey C. Arlen, of counsel and on the brief; Carol Matula, on the brief).

Law Offices of John Kennedy, attorneys for respondent (Keith Bursack, of counsel; Kerry E. Cahill, on the brief).

Before Judges SAPP–PETERSON and HOFFMAN.

Opinion

PER CURIAM.

***1** In this appeal, plaintiffs seek reversal of the no cause verdict and the remand for a new trial after the court failed to ask Question Six from the Administrative Office of the Courts **Directive** # **4–07**. Compliance with **Directive** # **4–07** is required of trial judges, and the trial judge's failure to do so here mandates reversal.

This was an auto negligence expedited trial[2] arising out of a motor vehicle accident. During the charge conference, plaintiffs' counsel expressed the desire to discuss some of the open-ended questions that the court, per **Directive** # **4–07**, was required to present to the jury. Those six sample questions set forth in the **Directive** # **4–07** are as follows:

> 1. What do you think about large corporations that are named as defendants in law suits? Would you consider the legal rights and responsibilities of a corporation differently than those of an actual person? Why do you feel this way?
>
> 2. Do you have any feelings about whether or not our society is too litigious, that is, that people sue over things too often that they should not sue over; or do you think, on the other hand, there are too many restrictions on the right of people to sue for legitimate reasons; or do you think our system has stuck the right balance in this regard? Have you heard of the concept of "tort reform" (laws that restrict the right to sue or limit the amount that may be recovered)? How do you feel about such laws?
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> 3. There may be expert witnesses in this case. If there are, I will instruct you in more detail, but let me say for now that you do not have to accept their opinions, but you should consider their opinions with an open mind. The expected field of expertise of these witnesses is _____. How do you feel about experts in that field? Will you be able to evaluate their opinions fairly and with an open mind? Why do you feel the way you do about this?
>
> 4. Do you have any particular feelings about whether people should be allowed to sue doctors, hospitals, and other health care providers if they are dissatisfied with the results of medical treatment? Tell me how you feel about this and about what kind of circumstances you think should have to be proven before a dissatisfied patient should be allowed to recover damages?
>
> 5. How do you feel about the jury system? Do you think law suits would be better decided by some sort of professional hearing officers, arbitration panels, or judges? In our country, under our constitution, in cases such as this one, people have the right to a jury trial. If it were up to you, should that right continue to exist or be eliminated?
>
> 6. Do you believe that you will make a good juror for this case? Please explain.

Plaintiff's counsel advised the court that he and defense counsel needed to agree on three open-ended questions and that he believed Question Six was helpful because it "gets [the jury] to talk a little bit." The court responded that asking that particular question would be fine if both counsel agreed. Defense counsel proposed that the court

eliminate Questions Four, Five and Six, "and just go with [O]ne, [T]wo, [and][T]hree." Both counsel ultimately agreed that Questions One, Three, and Four need not be asked, leaving Questions Two, Five, and Six for resolution.

***2** Once again focusing upon Question Six, plaintiff's counsel explained that he believed the court's proposed questions did not cover whether the prospective juror believed he or she "would make a good juror for this case, and why." The court responded that it would ask the jurors that particular question in the reverse: "if there's some reason why they feel they can't be a good juror." Plaintiffs' counsel explained that he believed asking the question in the negative made a difference. The following colloquy between plaintiffs' counsel and the court occurred:

> MR. ARLEN: I think the difference is, asking them in the negative, nobody is going to want to say, yeah, I can't be a good juror. And I think the reason that the question was drafted in the positive and the reason that the **directive** said to ask it is because it says, do you believe you will make a good juror.
>
> THE COURT: Yeah.
>
> ....
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> MR. ARLEN: And, so, I mean, somebody asks you a negative question, [your] reaction is going to be to say, no, of course[ ] not, I'm going to be great. But if somebody asks you a positive question, what's good about you, then you're comfortable. And then they're going to say, two or three sentences that at least Mr. Bursack—
>
> THE COURT: Or 15.
>
> MR. ARLEN: Well, we're not going to let that happen.
>
> And then Mr. Bursack and I, at least, will get a—you know, we get three peremptories. It's not like ... we're going to be here all day and it's not like we're going to have the normal opportunity to kick the jurors that we want.
>
> But this—Judge, I just feel that this question is so important because it's going to let a juror give us a little bit of an insight into how they feel about the jury system and why they think they'll be a good juror, versus just admit to me that you won't be a bad juror. Of course, I won't be.
>
> THE COURT: I'm not sure I totally agree. I think we'll be here forever. I'll explore it, but I think that my first question really covers it pretty well, which is the fact that I think the jury system is the best in the world, if you've got a problem against it, if you can't be fair to these people, let me know right away and I'll excuse you.
>
> So I think that covers it. I disagree with you, that's all I can say to you. I make sure I cover it, but I just want you to know that.

The court and plaintiffs' counsel briefly continued to discuss the matter, with the court finally asking defense counsel how he felt about Question Six. Defense counsel responded: "The defense is fine with it, Your Honor, I'll leave it up to your discretion." The judge ended the discussion on the issue by stating: "I'm not sure I will do it. I think it was covered adequately."

The jury voir dire proceeded, and the court did not ask Question Six. It did ask one prospective juror: "Can you look at those three people at that desk and assure them that you'll be absolutely fair in this case, that you haven't been subject to any bias and that you'll [sic] it as you see it[,] not as maybe the media might see it or something like that." To the remaining prospective jurors, the judge asked each whether they could "assure these attorneys and their clients at that table that you would be absolutely fair in this case [,]" or a slight variation of this question.

***3** Upon completion of his questioning, the judge inquired of the attorneys whether they had any other question they wanted the court to pose to the jurors. Once again, plaintiffs' counsel attempted to persuade the court to ask Question Six. The court responded, "I think I've covered it." The jury returned a no cause verdict and the court, in turn, entered judgment in favor of defendant. The present appeal followed.

Directive # **4**–**07** promulgated May 16, 2007 **directs** that

> 8. Some open-ended questions must be posed verbally to each juror to elicit a verbal response. The purpose of this requirement is to ensure that jurors verbalize their answers, so the court, attorneys and litigants can better assess the jurors' attitudes and ascertain any possible bias or prejudice, not evident from a yes or no response, that might interfere with the ability of that juror to be fair and impartial. Open-ended questions also will provide an opportunity to assess a juror's reasoning ability

> and capacity to remember information, demeanor, forthrightness or hesitancy, body language, facial expressions, etc. It is recognized that specific questions to be posed verbally might appropriately differ from one case to another, depending upon the type of case, the anticipated evidence, the particular circumstances, etc. Therefore, rather than designating specific questions to be posed verbally to each juror, the determination is left to the court, with input from counsel, in the case.

Directives promulgated by the Supreme Court are binding on all trial courts:

> The Supreme Court ... "has the power to promulgate rules of administration, as well as practice and procedure" pursuant to the New Jersey Constitution. In addition, as Judge Stern (then sitting in the Law Division) noted, "the Chief Justice, as administrative head of the court system, can promulgate binding **directives** either **directly** or through the Administrative Director of the Courts." Thus, the **Directive**, which includes its commentary, has the force of law.
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> [*State v. Morales*, 390 *N.J.Super.* 470, 472 (App.Div.2007) (citations omitted).]

Consequently, **Directive** # 4–07's requirement that some open-ended questions "must be posed verbally to each juror to elicit a verbal response," is mandatory. Here the court declined to do so, believing that it had covered the essence of Question Six. The court failed to pose the open-ended question. Instead, it formulated its question on each juror's ability to be fair in a manner that called for a "yes" or "no" response. As plaintiffs' counsel argued before the trial court, it is unlikely that a juror would admit that he or she cannot be a good juror. Moreover, the court posed no follow-up question to its original question which would assist counsel in assessing the "juror's reasoning ability[.]" *See* **Directive** # **4**–**07**, p. 5.

From the colloquy between counsel and the court, it is evident the court was concerned with the length of the voir dire that could potentially result from open-ended questions. When counsel explained to the court that he believed a positive question would make the prospective juror feel more comfortable, from which "two or three sentences" explaining the answer would follow, the court responded, "Or fifteen." In *Morales*, we stated: "We recognize that the **Directive** may cause jury selection to take longer, but that has been deemed an acceptable price to pay for a jury without bias, prejudice, or unfairness with regard to the trial matter or anyone involved on the trial." 390 *N.J.Super.* at 475 (internal quotation marks omitted).

***4** We disagree with defendant's contention that plaintiffs must come forward with some evidence that the process employed was biased or unfair before reversal is warranted. The court's utter refusal to pose the open-ended questions, as mandated under the **directive**, is presumptively unfair and warrants reversal. This is not a situation where the court asked some open-ended questions utilizing different phraseology. **Directive** # **4**–**07** contemplates that the sample questions appended to it are merely illustrative of the kinds of open-ended questions that must be posed to prospective jurors in order to assist judges and counsel. "These are examples; not model, or standard, open-ended questions." *See* **Directive** # **4**–**07**, p. 5. "Some degree of latitude to allow for variation in style is acceptable, so long as the essential ingredients of a thorough and meaningful voir dire are included. This residual measure of discretion does not encompass the judge's proposed method in this case." *Morales, supra*, 390 *N.J.Super.* at 474 (internal quotation marks omitted). Thus, the phraseology of the open-ended question is left to the discretion of the court, evaluated under an abuse of discretion standard. *Ibid.* What is not discretionary, however, is the trial judge's failure to ask any open-ended questions, as were the circumstances here, in addition to the biographical question and the two omnibus qualifying questions. We are therefore constrained to vacate the judgment entered in favor of defendant and remand for a new trial, with jury selection to proceed consistent with **Directive** # **4**–**07**.

Reversed.

Footnotes

1 Rolf Erga filed a per quod claim.

2 An expedited trial is a summary process through which both sides stipulate to admit into evidence expert reports and other

documentary evidence in lieu of calling live witnesses. The specific terms governing this summary proceeding are reflected in a model consent order approved by the Supreme Court. *Expedited Jury Trial Form* (Nov. 1, 2013), http:// www.judiciary.state.nj.us/civil/forms/10877_consent_exp_trial.pdf.

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